

TENSLY LAKI -v- ROBERT PITAHAGE AND SOLOMON ISLANDS
HOME FINANCE LIMITED

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

Civil Case No. 249 of 2004

Date of Hearing: 16th July 2004

Date of Ruling: 20th July 2004

A. Nori for the Plaintiff.

M. Pitakaka for the 2nd Defendant.

RULING

Kabui, J. This is an application by notice of motion filed by the Plaintiff (Mr. Laki) on 23rd June 2004, seeking the following orders-

1. Further proceedings for the sale of the First Defendant's property situated in Parcel Number 191-008-25 be stayed;
2. Subject to an undertaking by the Plaintiff as to cost and damages the Second be restrained from selling the Property herein until further orders;
3. Costs; and
4. Such other orders as this Honourable Court deems just and equitable in the circumstance.

The brief background.

The 1st Defendant is Mr. Pitahage. He borrowed a sum of money (the loan) from the 2nd Defendant, the Solomon Islands Home Finance Limited, (the Lender) which he failed to repay with interest. The Lender had a charge registered over Parcel Number 191-008-25 in its favour as security for the repayment of the loan in the event of foreclosure. In February, 2002, the Lender took court action against Mr. Pitahage for the recovery of the money lent and obtained a court order against him. The moneys outstanding against him were \$99,897.30 with interest accruing at 12% per annum until payment. The court order authorized the sale of Parcel Number 191-008-25 and the proceeds of the sale were to be applied to the repayment of the loan. The Lender having advertised the property obtained six bidders. Mr. Laki was one of the bidders. His bid was an offer of \$130,000.00. His offer was rejected on the ground that he was simply stepping into the shoes of Mr. Pitahage and was willing to service the loan with the view of having the title to the property transferred to him after completing the loan. The winning bidder was Mr. Szetu Ning Hung. Mr. Szetu Ning Hung's offer of \$125,000.00 was accepted because he was to pay cash for the property. A purported consent to transfer title to Mr. Szetu Ning Hung was signed by the Commissioner of Lands on 29th December 2003.

The Plaintiff's case.

Mr. Laki has commenced civil proceedings against Mr. Pitahage and the Lender, claiming damages for breach of contract, a stay of the sale of the property to a third party and an injunction against the Defendants from selling or entering into any agreement to sell the property. This application is to ask the Court to order a stay of the sale of the property and to restrain the Defendants from disposing of the property to anyone until the main dispute is heard by the Court.

The Lender's case.

The following was the case for the Lender as stated by its Counsel, Mr. Pitakaka. It is not in dispute that Mr. Laki was in occupation of the property at the time the Lender obtained the Court order for sale. It is also not in dispute that some sort of arrangement had been made between Mr. Laki and Mr. Pitahage regarding the repayment of the loan to the Lender. The undisputed fact however was that Mr. Pitahage had not been repaying his loan and therefore arrears had built up to the point that the Lender had to intervene to protect itself. Also, the Lender was not a party to the alleged agreement between Mr. Laki and Mr. Pitahage. In a novation situation, all the parties must consent to the new contract. In this case, there was no agreement by the Lender to the introduction of Mr. Laki, a third party, stepping into the shoes of Mr. Pitahage, the original borrower and taking over Mr. Pitahage's loan liability.

Why Mr. Laki does not succeed in his application.

