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8 July 2014 **Fiji Sun's Property Page Article**

When is a Mortgage Unenforceable?

A mortgage that does not describe or identify the property which is subject to the mortgage is void (not enforceable). Also a provision in a mortgage that charges all the property of the mortgagor renders the mortgage void as well. The law prohibits a mortgagor from creating or agreeing to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into.

A mortgage will be void if it contains a provision that goods supplied from time to time under continuing credit contract are subject to the mortgage. A mortgage that contains a provision that secures credit provided under another future credit contract or future related guarantee is normally unenforceable in relation to the future credit contract or future related guarantee.

If a credit provider includes a person other than a borrower or guarantor in a mortgage to secure his interest under a credit contract, then the mortgage will be unenforceable. This means that a person who has nothing to do with a credit contract cannot be roped in to provide additional security to the lender or credit provider.

A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract; and the reasonable enforcement expenses of enforcing the mortgage. This means that a borrower cannot take a mortgage on a property for more than the property is valued.

These provisions put brakes on the credit provider's ability to coerce persons other than the debtor and guarantor to be a party to the mortgage or to force the borrower to mortgage more properties than what would serve as adequate security for the amount lent. Hence, in the event the borrower is unable to repay the loan, he/she would lose only the property that is mortgaged, not everything that he/she owns. Further, anybody other than the debtor and the guarantor will not be implicated.

However, where more than one property is mortgaged, and the borrower defaults on his/her payments, the Act does not specify whether the credit provider can repossess only those properties that would be adequate to pay the amount in arrears or all properties under mortgage.

According to a complaint received by the Consumer Council of Fiji , the credit provider repossessed all three mortgaged properties with a total value of about $590,000 when the borrower had only $59,763.21 in default payments. To make matters worse, the bank received tenders that totaled about $300,000 only i.e. only about half the value of the three properties *(Banking Services in Fiji: From Consumers' Perspective, Consumer Council of Fiji Report, March 2011, p. 15).*

Case Study

Mr. K's 3 properties were mortgaged by Bank X through the bank's lawyers. Mr. K owned a construction company but the company was not doing well due to downturn in the construction business. He owed $59,763.21 in default payments. His three properties were valued at $285,000, $240,000 and $67,000 by the bank's recommended lawyer. The bank received tenders for $140,000, $120,000 (offered by a bank officer of another bank) and $43,000 (by a law firm that initially acted for Mr. K) respectively.

Questions that arise are:

• Why did the bank not sell one property to recover the debt owed by Mr. K? Selling one property would have paid off the arrears amount owed and the rest of the money could have been used to reduce the principal sum.

• Why was Mr. K not called when tenders were opened, for his peace of mind? This indicates lack of transparency.

• Why didn't real estate agents conduct the mortgagee sale as they are professionals who likely could have got better market rate?

To protect a person's source of livelihood, the act prohibits a mortgage being created over employees' wages or salary, or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so. The regulations currently do not permit this and to safeguard the interest of borrowers and their families it should remain prohibited. A mortgagor is further prohibited from assigning or disposing of property that is subject to a mortgage without the credit provider's consent or the authority of a court. However, a court may allow a mortgagor to dispose of the property provided certain conditions are satisfied

For example:

• a credit provider must not unreasonably withhold consent or attach unreasonable conditions to consent

• if a credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor

• consent is unreasonably withheld or unreasonable conditions are attached to the consent.

[to be continued]