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## Kaloumaira v NBF Asset Management Bank [2000] FJLawRp 20; [2000] 1 FLR 30 (7 February 2000)

[\[2000\] 1 FLR 30](#)

IN THE HIGH COURT OF FIJI

ATUNAIISA KALOUMAIRA  
&  
MAKELESI KALOUMAIRA

v

NBF ASSET MANAGEMENT BANK

High Court Civil Jurisdiction  
Shameem, J  
7 February, 2000  
HBC 595/99

*Striking out - whether statement of Claim discloses reasonable cause of action - whether plaintiff can amend claim to include negligence - whether Consumer Credit Act applies with retrospective application to mortgages and notices of demand - Consumer Credit Act s80; High Court Rules O.18 r.18(1)(a).*

The plaintiff borrowed \$25,000 from defendant for car loan, secured by bill of sale over land cruiser registration no. E 3315 (later CL 946) and registered mortgage over property at 295 Mead Road prior to Consumer Credit Act coming into force. Demand served subsequent to Act being in force. An interim injunction restraining mortgagee sale was dissolved. The plaintiff sought to amend pleadings to disclose negligence but was unable to because of lack of particulars from the defendant.

**Held** - The plaintiff may have an arguable case in respect of applicability of the Consumer Credit Act to mortgages. No grounds for the court to strike out the plaintiff's claim.

Leave granted to plaintiff to amend Statement of Claim within 21 days.

### Cases referred to in Decision

cons *Dyson v Attorney-General* (1911) 1 KB 414  
cons *Drummond-Jackson v British Medical Association* (1970) 1 WLR 688  
foll *Wenlock v Malomy* (1965) 1 WLR 1238  
cons *Addis v Crocker* (1960) 1 QB 87  
dist *R v Secretary of State for the Home Department ex parte Mundowa* (1992) 3 All ER 607  
cons *re a Solicitors Clerk* (1957) 3 All ER 617

*Apaitia Seru* for the plaintiffs  
*William Clarke* for the defendant

7 February 2000.

## DECISION

**Shameem, J.**

This is an application by the Defendant to strike out the statement of claim on the ground that it discloses no reasonable cause of action. It is made under Order 18 Rule 18(1)(a) of the High Court Rules 1988.

The Statement of Claim indorsed on the writ of summons filed on 16 December 1999 claims that the Plaintiff borrowed \$25,000 from the Defendant in March 1992 referred to the statement of claim as "the car loan." The loan was secured by a Bill of Sale of a Toyota Land Cruiser Registration No. E 3315 (later CL 946) and a registered mortgage over property at 295 Mead Road.

On 4<sup>th</sup> October 1999 the Defendant demanded payment of all money due on the Plaintiff's loan account, amounting to \$31,265.04, giving the Plaintiff seven days from the date of service for payment failing which the Defendant would exercise powers of sale.

On 27<sup>th</sup> November 1999 the Defendant advertised the sale on 295 Mead Road, and Toyota Land Cruiser CL 946. An interim injunction restraining sale was dissolved by this Court on 17<sup>th</sup> January 2000.

The Plaintiff in the body of the Statement of Claim alleges negligence on the part of the Defendant in the restructuring of the car loan. However the only relief sought is-

"(a) A Declaration that the Defendant Bank is in breach of the provisions of the Consumer Credit Act, No. 15 of 1999 and that the seizure and advertisements for sale of Toyota Land Cruiser CL 946 and Crown Lease No. 2627 situated at 295 Mead Road Suva are null and void;

(b) General damages to be assessed;

(c) Costs of this action;

(d) Any relief or order which the Court deems just;

(e) Interest on all sums claimed to the date of settlement."

The application to strike out was heard in Chambers on 27<sup>th</sup> January 2000. Mr W. Clarke for the Defendant submitted that the Plaintiff's claim relied entirely on the [Consumer Credit Act 1999](#). He submitted that the Bill of Sale and mortgage in this case had been entered into well before date on which the Act came into force, and that the Act did not have retrospective effect. He said this was so even though the Notice of Demand was issued after the Act came into effect, because the Act must be deemed not to have retrospective effect.

Mr A. Seru for the Plaintiff submitted that the Act applied to all Notices of Demand issued after May 1999. He further said that he

wished to amend the Statement of Claim claiming an alternative ground of negligence, but had been unable to do so because the Defendant had failed to supply the Plaintiff with a copy of his 1992 loan account figures. He asked the court to exercise its discretion to order amendment instead of allowing this application.

Order 18 Rule 18(1)(a) provides as follows:

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be;"

In *Dyson -v- Attorney-General* (1911) 1 KB 414 it was held that this rule ought not to be applied in matters involving serious investigations of ancient law and questions of general importance. Moreover the Court will not permit the Plaintiff to be "driven from the judgment seat" unless the cause of action was obviously and almost incontestably bad.

In *Drummond-Jackson -v- British Medical Association* (1970) 1 WLR 688, Lord Pearson said that a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. This is so even if the particulars disclose some cause of action. The fact that a case is weak and will probably not succeed is not a ground for striking out (*Wenlock -v- Malomy* (1965) 1 WLR 1238).

In *Addis -v- Crocker* (1960) 1 QB 87, it was held that even when an action was statute-barred, striking-out was not the proper procedure, an application for the trial of a preliminary issue being the correct remedy. Alternatively, in a very clear case, the Defendant can apply to strike out on the ground that the claim is frivolous, vexatious and an abuse of the process of the Court (*Riches -v- Director of Public Prosecutions* (1973) 1 WLR 1019).

In this case the Defendant's application rests on a submission that the [Consumer Credit Act 1999](#) has no application to Notices of Demand issued after May 1999, if the mortgage/bill of sale was entered into before May 1999. The Defendant says that applicability of the Act to mortgages executed before May 1999, would be to offend the presumption against retrospectivity.

However in *R -v- Secretary of State for the Home Department ex parte Mundowa* (1992) 3 All ER 607 Staughton LJ said at page 612 in relation to the presumption against retrospectivity of the application of statutes:

".... the presumption does not necessarily apply merely because some of the facts on which the statute operates will have occurred before it was passed. It is easy to think of examples. Suppose that a statute enacted that all persons reaching the age of 21 should be liable to two years military service. Could an unwilling conscript argue that it applied only to persons born - or more plausibly, conceived - after the passing of the Act? .... It would be absurd if the presumption against retrospectivity applied in every case where any single fact relevant to the operation of the statute occurred before it was passed."

In *re a Solicitors Clerk* (1957) 3 All ER 617 the Law Society made an order that a solicitor's clerk who had been convicted of larceny before the enactment of the Solicitors (Amendment) Act 1956, should not be employed by any solicitor without the written permission of the Law Society. The Law Society was empowered to make the order under the 1956 Act. The clerk argued that the Act could not have retrospective effect. Lord Goddard CJ said at p.619 -

"In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past. Accordingly, in our opinion the disciplinary committee had jurisdiction to make the order complained of and the appeal fails."

In this case the Plaintiff has at least an arguable case that the Act, whilst it does not apply to execution of mortgages before May 1999, does apply to notices of demand, and the exercise of powers of sale under section 80 of the Act, dated after May 1999. He can argue that the applicability of section 80 to mortgages executed before May 1999, does not on its own, give the legislation retrospective effect.

On the grounds therefore, that this is not a claim that is clearly and "incontestably" bad, I refuse this application. The Plaintiff wishes to amend the Statement of Claim. Leave is granted to do so within 21 days.

The Defendant is to pay the Plaintiff costs of this application, which I set at \$50.00.

*Application refused and leave to amend allowed.*

**Marie Chan**

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