I have noticed that Mr. Laki did not file any affidavit evidence to support his application other than the existence of his statement of claim. This is an omission on his part. I had asked Timothy Kwaimani to check with the High Court Registry and he confirmed that no supporting affidavit had been filed. According to Mr. Bennie's affidavit filed on 14th July 2004, the Lender had not agreed anything with Mr. Pitahage or Mr. Laki for that matter as to the renting of the property to Mr. Laki or as to Mr. Laki eventually becoming the owner of the property after completing repayment of the loan. There is nothing of that sort up until January, 2002. The discussion leading to a slightly different arrangement was done in January, 2002 perhaps with Mr. Bennie or his predecessor and so there is an agreement of some sort in place. That is to say, there is some tentative evidence to show that a new arrangement had come into existence whereby Pitahage had been discharged of his obligation to repay the Lender on the basis that that obligation had been taken over by Mr. Laki with the consent of the Lender. One of the terms of the arrangement was that in the event of foreclosure on the property, the first option to purchase was to be given to the property on the basis that Mr. Laki was the sitting tenant and rental payment was being made direct to the Lender. The exact term of the option to purchase is not very clear though that allegation is denied by Mr. Bennie in his affidavit filed on 14th July 2004. There is an allegation of breach of contract pleaded by Mr. Laki. There is therefore a triable issue in place for the consideration of the Court at trial. That being the case, where then does the balance of convenience lie? If Mr. Laki is denied an interim injunction and he wins his case at the end of the day, would he be adequately compensated? If the answer is yes, then he is not entitled to an interim injunction. If, on the other hand, the answer is no and Mr. Laki gives an undertaking to abide by any order for damages made by the Court, would that adequately compensate the Lender? If the answer is yes, then Mr. Laki is entitled to an injunction. If doubt still remains, then the Court must consider other factors bearing in mind that the bottom-line in giving consideration to the case is the need to keep the status quo between the parties. If that still does not do, then the Court must consider the relative strength of each party's case and

based upon the merits derived from the evidence, the Court can decide the application for the injunction.

How I understand Mr. Laki's claim is that he is interested in acquiring the property himself but if he does not succeed in that, he would settle for damages. The affidavit filed by Mr. Bennie on 14th July 2004 clearly shows that Mr. Laki's offer to purchase the property had indeed been considered by the Lender but was rejected on the ground that his offer was not a cash offer. The other four bidders had also been rejected on the same ground in that the source of funding in each case had been considered as lacking in sufficiency. In fact, Mr. Laki's offer was the highest of them all being \$130,000.00. The offer by Mr. Szetu Ning Hung of \$125,000.00 was a cash offer and was therefore accepted on that basis. Whether the consideration of Mr. Laki's offer was the exercise of his option to purchase under the subsequent arrangement is a point of argument at trial. The answer is not conclusive at this stage. If I should grant an interim injunction, its effect on the Lender is that the interest on the loan will continue to increase perhaps beyond \$125,000.00 point in the meantime and Mr. Szetu Ning Hung may be forced to withdraw his offer for an obvious reason. I do not think Mr. Laki will be able to compensate the Lender for its damages, even if he makes an undertaking as to damages. As a matter of fact, there is no undertaking on his part in this case though there is mention of it in paragraph 2 of his Notice of Motion. But that is not an undertaking as I understand it. I will not grant the injunction sought by Mr. Laki.

Mr. Laki also asked for an order to stay the sale of the property. The same reasons advanced from the bar table by Counsel for Mr. Laki, Mr. Nori, in support of an injunction were given in the same manner in support of the order for a stay of the sale of the property. Again, I will not grant a stay of the sale of the property. I think the true position in cases such as this case was clearly stated by Walsh, J. in *Inglis and Another v. Commonwealth Trading Bank of Australia*, (1972) 26 CLR 161 at 164-165. The principle stated there is that the rights of a mortgagee to exercise the right of sale cannot be extinguished by anything short of actual payment regarded as sufficient to extinguish a mortgage debt. If the debt is not paid, the Court will not, as a general principle, deprive the mortgagee of the benefit of his security for the security would be greatly diminished if the debtor has raised a claim for damages against the mortgage and to allow that to prevent the enforcement of the security pending the litigation of such claim. The principle restated by Walsh, J. had subsequently been affirmed by the High Court of Australia on appeal, affirming the same principle stated by Megarry, J. in *Samuel Keller (Holdings)Ltd. V. Martins Bank Ltd.* [1971] 1 W.L.R. 43. Applying that principle to this case, I do not think Mr. Laki's claim can be allowed to defeat the Lender's right to sell the security in satisfaction of its loan.. Mr. Laki's application is therefore dismissed with costs.

F.O. Kabui
Puisne Judge