IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 19 of 2017
(High Court Civil Action No. HBC 551 of 2006)

BETWEEN	:	**MICHAEL and ROSLYN LOSA LOW**
		Appellants
AND	:	**NBF ASSET MANAGEMENT BANK**
		Respondent
Coram	:	**Basnayake JA** **Almeida Guneratne JA** **Jameel JA**
Counsel	:	**Mr. G. O'Driscoll for the Appellants** **Mr. K. Jamnadas and Mr. J. Baleidrokadroka for the Respondent**
Date of Hearing	:	**13 September 2018**
Date of Judgment	:	**5 October 2018**

JUDGMENT

Basnayake JA

[1] This is an appeal filed by the appellants to have the judgment dated 7 February 2017 set aside. By this judgment the learned Judge whilst declining the plaintiff's claim, had

partly allowed the respondent's counter claim with an order to pay the respondent a sum of $590,328.60 together with interest at 13.5% from 6 March 2006 to-date and post judgment interest. The respondent was also declared entitled to an order of sale of the property contained in Crown Title 19038.

[2] The appellants are the owners of CT No. 19038 containing 32 perches of land together with a house etc. On 23 November 1992 the appellants provided a third party mortgage to the respondent for loans and advances made to Unique Marketing South Pacific Limited. According to the appellants there was a monetary limit to this mortgage. That is to refinance the principal debtor, namely, Unique Marketing South Pacific Limited's outstanding term loan account with Australian and New Zealand Group Limited (ANZ). At the time of the mortgage the term loan account was $51,540.23, less interest rebate of $12,319.19 leaving a settlement figure for the loan account at $ 39,221.04. The appellants specifically state that the mortgage was limited to this amount, namely, $39,221.14. The appellants' complaint is that the defendant however has continued to provide additional advances to the principal debtor without the appellants' consent and are not liable for those advances made thereafter.

[3] The appellants state that their indebtedness is limited to this amount. The appellants also complain about the procedure followed in the execution of the mortgage. The appellants state that the respondent alleges having made advances of $207,000.00 on 22 July 1992 and $20,000.00 on 23 June 1995 to the principal debtor which the appellants claim, were done without their consent. The 1st appellant while giving evidence however admitted that the principal debtor is a company formed by him, his wife and his brother. He said that he was a director of this company and also did the accounts.

[4] The appellants state that after making a total repayment of $477,728.47, the respondent claims another $747,444.89 from the appellants. The appellants state that there were five debits ($10,397.29, $11,260.02, $50,000.00, $12,795.25 and $72,070.00) made by the respondent in the debtor's account. The appellants *inter alia* prayed for a declaration that the appellants' liability be limited to the amount remaining at the time of the execution of

the mortgage. The appellants also moved for a restraining order against the respondent from disposing the property in CT 19038. The appellants do not ask that they be given credit on the five unexplained debits.

[5] The respondent in its statement of defence (amended statement of defence at pages 20 to 22 of the Record of the High Court (RHC)) states that the consent of the appellants was not required for further advances as the appellants had provided the third party mortgage to cover further advances. The respondent made a counter-claim for judgment in a sum of $746,851.14 together with interest and an order for sale of CT 19038.

Judgment

[6] The learned Judge whilst declining all the reliefs prayed for by the appellants and partly allowing the counter-claim made by the respondents, ordered the appellants to pay the respondent $590,328.60 together with interest. The respondent was also allowed an order permitting the sale of the mortgaged property. Having perused the mortgage bond, the learned Judge determined that it was not necessary for the respondent to have informed the appellants, or to have obtained their consent to grant further advances to the principle debtor. As the respondent was not able to show how the five unexplained debits were made up, the learned Judge decided to disregard those debits amounting to $156,522.54.

New cause of action after the closing of the evidence

[7] The learned counsel for the appellants in the written submissions (closing submissions at pages 39 to 42) before the learned Judge made the following submission in paragraph 16 that, "*If the anomalies are removed and credit given for the not credited amounts then it is the plaintiff's (appellants') contention that there would be nothing owing to the defendant on the accounts, but they are unable to determine this properly unless and until the defendant (respondent) explains the account to them*". Here what the learned counsel states for the first time is that in the event the five debits are disregarded, the interest already calculated on those debits should be credited to the debtors' account and that

would mean the appellants owe nothing to the respondent. Although the learned counsel states so in the written submission, no evidence was led with regard to the calculations. That was not something that the appellants prayed for in the statement of claim either. Therefore this becomes a new cause of action. It is in answering this submission that the learned Judge stated in paragraph 40 of the judgment that, "***The plaintiffs (appellants) did not lead any evidence on the resulting reduction in interest upon the deduction of the unexplained debits, which therefore does not fall for the consideration of the Court***".

