IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 037 OF 2020

BETWEEN	:	**JOSEPH LUM KON WISE**
		Appellant
AND	:	**FIJI DEVELOPMENT BANK**
		Respondent
Coram	:	**Andrews, JA** **Lakshman, JA** **Qica, JA**
Counsel	:	**Ms L Jackson for the Appellant** **Mr S Nand for the Respndent**
Date of Hearing	:	**15 September 2023**
Date of Judgment	:	**29 September 2023**

JUDGMENT

Andrews, JA

Introduction

[1] The appellant, Joseph Lum Kon Wise (Mr Wise), has appealed to the Court of Appeal against the judgment of his Honour Justice Seneviratne, delivered on 27 April 2020, in which Mr Wise was ordered to pay $195,956.41 to the respondent, Fiji Development Bank, (the Bank), together with interest at 9.5 percent per annum from 1 April 2014 until the entire sum is paid in full. The appellant was also ordered to pay the Bank $10,000 as costs.[1]

[1] *Fiji Development Bank v Joseph Lum Kon Wise* High Court at Suva, Civil Action No. HBC 275 of 2013, 27 April 2020.

Background

[2] On 22 February 2007, Mr Wise, David Jack Evans and Arthur Evans "T/A Wai Pac Company" (the partnership) accepted a loan offer from the Bank for an advance of $100,000 for a term of five years (the loan offer). The Facility Schedule to the loan provided that interest would be charged at "12% per annum on the first $325,000 and 17.5% on any excess". In the letter accepting the loan, in which Mr Wise, Mr D J Evans and Mr A Evans accepted the terms and conditions contained in the offer, the "Borrower" was recorded as "joint borrowing".

[3] The loan was secured by a Mortgage dated 28 February 2007 granted by the partnership over the fishing vessel "Shogun", together with a Bill of Sale, also dated 28 February 2007, over "fishing equipment, refrigeration appliances and navigational equipment" (the equipment). Both the Mortgage and the Bill of Sale provided for interest to be paid at "10% per annum over the first $325,000 and 15.5% per annum on any excess".

[4] On 16 July 2008, 6 August 2008, 31 March 2010 and 20 December 2011, the Bank advised the partnership that the loan was in arrears, and asked that the arrears be cleared. On each occasion the Bank recorded the balance of the debt owed to the Bank. Over the period from 16 July 2008 to 20 December 2011 the stated balance of the debt increased from $120,765.72 (as at 30 June 2008) to $138,231.48 (as at 20 November 2011).

[5] Pursuant to a Notice dated 13 June 2012, the vessel, together with the equipment, was seized by a bailiff on behalf of the Bank. The Notice stated that the sum of $146,912.19 plus interest was owed by the partnership.

[6] The Bank, as mortgagee in possession, sought to dispose of the vessel and the equipment. The Bank noted in its in-house records a market value of the vessel and the equipment of $80,000.

[7] On 5 July 2012 Mr Wise wrote to the Bank recording that the Bank had been notified of an intended inspection of the vessel by an interested party identified by him. He

said that the Bank had nominated a date and time for the inspection but no one from the Bank turned up for the inspection. He said that this was "an opportunity gone begging" and that a "would be" sale had been lost due to his inability to facilitate the request for inspection.

[8] The Bank accepted a tender for the vessel at $110,000 (exclusive of VAT) on 31 July 2012. However, that tender was withdrawn on 1 August 2012.

[9] On 26 September 2012 Mr Sanjay Kirpal, of Professional Valuations Ltd, carried out an inspection and prepared a market valuation of the vessel. He valued the vessel's hull at $25,000 and the equipment at $20,000 (totalling $45,000).

[10] On 25 February 2013 the Bank accepted an offer at $32,500 (exclusive of VAT), but that offer was later withdrawn.

[11] The Bank issued proceedings in the High Court on 25 September 2013. It named Mr Wise as 1st defendant, Mr D J Evans as 2nd defendant and Mr A Evans as 3rd defendant. The Bank alleged that the defendants had jointly and severally granted the Mortgage and Bill of Sale and agreed to repay the loan with interest at 15.5% per annum but had made default in repayments, leading to the seizure of the vessel and the equipment pursuant to the Mortgage and Bill of Sale. The Bank's statement of claim included the allegation that "the vessel and the items have deteriorated to the extent that the [Bank] is finding it difficult to secure a buyer and or place a value on it". The Bank claimed the sum of $193,559.48 (being the balance of the debt at 31 August 2013) together with interest at 15.5% per annum as from 1 September 2013.

[12] In his statement of defence dated 22 October 2013, Mr Wise admitted "taking a loan under security", but put the Bank to "strict proof" as to "its details". He referred to an insurance claim made following damage sustained in July 2010, which was refused by the insurer. He alleged that because the insurer refused to pay for the damage, the boat could not be operated so as to repay the loan.

[13] Mr Wise also counterclaimed, alleging that the Bank had taken control of the vessel in June 2012, at which time it was insured for $200,000 which, he alleged, was its market

value. He alleged that the Bank had allowed the vessel to fall into disrepair, that at times it had been used by the Bank's security guard as living quarters, and that the Bank had failed to attend an inspection arranged by Mr Wise for a genuine buyer. He sought orders dismissing the Bank's claim and for judgment on his counterclaim. The Bank filed a reply to the statement of defence and a defence denying the counterclaim allegations.

[14] On 13 February 2014 the Bank accepted an offer of $7,000 (exclusive of VAT) and the sale was completed. On 31 March 2014 the Bank advised the partnership that the vessel had been sold, "with proceeds receipted to your abovementioned account". The letter recorded the debt balance as being $195,956.41.

[15] The proceeding did not go to trial until 12 March 2020. In the interim, the Bank (with leave) filed two amended statements of claim:

[a] First amended statement of claim, filed on 26 October 2017: which included allegations that the Bank had "finally managed to sell the items for $7,000 and the defendants' account was credited accordingly", and that the balance of the defendants' debt (and the amount for which judgment was sought) stood at $195,956.41 as at 31 March 2014, with interest accruing at 15.5% per annum as from that date.

[b] Second Amended Statement of Claim, filed on 23 July 2019: in which Mr David Evans and Mr Arthur Evans were no longer named as defendants.[2] An affidavit sworn in support of the Bank's application for leave to file the second amended statement of claim stated that the amendment was required in respect of the interest rate for the loan, there being a discrepancy between the interest stated in the loan offer and that stated in the security documents. A letter to the partnership dated 25 February 2010, advising of a change in the interest rate, from 10.0% to 9.5%, was annexed to the affidavit. The second amended statement of claim alleged that interest was payable at 12% per annum on the first $325,000 and 17.5% per annum on any excess, and

[2] A notice of discontinuance against the 2nd and 3rd defendants was filed on 9 August 2018.

that the Bank had charged interest at 10% per annum, which had been changed to 9.5% per annum with effect from 1 April 2010.

[16] Statements of defence and counterclaim to each amended statement of claim were filed by Mr Wise, and the counterclaim was maintained. The pleaded particulars of the negligence alleged against the Bank, may be summarised as being that the Bank:

[a] failed to ensure the best price was obtained for the vessel when exercising its power of sale;

[b] failed to act in good faith towards Mr Wise and recklessly sacrificed his rights as one of the owners of the vessel by recklessly and willingly selling the vessel at an exceedingly low price;

[c] failed to take reasonable care and maintain and preserve the vessel;

[d] failed to ensure that the agreement to sell the vessel for $110,000 was successfully concluded; and

[e] failed to assist him to obtain the best price, by failing to send its representative to facilitate an inspection.

[17] Mr Wise claimed damages for loss suffered of $193,000 (being the insured value of $200,000 less $7,000), together with interest at 10% per annum pursuant to s 3 of the Law Reform (Miscellaneous Provisions)(Death and Interest) Act 1935.

[18] At the High Court trial, the Bank contended that there was no dispute that Mr Wise had taken a loan from the Bank, that he had failed to repay the loan, and that he was liable for the outstanding balance on the loan. It was submitted that the only issue for determination was Mr Wise's counterclaim. The Bank called evidence from a Bank Officer, Ms Kwong, and from the Valuer, Mr Kirpal. Mr Wise gave evidence on his own behalf. Witnesses were cross-examined and re-examined.

The High Court judgment

[19] The learned High Court Judge found that Mr Wise was liable to the Bank for the amount claimed of $195,956.41, together with interest at 9.5% per annum as from 1 April 2014. He dismissed Mr Wise's counterclaim. I summarise the Judge's findings and conclusions below.

[a] On the challenge to the Bank's suing Mr Wise, alone, the Judge referred to a "guarantee bond", clause 3.3 of which, he said, provided that the obligations of the guarantee bound each of the guarantors alone, and any two or more of them together, and that the release of one person from the obligation did not mean the others were released. The Judge found that it was "abundantly clear" from that clause that the Bank could sue the partners of the business jointly and severally.[3]

[b] The Judge found that the Bank had advertised the vessel for sale and "made every attempt to sell and obtain the maximum price for the vessel from the time it was seized".[4]

[c] The Judge held that there was no duty on the Bank, as mortgagee, to maintain the vessel after it was seized. He found there was no evidence that the vessel was damaged due to the negligence of the Bank.[5]

[d] The Judge referred to evidence on behalf of the Bank that it had fixed another date for the inspection by Mr Wise's buyer, and held that there was no negligence on the part of the bank with respect to the inspection sought by Mr Wise.[6]

[e] Mr Wise's counterclaim was based on the sum insured in the policy of insurance for the vessel, but there was no evidence that that was a valuation given by a registered valuer. He rejected Mr Wise's challenge to the Bank's

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3 High Court judgment, at paragraphs [19]-[22].
4 At paragraphs [9]-[12] and [14].
5 At paragraphs [7]-[8].
6 At paragraph [13].

valuation (at $45,000) on the grounds that Mr Wise had not obtained a valuation from a qualified valuer.[7]

[f] Mr Wise had not been prejudiced by the interest rate variations, as the rate referred to in the original statement of claim was 15.5% per annum, which was reduced in the amended statement of claim to the much lower rate of 9.5% per annum. The Judge found that Mr Wise was not entitled to complain that the discrepancy between the interest rates claimed in the offer letter, the original statement of claim, and the amended statement of claim would cause him any injustice.[8]

Appeal issues

[20] The grounds of Mr Wise's appeal may conveniently be grouped as follows:

[a] The Judge erred in holding that the Bank was entitled to sue Mr Wise in his personal capacity, and holding Mr Wise personally liable for Wai Pac's debt.

[b] The Judge erred in relying on a "guarantee bond" which was not referred to in pleadings and not produced in Court.

[c] The Judge erred in concluding that the Bank had charged interest at 9.5% and that the debt to the Bank was $195,956.41, when the Bank had failed to produce evidence to prove either the interest rate or the amount of the debt.

[d] The Judge erred in considering Mr Wise's counterclaim, by:

[i] misinterpreting the counterclaim as being for damages for failure to repair the vessel and the equipment (when it was based on the Bank's failure to take reasonable care of the vessel and the equipment by effecting general maintenance);

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7 At paragraphs [17]-[18].
8 At paragraph [24].

[ii] failing to hold that the Bank's duty as mortgagee in possession to take reasonable care of the vessel and the equipment included general maintenance to preserve its value;

[iii] disregarding evidence that the Bank's failure to take reasonable care of the vessel and the equipment caused a significant deterioration in its value;

[iv] holding that the Bank had "done its best to dispose of the vessel at the maximum price", in the absence of evidence that the Bank had adequately and sufficiently advertised to vessel and the equipment for sale.