The appellants' notice of appeal

[8] The notice of appeal contained five grounds of appeal. However the learned counsel for the appellants in the written submissions tendered to court has relied only on the 1st ground of appeal, and thus made no submissions on the other four grounds. The learned counsel for the respondent too has made submissions only with regard to ground No. 1.

Ground No. 1

[9] That the learned trial judge erred in law and in fact when calculating the rebated interest for each amount discounted from the total figure counter-claimed from 6 march 2006 and not from the time of each wrongful initial entry as per the account statement".

Submissions of the learned counsel for the appellants

[10] The learned counsel submitted that the learned Judge decided to discount a sum of $156,522.54 from the counter claimed sum of $744,851.14. However the learned Judge did not calculate the interest for each debit. The learned counsel submitted that interest for each debit should have been calculated from the date that each debit was made. The learned counsel submitted that although the learned Judge deducted the debits (five debits amounting to $156,522.54) he did not deduct the interest that was attached to these from

the dates the debits were made. Therefore interest had to be calculated from the date the debits were made and up to 6 march 2006.

[11] The learned counsel in the written submissions dated 13 August 2018 has made a calculation. In this, he has shown the five debits separately and against each debit shown the interest calculated. The rate of interest was taken as 14%. The total amount thus to be deducted up to 6 March 2006 was reckoned at $812,772.45. Thus by 6 March 2006, the appellants' account should have a credit balance of $65,921.31. The learned counsel submitted in the written submissions that judgment should have been entered in favour of the appellants for the said sum of $65,921.31 together with interest until the date of judgment and thereafter payment in full.

Submissions of the learned counsel for the respondent

[12] The learned counsel submitted that the only ground that the learned counsel for the appellant is relying on ought to fail as it amounts to raising a new issue, as it was not an issue that was taken up in the pleadings and/or at the trial. The learned counsel submitted that although the statement of defence (pgs. 20-23) refers to these unexplained debits (paragraph 9 at page 21) as advances made to the principle debtor, the appellants made no mention of a recalculation of interest resulting from a possible removal of these sums nor sought any such relief in the appellants reply to the defence and counter claim (pgs. 24-30). The learned counsel submitted that no evidence was led at the trial which would have enabled the learned Judge to determine whether any other sums should have been paid by way of interest and how. The learned counsel submitted that the burden of this was entirely on the appellant. The learned counsel also submitted that the appellant had not prayed for any deduction of interest.

[13] The learned counsel further submitted that this ground has no bearing on the orders made by the learned Judge. According to the orders made the interest was calculated from 6 March 2006 on the outstanding balance (that is after the deductions) and not on the rebated interest. The learned counsel reiterated paragraph 40 of the judgment wherein the

learned judge had said that; *"the appellant had not lead any evidence on the resulting reduction in interest upon the deduction of the unexplained debts and therefore any resulting deduction did not fall for the consideration of the court"*. The learned counsel thus submitted that the court did not make any calculation of rebated interest. The learned counsel submitted that no attempt was made by the learned counsel for the appellants to even lead evidence before this court on these calculations. The calculations from the Bar were given by way of written submissions.

The Legal Matrix

[14] The appellants filed this case against the respondent bank to prevent it from disposing the property CT 19038 that was mortgaged to the bank on 23 November 1992 by Deed No. 331812. The appellants are the mortgagors. The Bank, the mortgagee. The customer of the Bank is Unique Marketing South Pacific Limited, a limited liability company. The Memorandum of the company is not filed of record. However the 1st appellant while giving evidence admitted that this is a family business. According to him this was formed by the appellants and a brother of the 1st appellant. This brother is not a witness. The 1st appellant said that the 1st appellant was a director of the company. He was the only witness for the appellants.

[15] The principal debtor was the company. The principal debtor had an outstanding loan with ANZ Bank. At the time of execution of the mortgage the appellants state that the liability of this loan account stood at $39,221.04. The mortgage the appellants gave was to cover this amount. The complaint of the appellants is of the respondent providing additional advances to the principal debtor without obtaining the consent of the appellants. The appellants' case against the bank is the infusion of this extra money into this company. The appellants state that the liability is limited to the amount it stood at the time of the execution of the mortgage, namely, 23 November 1992. The appellants state that although a sum of $477,728.47 was paid, the respondent Bank is claiming $747,244.89.

[16] The appellants in paragraph 15 of the statement of claim state that the principal debtor's account contained five unexplained debits. However the appellants do not ask for any relief in respect of these debits, or that they be given credit for these debits. Debits attract interest. The appellants do not state that the appellants have been debited without a basis.