[e] The Judge summarily assessed costs at $10,000, which was harsh and excessive.

Did the Judge err in holding that the Bank was entitled to sue Mr Wise in his personal capacity, and holding Mr Wise personally liable for Wai Pac's debt?

Submissions

[21] Ms Jackson submitted for Mr Wise that the foundation of the Bank's claim is a loan agreement between the Bank and the three partners (Mr Wise, Mr D Evans and Mr A Evans) trading as Wai Pac Company. She submitted that in line with the principles of privity of contract, in suing for the debt, the Bank could have named all three individuals "trading as Wai Pact Company", named the three individuals as a partnership without reference to Wai Pac, or (in accordance with what she submitted was the well-known and accepted practice in Fiji) sued Wai Pac as a firm, pursuant to Order 81, Rule 1 of the High Court Rules.

[22] Ms Jackson submitted that in its second amended statement of claim the Bank sued Mr Wise, alone, without any reference to the partnership, or Wai Pac, and did not plead that Mr Wise was liable to the Bank pursuant to partners' joint and several liability. She submitted that this was a fatal defect as the Bank's claim stemmed from the agreement between the Bank and the partnership. She submitted that if the Bank chose

to pursue one partner only, it should have pleaded that the loan was to the partnership and that as a result Mr Wise was liable under the principle of joint and several liability. She submitted that there was no pleading that Mr Wise, as an individual, was jointly and severally liable for the partnership's debt, and (as there was no loan to Mr Wise, individually) there was no privity of contract between the Bank and Mr Wise, personally, and therefore no foundation for a claim against Mr Wise in his personal capacity.

[23] For the Bank, Mr Nand submitted that the learned High Court Judge was correct to hold that Order 81 Rule 1 of the High Court Rules offers an option, but does not make it imperative to sue a partnership as a firm. He further submitted that this was a matter not raised by Mr Wise until the closing stages of the trial, and had not been raised in any pleadings nor been the subject of any evidence. He submitted that it would be unjust to allow Mr Wise to raise it now.

[24] Mr Nand further submitted that the Bank had pleaded Mr Wise's joint and several liability: he referred to paragraph 4 of the second amended statement of claim in which the bank alleged that Mr Wise had "jointly and severally" granted the Mortgage and Bill of Sale.

Discussion

[25] It is well understood that, as a matter of law, members of a partnership are jointly and severally liable (that is, both together and separately as individuals) for the partnership's debts. As Ms Jackson submitted, the Bank could have maintained the proceedings against all three partners, against the three partners (trading as Wai Pac), or against Wai Pac (pursuant to Order 81, rule 1 of the High Court Rules). But it is always open to a creditor to claim against one partner for the entirety of a partnership debt, on the basis of joint and several liability.

[26] The Bank's original statement of claim and its first amended statement of claim named all three partners as defendants, referred to the loan agreement between the bank and the partnership, and pleaded the partners' joint and several grant of the Mortgage and Bill of Sale.

[27] The Bank's pleadings in the second amended statement of claim are inconsistent: it proceeds from alleging (at paragraph 3) that the Bank "lent and advanced a sum of $100,000 ... to the *defendant*" (that is, as if the loan were to Mr Wise, only), to alleging (at paragraph 4) that "As security the *defendant* jointly and severally granted [the Mortgage and Bill of Sale]". At paragraph 8 it alleges that "the *defendants*" had a right of redemption which "the *defendants*" failed to exercise. Then at paragraph 9 it is alleged that "the *defendant's*" account was credited with $7,000, and at paragraph 10 the Bank claims $195,956.41 from "the *defendant*".

[28] The pleading is untidy, but paragraph 4 includes an allegation of joint and several liability under the Mortgage and Bill of Sale. As the claim against Mr Wise stems from the seizure pursuant to the Mortgage and Bill of Sale, I have concluded that that is a sufficient basis for a claim against Mr Wise, personally, and without claiming against the other two partners, and the learned High Court Judge did not err in finding that the Bank could sue Mr Wise, only.

[29] Further, I am not persuaded that the Judge erred in finding that Order 81 Rule 1 of the High Court Rules does not make it imperative for a party to sue all partners of a business. Order 81 Rule 1 states that:

> ***Order 81: Actions by and against firms within jurisdiction***
>
> *(1) Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.*

[30] It is clear that the rule allows an action to be brought against the firm. It does not make it mandatory that entitlement, or liability, can only be claimed by way of an action against the firm.

Did the Judge err in relying on a "guarantee bond" which was not referred to in pleadings and not produced in Court?

Submissions

[31] In the course of her examination in chief in the High Court trial Ms Kwong (witness for the Bank) was referred to a document which was said to be a "guarantee document". Ms Jackson objected to the document being admitted into evidence, on the grounds that it had not been pleaded by the Bank. She submitted that the only documents relied on were the loan agreement, the Mortgage and the Bill of Sale. Mr Nand submitted that a guarantee was one of the documents attached to the loan agreement, but Ms Jackson responded that the Bank was bound by its pleadings and a "guarantee" was not pleaded in any statement of claim. In the event, a guarantee document was not tendered in evidence at the trial.

[32] However, at paragraph [21] of his judgment, the learned High Court Judge referred to a "guarantee bond", and set out clause 3.3 of that document.

[33] Ms Jackson submitted in this Court that the Judge was wrong to refer to a "guarantee bond", as no such document had been referred to in the pleadings or tendered in evidence in the High Court. The document was not, therefore before the Judge, and he was wrong to refer to it and rely on it. She submitted that the Judge used the document (wrongly) to support his finding that the Bank was entitled to sue Mr Wise in his personal capacity.

[34] Mr Nand submitted that the claim against Mr Wise was based on the documents that were in evidence: the loan agreement, Mortgage, and Bill of Sale. He submitted that the Bank's claim was not founded on a "guarantee".

Discussion

[35] The reference to a "bond guarantee" immediately follows the Judge's finding at paragraph [21] of the judgment that Order 81 Rule 1 of the High Court Rules does not make it imperative for a party to sue all partners of a business, as set out below:

[21] Order 1 Rule 1 does not make it imperative for a party to sue all partners of a business. It is more so when the guarantee bond states as follows:

Clause 3.3 More than one guarantor
If two or more people are named as guarantor:
(a) 'I' refers to each of us alone and any two or more of us together;
(b) our obligations bind each of us alone and any two or more of us together; and
(c) the release of one person from his obligation does not mean that the others are released.

[22] From the above clause it is abundantly clear the [Bank] could sue the partners of the business jointly and/or severally.

[36] It is apparent from the fact that the reference to cl 3.3 of a "guarantee bond" appears in the same paragraph as the learned High Court Judge's discussion of Order 81 Rule 1 of the High Court Rules, and the Judge's conclusion set out in paragraph [22], that the reference was intended to bolster the Judge's conclusion that the Bank was entitled to sue Mr Wise, personally, for the partnership debt.

[37] I am satisfied that the learned High Court Judge erred in referring to a "guarantee bond". No such document had been pleaded, or tendered in evidence in Court, and he was not entitled to refer to and rely on it. However, I am not persuaded that in the absence of a reference to a "guarantee bond" the Judge had no basis on which to find that the Bank could sue Mr Wise for the partnership debt. As a matter of law Mr Wise, as a partner, could be sued for the entirety of the debt.

Did the Judge err in concluding that the Bank had charged interest at 9.5% per annum and that the debt to the Bank was $195,956.41, when the Bank had failed to produce evidence to prove either the interest rate or the amount of the debt?

(a) Interest

Submissions

[38] Ms Jackson submitted that no evidence was tendered in the High Court to prove that the Bank had in fact reduced interest to 9.5% per annum and if so, when and from what figure. She submitted that the interest rate was a disputed fact, which the Bank was required to prove. She also submitted that the discrepancies in the interest rate charged raised issues as to compliance with the Consumer Credit Act 1999.

[39] Mr Nand referred this Court to the affidavit filed in the High Court on 5 June 2019 in support of the Bank's application to file the first amended statement of claim. Annexed as an exhibit to that affidavit was a letter dated 25 February 2010, addressed to "Joseph L K Wise & Others", advising that the base interest rate had been revised with effect from 1 April 2010 from 10% per annum to 9.5% per annum. He further submitted that the interest rate was not disputed in Mr Wise's statements of defence and counterclaim, and not listed in pre-trial conferences as an issue to be determined at trial. He also submitted that a Loan Statement of Account does not set out the interest rate.

[40] Mr Nand also submitted that neither the Bank's witness, Ms Kwong, nor Mr Wise had been asked any questions during the High Court trial concerning the change in the interest rate to 9.5%.

[41] With respect to the letter of 25 February 2010, Ms Jackson submitted that interest was a disputed fact: in his statement of defence to the second amended statement Mr Wise denied the Bank's allegation as to the interest rate, asserting that "he has no knowledge of the same". Ms Jackson submitted that if the Bank wished to establish the interest rate, it should have produced the letter in Court. She submitted that the Bank had not produced the letter, it was not in evidence in the High Court, and it could not be produced in this Court.

Discussion

[42] With respect to interest the learned High Court Judge held, at paragraphs [23] and [24]:

> *[23] The next issue raised by [Mr Wise] is that there is a discrepancy in the interest rate claimed by [the bank]. In the Facility schedule of the Loan offer letter the interest rate is 12% per annum on the first $325,000 and 17.5% on any excess. It also provides for 2% default interest.*
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> *[23] In the original statement of claim the interest rate claimed by [the Bank] was 15.5% per annum. However, the interest rate has been reduced to 9.5% per annum. The interest rate claimed by [the Bank] in the amended statement of claim is very much less than the interest rate agreed upon by the parties. Therefore, [Mr Wise] is not entitled to complain that any injustice would cause to him due to the discrepancy in the interest rates claimed in the statement of claim, offer letter and in the amended statement of claim.*

[43] In other words, the learned High Court Judge found that any discrepancy in stating the interest was excused because the Bank was charging Mr Wise a lower rate. That finding misses the point raised by Ms Jackson: whatever the interest rate charged by the Bank was at any particular time, Mr Wise, as a member of the partnership to which the loan had been made, was entitled to know what interest rate was being charged at that time.

[44] Further, as part of establishing its claim against him, the Bank was required to prove the interest rates charged for the loan, including changes in the interest rates from time to time. At paragraphs [5] and [6] of its second amended statement of claim the Bank alleged:

> *[5] The Defendant had agreed to repay the loan to the Plaintiff in instalments with interest at the rate of 12% per annum on the first $325,000 and 17.5% per annum on any excess together with Bank fees upon disbursement of the loan.*
>
> *[6] The Plaintiff however charged interest at the rate of 10% per annum to the Defendant account which said interest rate was changed to 9.5% per annum with effect from 1st April 2010.*

[45] Mr Wise's response in his statement of defence and counterclaim was:

> *[3] The Defendant admits paragraph [5] of the Plaintiff's claim.*
>
> *[4] Further, the interest rates of the Plaintiff's Security documentation namely the [Mortgage and Bill of Sale] vary from and are therefore contrary to the agreed interest rates outlined in the Loan Agreement dated 22 February 2007.*
>
> *[5] The Defendant denies paragraph 6 of the Plaintiff's claim as he has no knowledge of the same.*

[46] The Minutes of a Pre-Trial Conference dated 15 October 2019 record, under the heading "B. Issues to be determined at trial", the following:

> *1 Whether the Plaintiff's Security documentation namely the [Mortgage and Bill of Sale] vary from and are therefore contrary to the agreed interest rates outlined in the Loan Agreement dated 22 February 2007.*

[47] Clause 5 of the "General Terms and Conditions" of the Facility Schedule to the loan offer provided that:

> *(b) ... the interest rate is subject to change at any time, generally in response to market conditions. Changes to your interest rate will be a Bank's discretion and you will be advised prior to it taking effect.*
> ...
>
> *(c) Interest will be calculated on a daily balance owing and charged to your loan account at the end of each month or such other period as the Bank may determine without any prior notice to you. The interest debited to the account will itself accrue interest from the date of the debt.*

[48] I accept Ms Jackson's submission that, as pleaded, the interest rate was disputed, and was required to be proved by the Bank, and that no evidence was tendered at trial as to changes in the interest rate. I also accept that the letter referred to by Mr Nand (dated 25 February 2010) was not tendered as evidence in the High Court and cannot be considered by this Court.

[49] However, given Mr Wise's admission of liability for interest, and of the condition that the interest rate was subject to change, I am not persuaded that the Bank's failure to prove the interest rate throughout the period of the loan was fatal to its claim for interest.

(b) Quantum of claim

Submissions

[50] Ms Jackson submitted that quantum of the claim was also disputed on the pleadings, and was required to be proved by the Bank. She submitted that the Bank had not tendered any evidence, written or oral, to prove the quantum of the debt claimed against Mr Wise. She further submitted that no Loan Statement of Account had been produced at trial.

[51] Mr Nand submitted that there was evidence as to quantum before the High Court. He referred to the Bank's letter to the partnership, dated 31 March 2014 (tendered in Court as a Defendant's exhibit). In this letter the Bank stated the debt balance of the loan as

being $195,956.41 with repayment "On Demand", and advised the partnership of the sale of the vessel. Mr Nand also referred to the Minutes of the Pre-trial Conference in which it was agreed that:

> *On 31 March 2014, the Plaintiff wrote to the Defendants informing them that they had sold the [vessel] via a Private Sale ... for the sum of $7,000 plus VAT.*

[52] Mr Nand submitted that by agreeing to the letter of 31 March 2014 as an admitted fact, Mr Wise had agreed to its contents. He submitted that Mr Wise could not now assert that he was unaware of the debt balance claimed by the Bank. He also submitted that as the letter of 31 March 2014 had been tendered in evidence in the High Court, the learned High Court Judge was entitled to rely on it as evidence of the quantum of the debt.

[53] Mr Nand further submitted that neither Ms Kwong nor Mr Wise had been questioned during the trial regarding the quantum of the debt claimed by the Bank.

Discussion

[54] As for the issue as to the interest rate, I accept that the Bank was required to prove the debt balance of the loan. However, I accept Mr Nand's submission that there was sufficient evidence before the learned High Court Judge on which he could make a finding as to the quantum of the claim against Mr Wise. I am not persuaded that the learned High Court Judge erred in accepting that the Bank's claim for $195,956.41 was proved.

Did the learned High Court Judge err in considering Mr Wise's counterclaim, by misinterpreting the counterclaim as being for damages for failure to repair (when it was based on the Bank's failure to reasonable care by effecting general maintenance), failing to hold that the Bank's duty as mortgagee in possession to take reasonable care of the vessel included general maintenance to preserve its value, disregarding evidence that the Bank's failure to take reasonable care of the vessel caused a significant deterioration in its value, and holding that the Bank had "done its best" in disposing of the vessel in the absence of evidence that the Bank had adequately and sufficiently advertised to vessel and the equipment for sale?

Submissions

[55] Ms Jackson submitted that the learned High Court Judge had misinterpreted Mr Wise's counterclaim as being for damages to *repair* the vessel. She submitted that as a mortgagee in possession the Bank owed a duty to the partnership (and Mr Wise) to take reasonable care of the vessel. She submitted that there was a complete absence of reasonable care on the part of the Bank (demonstrated in the evidence for the Bank) over the two years the vessel was in its possession and under its control, which caused the significant and rapid deterioration of the vessel and the equipment. She also submitted that the Bank failed to advertise the vessel and the equipment adequately and sufficiently for sale. She submitted that as a result of those failures, the vessel was sold for only $7,000, a fall of $193,000 from its insured value (at the time of the loan) of $200,000.

[56] Mr Nand submitted that the Bank had exercised its powers in good faith. He submitted that although Mr Wise had given evidence at the High Court trial as to what was required to maintain the vessel, he had not produced any expert or documentary evidence as to how a vessel should be preserved. He submitted that the Bank was not under any duty to improve or increase the value of the vessel.

Discussion

(a) Did Mr Wise allege the Bank had a duty to "repair" the vessel?

[57] I observe, first, that the learned High Court Judge did not say in his judgment that Mr Wise's counterclaim was for damages for failure to repair the vessel. However, I also observe that the word "repair" appears in the Minutes of the Pre-trial Conference, where it is stated that one of the issues to be determined at trial was whether "*the [Bank] Is liable to pay for repair costs incurred by [Mr Wise]*", which appears to refer to repairs to the vessel undertaken in 2010, and subsequent between Mr Wise, the insurer, and the Bank as to payment for the repairs. The Judge dealt with the counterclaim as being a claim that the Bank had failed in its duty to maintain the vessel and equipment.

(b) Did the Bank have a duty to maintain and preserve the condition of the vessel and the equipment?

[58] At paragraph [7] of the judgment, the learned High Court Judge said:

> *[Mr Wise's] position is that after seizing the vessel and equipment the [Bank] did not maintain the vessel and equipment and it resulted in the deterioration of the vessel and equipment. There is no duty on the mortgagee to maintain the property seized under a mortgage.*

[59] It is not a correct statement of the law to say that "there is no duty on the mortgagee to maintain the property seized under the mortgage". The authority cited by the Judge in support, *Funworld Centre (Fiji) Limited v Bank of Baroda*, states the opposite of his assertion:[9]

> *A mortgagee who goes into possession becomes the manager of the charged property. He thereby assumes a duty to take care of the property. This requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks (see: Halsbury's Laws of England 5th Ed Mortgage (Vol 77 (2016), para 429)*

[60] The dicta from *Funworld* is amply supported by the authority of the judgments of the Privy Council (on appeal from the Supreme Court of Canada) in *McHugh v Union Bank of Canada*,[10] the England and Wales Court of Appeal in *Cuckmere Brick Company v Mutual Finance Limited*,[11] and the Privy Council (on appeal from the New Zealand Court of Appeal) in *Downsview Nominees Limited & Anor v First City Corporation & Anor*.[12]

[61] In *McHugh*, it was alleged that mortgaged horses had been sold at undervalue, as a result of insufficient advertising and the manner in which they were driven to market by the mortgagee. Lord Moulton said in his judgment for the Privy Council:[13]

> *It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a*

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9 *Funworld Centre (Fiji) Limited v Bank of Baroda* High Court of Fiji (Western Division), Civil Action No. HBC 224 of 2016 (23 September 2019) at paragraph 25.
10 *Mc Hugh v Union Bank of Canada* [1913] AC 299.
11 *Cuckmere Brick Company v Mutual Finance Limited* [1971] Ch 949.
12 *Downsview Nominees Limited & Anor v First City Corporation & Anor* [1993] AC 295.
13 *McHugh*, at 811.

reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

[62] In *Cuckmere Brick*, Lord Cross said (in relation to a claim that receivers had failed in their duty in exercising a power of sale):[14]

> *There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking possession of it and the date of sale, including as in the McHugh case, steps taken to bring the property to the place of sale. It seems quite illogical that the mortgagee's duty should suddenly change when one comes to the sale itself and that at that stage if only he acts in good faith he is under no liability, however negligent he or his agent may have been.*

[63] In *Downsview Nominees* (in relation to a claim as to a receiver's duties in the management of a motor vehicle dealership in receivership) Lord Templeman said in his judgment for the Privy Council:[15]

> *If a mortgagee goes into possession he is liable to account for rent on the basis of wilful default; he must keep the mortgaged premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor.*

[64] I conclude that the Bank had a duty to maintain and preserve the vessel and the equipment.

(c) Did the Bank comply with its duty to maintain and preserve the vessel?

[65] It is necessary to examine the evidence given in the High Court. As recorded in the transcript of evidence at the trial, the witness for the Bank, Ms Kwong was asked in examination in chief what the Bank did after it seized the vessel and the equipment. She replied:

> *They engaged a bailiff a watch man though to be on the vessel*

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[14] *Cuckmere Brick*, at 972G.
[15] *Downsview Nominees*, at 313B.

She was not asked any further questions regarding care and maintenance of the vessel and the equipment in her examination in chief.

[66] In cross-examination, Ms Kwong:

[a] Confirmed that the vessel was in good working condition when it was seized;

[b] Confirmed that the vessel was left idle at Kings Wharf Suva for nearly two years;

[c] Said that it was correct that in order to preserve the condition of the vessel and the equipment, basic maintenance would be required, meaning chipping and painting for rusted components, running the engines from time to time, starting the generators so that the batteries could charge, checking that the navigation, communication and fishing equipment was in working order, and removing growth such as algae and barnacles (and the failure to remove such growth would compromise the integrity of the whole vessel);

[d] Was unable to comment on whether the bailiff lived on the vessel with his family, but said it was supposed to be only the bailiff on the vessel;

[e] Was unable to comment on whether the Bank ever ran the engines on the vessel, started the generators, or removed growth from the hull of the vessel.

[67] When it was put to her that the Bank had failed to carry out basic maintenance on the vessel while it was in its possession, Ms Kwong said:

> *We had a security guard that was on the, the caretaker that took care of all that.*

However, when it was put to her that the security guard had not carried out basic maintenance on the vessel during the period that it was in the Bank's possession, she replied:

> *Cannot comment on that.*

[68] In re-examination Ms Kwong was asked what duties were assigned to the security guard on the vessel. She replied:

> *The security was supposed to look after the vessel and he had due diligence to ensure that the vessel was in good condition when it was seized.*

[69] Mr Wise gave evidence as to his training and experience:

> *I am engineer by trade. I work in the field for almost 20 years. I work for government shipping. I work for South Seas Stowage and I know the value of the boat and the engine.*

[70] Regarding what was required to maintain and preserve the condition of the vessel and the equipment, Mr Wise said:

> *When the fishing boat is idle all the crew have to be there all the time to chip and paint and monthly they have to go underneath the water and scrub the hull because there's a lot of zebra mussels accumulate on the hull and the algae so we need to brush and paint the deck.*
>
> ...
>
> *Well it's just that those algae that started accumulated on the hull and losing a lot of [metal] and chews a lot of [metal] and its becoming thinner. Once it's becoming thinner you have a chance of have holes on the metals itself.*

When asked what would happen if you did not run the engine and start the generators regularly, Mr Wise replied:

> *If you don't run the generators there is a chance of the generator seized and even the main engine those things we need to have the batteries first before it start running those two equipment and to test the fishing equipment we need batteries to come in on board to be recharged.*

[71] Mr Wise was asked if he noticed what was happening on the vessel while it was held by the Bank. He replied that his office was very close to where the vessel was anchored and he noticed that the security and family were living there, for almost two years. He said he saw them drying mats on the deck. He was asked if he saw any maintenance being carried out on the vessel during the two years and replied "*No*".

[72] Under cross-examination, Mr Wise was asked if he had "*rectified or maintained the vessel to the proper condition that it ought to have been*" after it had been involved in accidents and suffered wear and tear. He replied that he had, and added:

> *We have the marine survey that's that fishing vessels they can't go out to sea if they don't pass it, right we have those certificate.*

Mr Wise was then asked if that meant that the maintenance was done, and replied "*yes*".

[73] It was put to Mr Wise that he could have undertaken maintenance:

> *Mr Nand: ... you could have also done your part in due diligence in maintaining the boat, correct?*
>
> *Mr Wise: How can we clean it when the security guard is there? We are not allowed to access.*
>
> *Mr Nand: But you could have liaised with the bank to allow you, correct?*
>
> *Mr Wise: I didn't know that.*

[74] Mr Wise's counterclaim was set out in his statement of defence and counterclaim to the Bank's original statement of claim, and was maintained following the Bank's subsequent amended statements of claim. The issues raised in the counterclaim were recorded as issues for determination at trial. It is therefore of concern to this Court that the Bank's witness was "unable to comment" on many of the issues raised by Mr Wise, in particular as to steps taken by the Bank to maintain and preserve the vessel and the equipment.

[75] It was incumbent on the Bank, once it had taken possession and control of the vessel in June 2012, to give consideration to what was required in order to maintain and

preserve the good condition Ms Kwong confirmed it was in at the time of seizure. The Bank's inability to comment as to whether any of the steps outlined by Mr Wise were taken leads me to conclude that it failed to give any, or any adequate, consideration to what was required of it in order to maintain and preserve the good condition of the vessel.

[76] I conclude that there is no evidence that the Bank took any, or any adequate, steps to maintain and preserve the condition of the vessel and the equipment. There is no evidence that it (or its bailiff) carried out the basic maintenance described by Mr Wise, by running the engines from time to time, starting the generators, removing growths of algae and barnacles from the hull, or chipping and painting components that had become rusty.

[77] The learned High Court Judge dismissed Mr Wise's counterclaim out of hand by holding (at paragraph [7]) of the judgment) that there was no duty on the Bank to maintain the property seized under the mortgage, and by finding (at paragraph [8] of the judgment) that while the vessel had been in the Bank's custody for two years and its condition had deteriorated, there was no evidence that it was damaged due to the Bank's negligence, and that the bank had appointed a person to look after the vessel.

[78] In doing so, the Judge disregarded Mr Wise's evidence. I accept Ms Jackson's submission that he erred in doing so. On the basis of Mr Wise's training and experience he was well able to provide the Court with reliable evidence as to what was required to maintain the condition of the vessel, so as to maintain it and preserve its value. Mr Wise's evidence as to what was required to maintain and preserve the vessel and the equipment was unchallenged. I accept Ms Jackson's submission that the Judge erred in disregarding Mr Wise's evidence.

[79] Other to say that he "took care of all that", the Bank produced no evidence that the bailiff appointed by the Bank took any steps to carry out basic maintenance on the vessel and the equipment while it was in its possession and control. I conclude that the Bank failed in its duty to maintain and preserve the good condition of the vessel.

(d) Did the Bank's failure to maintain and preserve the vessel and the equipment cause a significant deterioration the value of the vessel and the equipment?

[80] I accept Ms Jackson's submission that the Bank's failure to maintain and preserve the condition of the vessel and the equipment was (at least) a significant contributing factor to the significant deterioration in the condition of the vessel and the equipment, as demonstrated by the evidence given by the Bank.

[81] The Bank recorded the insured value of the vessel at the time of the loan agreement as $200,000. From the "good working condition" (stated by Mr Wise and confirmed by Ms Kwong) when it was seized, the Bank assessed the market value for the vessel and the equipment at $80,000 (as recorded in its advertising "extracts") in June 2012. The valuation arrived at by Mr Kirpal in September 2012 for the vessel and the equipment was $45,000. It was eventually sold in March 2014 for $7,000.

[82] As the learned High Court Judge said in his judgment, the vessel and the equipment deteriorated during the two years between seizure and the eventual sale. It may be observed that the Bank was clearly aware of the deterioration, as evidenced by the changes in the advertisements (from sale by tender to private sale "as is where is"), discussed below. I conclude that the Bank's failure to maintain and preserve the condition of the vessel and the equipment caused its deterioration in value to the point where it was sold for $7,000.

(e) Did the Bank "do its best" and adequately and sufficiently advertise the vessel and equipment for sale?

Submissions

[83] Ms Jackson submitted that there was no proof that the Bank adequately and sufficiently advertised the vessel and the equipment for sale. She submitted that while the Bank produced copies of "extracts" (that is, drafts sent to the newspapers), it did not produce copies of actual advertisements, as they appeared in each newspaper. She further submitted that each of the extracts invited tenders, or offers, for the hull, only, with no reference to the navigation, fishing, and refrigeration equipment. She submitted that this showed that the Bank was reckless as to the interests of Wai Pac, and that there was no basis on which the learned High Court Judge could find (as he did at paragraph

[12] of the judgment) that the Bank had "made every attempt to sell and obtain the maximum price for the vessel from the time it was seized".

[84] Mr Nand submitted that the vessel was properly advertised for sale by tender, then for private sale. He submitted that Ms Kwong had given evidence as to advertisement, and there is no specific requirement in law that would have required the production of actual newspaper cuttings.

Discussion

[85] The Bank produced copies of "extracts" of advertisements on which it was noted that they were to appear in the Fiji Sun on 29 June 2012 and the Fiji Times on 6 July 2012. These included a photograph of the vessel and gave some details as to the vessel, and invited tenders by way of a "Cash Offer" for the "Motor Vessel Shogun". I note that at the foot of the "extract" the Bank records the market value of the vessel as "$80,000".

[86] The Bank also produced copies of "extracts" of advertisements on which it was noted that they were to appear in the Fiji Sun on 18 August 2012 and the Fiji Times on 24 August 2012. These also invited tenders by way of a "Cash Offer" for the vessel and included a photograph of the vessel and the same details as on the earlier extracts. They further included the words "& Fishing Equipments, Refrigeration Appliances & Navigational Equipments". Again, at the foot of the "extract" the Bank records the market value of the vessel as "$80,000".

[87] The Bank further produced copies of "extracts" of advertisements on which it was noted that they were to be advertised on 12 October 2012, 16 November 2012, 21 December 2012, and 1 February 2017. These were headed "Motor Vessel on Private Sale" and "As Is Where Is". These again included a photograph of the vessel, and the same details as in the earlier "extracts, but with no reference to the fishing, refrigeration and navigational equipment. These do not carry the Bank's assessment of the market value of the vessel.

[88] All of the "extracts" included the instruction "You are required to carry out inspection prior to making an offer".

[89] In her examination in chief Ms Kwong gave evidence that each of the "extracts" appeared as advertisements in the newspapers and on the days noted on the "extracts. Under cross-examination Ms Kwong accepted that the "extracts" were not copies of the actual pages of the newspapers, but again said that the extracts were advertised.

[90] The vessel was advertised within one month of its seizure, and a total of eight times before it was sold. The Bank accepted two tenders, which were later withdrawn, before accepting the offer of $7,000 for an "as is where is" sale. In the light of Ms Kwong's oral evidence that the "extracts" appeared in the newspapers, I conclude that the learned High Court Judge did not err in finding that the "extracts" had actually been published, and the vessel was advertised for sale.

[91] I accept Ms Jackson's submission that (except in the case of the advertisements on 18 and 24 August 2012) there was no reference to the fishing, refrigeration, and navigational equipment. However in every case, the advertisements required potential tenderers or buyers to inspect the vehicle before making an offer. There being no indication that the equipment was excluded from the sale, anyone interested in making an offer could have assumed that it was included.

[92] Accordingly, I conclude that the Bank did not fail in its duty as to disposing of the vessel.

(f) To what extent did the value of the vessel and the equipment fall during the period of two years when it was in the Bank's custody and control?

[93] The final issue to consider is that of value: it is common ground that the value of the vessel and the equipment fell during the period it was in the Bank's custody and control, but I must consider what that value was when it was seized.

Submissions

[94] Ms Jackson submitted in the High Court that Mr Wise had properly valued the vessel and the equipment at $200,000, which was its insured value. That was rejected by the learned High Court Judge at paragraph [16] of the judgment:

> *[16] The quantum of damages claim by [Mr Wise] is based on the value of the vessel given in the policy of insurance. According to the said policy the sum insured is $200,000. The sum insured cannot be taken as the actual value of the vessel. There is no evidence that this valuation was given by a qualified valuer. This is just an amount agreed by the parties as the sum insured.*

[95] On appeal, Ms Jackson submitted that the insured value of $200,000 at the time of seizure meant that the value of the vessel and the equipment was $200,000. She submitted that the market value of $80,000 noted on the advertising "extracts" indicated that the vessel and the equipment had dropped by $120,000 after only one month in the Bank's possession, and that it fell further to $45,000 (at the time of Mr Karpal's valuation) then to $7,000 (on eventual sale).

[96] Mr Nand submitted that the insured value of the vessel cannot be relied on as its actual value, in the absence of any valuation report. He further submitted that Mr Wise could not expect the value of the vessel to remain at $200,000 from the time it was insured to when it was sold, as depreciation would have to be accounted for.

Discussion

[97] It is relevant to note that in the course of cross-examination, Mr Wise was asked if he were a registered valuer, to which he replied:

> *Yes, a registered valuer I can value equipment*

[98] Notwithstanding that, I am not persuaded that the learned High Court Judge erred in rejecting the submission that the insured value of the vessel and the equipment must be accepted as being its market value at the time of seizure. Mr Wise did not produce any formal valuation that would support any other conclusion.

[99] In the absence of any formal valuation at the time of seizure, the appropriate course is to adopt the market value as assessed by the Bank in its advertisements on 29 June and 6 July 2012, and 18 and 28 August 2012, as being the market value of the vessel and the equipment at the time of seizure: that is, $80,000.

[100] I have concluded that the value of the vessel and the equipment fell from $80,000 to $7,000 during the period it was under the Bank's possession and control. As a result of my conclusion set out at paragraph [82], above, I find that the Bank caused the fall in value from $80,000 to $7,000, and that Mr Wise's counterclaim must succeed to that extent.

[101] I would therefore order that Mr Wise's appeal is allowed to the extent that the High Court judgment dismissing the counterclaim is quashed, and an order is made that it succeeds to the extent that an order is made that Mr Wise is to pay the Bank $195,956.41 minus $80,000. I would also order that the learned High Court Judge's order that Mr Wise is to pay costs of $10,000 is quashed and replaced by an order that each party is to bear its own costs in the proceeding before the High Court, and that each party is to bear its own costs on the appeal.

Lakshman, JA

[102] I agree with the reasoning and conclusions of Andrews, JA.

Qica, JA

[103] I have duly considered the judgment and in agreement with the decision of Andrews, JA.

Formal Orders

[1] The order made in the High Court dismissing Mr Wise's counterclaim is quashed and an order is made that Mr Wise is to pay the Bank the sum of $115,956.41.

[2] The order made in the High Court that Mr Wise was to pay costs of $10,000 to the Bank is quashed and replaced with an order that each party is to bear its own costs in the High Court.

[3] Each party is to bear its own costs in this Court.

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Mr Justice Chaitanya Lakshman
JUSTICE OF APPEAL

Hon. Mr Justice Samuela Qica
JUSTICE OF APPEAL

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