[17] The appellants complain that they were not served with the bank statements of account. The respondent's position is that the statements were sent to the customer who was the principal debtor. The principal debtor is a limited liability company formed by the appellants. Originally the respondent was known as National Bank of Fiji. Now it is NBF Asset Management Bank. At the trial, evidence was given on behalf of the respondent. The witnesses could not explain the five debits the appellants have referred to, the possible reason being misplacement of documents. Due to the re-structuring of the Bank, some of the documents could not be traced. As there was no explanation for the five debits, the learned Judge decided to disregard those debits. However there was no issue as to what happened to the interest charged over the years on those five debits in the event such debits were discarded. That was not the case of the appellants.

[18] The appellants filed this action to get some relief or buy time to save their property which is subject to the mortgage. On behalf of the company all the work was done by the appellants. Payments were made to the Bank by the appellants. Throughout the case it was the appellants who had been transacting business for the Company. It was a family business. The advances were made by the Bank to the debtor at the request of the appellants. The appellants are therefore estopped from limiting the liability of the Company to the debt that existed at time of the execution of the mortgage.

[19] After perusing the Mortgage Bond (pg. 82 RHC) the learned Judge in his judgment (at pg. 6 RHC) held that it was not necessary for the respondent to obtain the consent of the appellants to grant further advances to the principal debtor. On a perusal of the Mortgage Bond it appears that the loans and advances were given to the mortgagor or the Company. The appellants were the Mortgagor. The appellants do not challenge that stance.

[20] It is against this backdrop that the learned Judge disregarded the five unexplained debits. If the appellants were wrongly charged, the appellants could have questioned the Bank when it happened. The appellants' stance is that they were not aware as they were not served with Bank statements. This is the reason why the appellants do not claim interest charged on unexplained debits. That was not the case brought before court.

[21] The appellants or the Company were the debtors. The Bank or the respondent was the creditor. The property was mortgaged as security for the borrowings. The respondent did not have material to substantiate the five debits. The appellants were able to trace those debits made years ago. The appellants did not query this. There was no question of interest being charged on them. That is why there is no claim based on these debits. The respondent in paragraph 9 of their amended statement of claim (pg. 21 RHC) states that the unexplained debits are the advances made to the principal debtor. The respondent further states that payments made by the principal debtor or the appellants would be shown in the statements. The Company never complained of non-receipt of any statements. The respondent states that statements were sent monthly. Then the appellants should have the statements sent to the Company. The appellants do not complain that the company did not receive statements.

[22] Even at the pre-trial conference (pgs. 34-37 RHC) no questions were raised with regard to these five unexplained debits. Nowhere have the appellants claimed that they were unduly charged. Nowhere have the appellants claimed that interest had been unduly imposed. That is why no evidence was led at the trial as to the over-charging of the account. The question relating to interest was raised by the learned counsel for the appellants for the first time in his written submissions dated 24 October 2016. Judgment was pronounced on 17 February 2017. In the judgment the learned Judge in paragraph 40 states that, "The plaintiffs (appellants) did not lead any evidence on the resulting reduction in interest upon the deduction of the unexplained debits, which therefore does not fall for the consideration of the Court".

[23] The notice of appeal is dated 21 March 2017. The learned counsel for the appellant is relying on the first ground only. In that the learned counsel makes reference to the learned Judge calculating the rebated interest for each amount discounted. That is not correct. The learned Judge refrained from making an order as no evidence was adduced. The learned Judge specifically states so in paragraph 40 of the judgment. The appellants (or the learned counsel) never make an attempt to place before court either original or appellate any evidence for consideration of this so called rebated interest. A calculation is put forward by the learned counsel in the written submissions tendered to court on 13 August 2018. (The learned counsel claims that the respondent owes the appellant). If that was the case, the appellants should have sought a discharge of the mortgage. The learned counsel for the appellants does not do so.

[24] It was to the advantage of the appellants that the respondent could not find evidence to prove five unexplained debits. The appellants are entitled to reap the fruits of that lapse. However that does not wipe off the debt completely. Now that the five debits have been disregarded, the appellants invite the appellate court to cancel the interest charged on the five debits from the time those debits were made. Apart from that, the appellants do not challenge the judgment of the High Court learned Judge. I am not able to accept the submission of the learned counsel as it has no basis. No evidence has been adduced before the learned trial Judge. The learned Judge had already explained his difficulty in paragraph 40 of the judgment.

[25] I see no error in the judgment of the learned Judge. Therefore this appeal is without merit and is dismissed with costs fixed at $5000.00 payable to the respondent by the appellants.

Guneratne JA

[26] I agree with the judgment, the reasoning, conclusion and the proposed orders of Basnayake JA

Jameel JA

[27] I have read the draft judgment and agree with the reasoning, conclusion and proposed orders of Hon. Basnayake JA.

Orders of the Court are:

1. *Appeal dismissed.*
2. *Costs in a sum of $5,000.00 payable to the respondent by the appellants.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL