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

CIVIL APPEAL NO. ABU 013 OF 2023
[Lautoka Action Number HBC 06 of 2014]

BETWEEN : **WESTERN CUSTOMS BROKERS (AIRPORT) LIMITED**
Appellant

AND : **BANK OF BARODA**
Respondent

CIVIL APPEAL NO. ABU 025 OF 2023
[Lautoka Action Number HBC 06 of 2014]

BETWEEN : **BANK OF BARODA**
Appellant

AND : **WESTERN CUSTOMS BROKERS (AIRPORT) LIMITED**
Respondent

Coram : **Jitoko, P**
Qetaki, JA
Dobson, JA

Counsel : **Mr. B. C. Patel for Western Customs Brokers (Airport) Limited**
Mr. S. R. Krishna for Bank of Ba

Date of Hearing : **03 July 2024**
Date of Judgment : **26 July 2024**

JUDGMENT

Jitoko, P

[1] I have read the judgment in draft of Dobson, JA and I am in complete agreement with his reasonings and conclusion.

Qetaki, JA

[2] I agree with the judgment of Hon. Dobson, JA in these appeals, the reasoning and the orders.

Dobson, JA

Introduction

[3] These appeals arise out of a dispute between a registered bank (Baroda/the Bank) and Western Customs Brokers (Airport) Limited (WCB), a former commercial customer of the bank. The dispute relates to Baroda's charges imposed over a period of years for its practice in holding WCB's cheques that had been presented to it for payment on behalf of the payee of the cheques, until there were sufficient cleared funds in WCB's account to honour the cheques, or for the cheque to be paid within the limit of an agreed overdraft that was operating.

[4] In the High Court, WCB succeeded substantially with its claim on the ground that Baroda was unjustly enriched by claiming the charges in question. The primary appeal (25/23) is brought by Baroda against the ruling that it is obliged to repay the charges that it had applied. The other appeal (13/23) is brought by WCB to seek recovery of a subset of the charges labelled as dishonoured cheque fees that was not allowed by the High Court, and also to seek an award of pre-judgment interest that was not addressed by the ruling.

The parties and their relevant arrangements

[5] Throughout the relevant period WCB was in business in Nadi as a customs agent and broker. It provided services including clearing imported goods for its clients. On receipt of assessments of duty or levies required to be paid to the Fiji Revenue and Customs Authority (FRCA) before it could take delivery of its client's goods, WCB would demand that amount from its client and provide payment to FRCA using cheques drawn on its account with Baroda. In doing so, WCB anticipated that payment by their clients would follow promptly.

[6] For many years until 2004, Baroda would hold WCB's cheques that were presented for payment by FRCA's bank (and in some cases banks of other creditors) until the cheque from WCB's client to cover that cost had been cleared. From sometime in mid 2004, Baroda indicated that it would charge for this service. The alternative would be to dishonour WCB's cheques when the amount of cleared funds (or the limit of the overdraft operated by WCB) was insufficient. From then until 2010, Baroda charged a cheque holding fee of $25 per cheque per day. Throughout that period, WCB protested at the extent of these charges but there was no evidence of an instruction for Baroda to stop the practice.

[7] In 2012, WCB learned from an ex-employee of Baroda that an internal review had found that Baroda was not entitled to impose these charges.

The claims, and litigation so far

[8] In 2014, WCB commenced proceedings for declarations that Baroda had wrongly charged these fees and to recover the extent of charges imposed by Baroda from 2005 to 2010, amounting to $253,345, and for recovery of the interest that had been charged on those amounts.

[9] WCB pleaded six causes of action, namely:

(a) breach of contract;
(b) fraudulent misrepresentation;
(c) mistake of law;
(d) breach of trust;
(e) unjust enrichment;
(f) breach of Fair Trading Decree 1992 or Commerce Commission Decree 2010.

[10] The claim was heard in October 2016 and the Judge's decision was reserved. That Judge left Fiji four years later without delivering a judgment. With the consent of the parties, Justice Seneviratne agreed to hear submissions from the parties and then deal with the claims on the basis of the evidence at the original hearing.

[11] In a January 2023 judgment,[1] the Judge upheld WCB's claims for the extent of charges labelled as dishonour fees, being $108,825. The claim for the remaining fees of $60,775, which had been labelled by Baroda as dishonour fees, was not allowed on the basis that WCB had failed to prove that they constituted part of the unauthorised cheque holding fees. The Judge invoked unjust enrichment as the ground for ordering recovery. The judgment did not determine any of the remaining causes of action.

The Baroda appeal

[12] It is appropriate to deal with Baroda's appeal first. If it is upheld, then WCB's appeal becomes academic. In challenging the finding that retention of the cheque holding fees resulted in unjust enrichment, Baroda advanced a number of grounds for justifying the charges and its challenges to the High Court reasoning can be reflected in analysing these various justifications.

(i) They were "normal charges"

[13] The relevant contract between the parties was a credit facilities letter dated 12 December 2005, pursuant to which Baroda offered:

(a)	Overdraft facility	$110,000.00
(b)	Demand loan	$18,000.00
(c)	Guarantee	$33,000.00
(d)	Interest rate	10.5%
(e)	Default rate	0.5%

> [4] Clause 11 of the offer letter reads as follows:
>
> i) The facilities are subject to review by us at our discretion and all indebtedness to us from time to time is repayable on demand.
>
> ii) We are entitled to discontinue the facilities and demand repayment of all indebtedness owing to us at any time without providing a reason therefore.
>
> iii) Notwithstanding the generality of the foregoing, we shall be entitled to require repayment of all indebtedness forthwith upon any breach of the terms of this offer or if any security for the

[1] *Western Customs Brokers (Airport) Limited v Bank of Baroda, HBC 06.2014 (January 2023)*

facilities are breached. We shall be under no obligation to provide you with additional or alternative credit facilities.

iv) You shall be bound to pay all normal charges and expenses associated with the provision of the facility, any security therefore and enforcement of our rights in respect of those facilities and securities.

v) The borrower shall furnish its Balance Sheet Trading and Profit and Loss account to the Bank on at least annual basis within 120 days of the annual balance date. This financial data is to be prepared in accordance with generally accepted accounting principles consistently applied in Fiji. The Borrower also agrees to provide any financial/ other information as the Bank may reasonably request from time to time. Please note that if financial are not received within 120 days of the annual balance date a penalty interest rate of 2% will apply on the account.

vi) The borrower will not borrow or raise funds by way of Loans/Overdraft facilities from any other financial institution/s or outside parties without the formal written consent of the Bank.

vii) A processing/establishment fee of F$2964/- has been recovered in addition to normal procedural charges to be levied in accordance with Bank's rules from time to time.

viii) Penal interest will be charged on excess drawings in the account and on Overdue loan instalments/ overdue bills.

ix) The terms specified herein are to take precedence over any other agreements, representations or warranties unless these terms are expressly negotiated or varied in writing signed by the bank and you.

[14] Baroda's first justification was that the cheque handling fees came within the expression of "all normal charges and expenses" in clause 11(iv).

[15] WCB disputed that these were "normal charges" as its evidence was that no other banks in Fiji made such charges, and the brochure to promote Baroda's services as published throughout the relevant period made no reference to it.

[16] The parties were also at odds over the terms of the customer's instruction to Baroda for this service to be undertaken. A handwritten note from WCB dated 7 April 2005 requested:

> Could you please hold our cheques amounting to approximately $58,000 and we assure you Sir that we will meet this amount by tomorrow 8/4/05. We thank you for your continued support shown towards our company.

[17] Counsel for WCB dismissed that as authority to adopt an on-going practice of holding cheques, when its terms related to only one specific instance. That was at odds with WCB's case that Baroda had held its cheques as a long-standing practice of many years, and without charging for doing so up until 2004.

[18] A note by a bank employee of an earlier meeting on 14 July 2004 notes "cheque holding" as a matter discussed.

[19] Then a note of a meeting on 3 February 2005 between representatives of Baroda, WCB and its accountant included:

> 2 Holding of cheques daily is costing money to company charges $25 per chq per day plus interest (yet to be charged) may be later this month.
>
> Try to obtain special answers for big cheques say $25,000 and over.

[20] A letter to WCB from the branch manager of Baroda raising concerns at WCB's inability to stay within the limit of its overdraft, dated 22 February 2005, referred to a recent meeting between the parties which appears most likely to have been that on 3 February. The letter advised that WCB should review its management/monitoring of its accounts and "issue cheques only when cleared funds are available". The letter continued "it appears this is not being followed". The letter then included a list of 12 cheques, 11 of them to FRCA or Customs and totalling some $112,123.31, that could not be paid on the date of the letter. It continued:

> As a very special case, at your request, we have to hold these cheques for a day. Please make arrangements to pay the same tomorrow.
>
> We may mention that there have been similar instances in the past. As advised, interest and charges will be recovered from your account for such "holding".

[21] After the prospect that Baroda had not been entitled to impose the charges was raised by WCB, Baroda liaised with the Reserve Bank of Fiji from at least 2012 about including a charge for holding cheques in its published schedule of fees and charges. After getting agreement on certain terms from the Reserve Bank, Baroda issued a revised brochure in early 2013 that did include a cheque holding fee in a list of the

charges it imposed. This was notified as being a charge of $15 per cheque rather than the $25 per cheque per day WCB had been charged.

[22] For Baroda, Mr Krishna made reference to authorities on two points that were not sufficiently connected to influence the issue of interpretation of "normal charges". First, from the decision in *Lloyds plc v Voller*, the proposition that banking law and practice supports the proposition that once a customer opens a current account with no express agreement but then draws a cheque which requires the account to go into overdraft, then the customer is imputed with the request to the bank to grant an overdraft for the necessary amount.[2] There was in this case a facility which provided the limit of an overdraft that was more or less fully utilised throughout the whole period.

[23] The second case cited was that in *Emerald Meats (London) Ltd v AIB Group (UK) plc*.[3] That appeal confirmed the proposition that a bank's standard terms for trading are to be implied into customer contracts. That proposition can also not avail Baroda in establishing that the cheque dishonour fees charged in this case were a component of its "normal" charges.

[24] On both this first justification that the fees were "normal charges" and on the second justification claiming an implied term, Baroda relied on the decision of the New Zealand Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* for its entitlement to adduce extrinsic evidence going to the parties' intentions in the contract.[4] That recognised that mutual communications that might evidence what the parties intended words to mean will be admissible.

[25] Given the extensive history of the bank/customer relationship for decades before the specific contract was entered into, this is an appropriate case in which to have regard to the prior dealings and terms of communications between the parties, as an aid to determining the scope of what were "normal charges".

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2 *Lloyds Bank plc v Voller* [2002] 2 All ER (Comm) 978.
3 *Emerald Meats (London) Ltd v AIB Group (UK) plc* [2002] EWCA Civ 460.
4 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [76].

[26] It is tolerably clear that the reference to "normal charges" is by reference to the bank's usual practices, and not what might have been a normal practice within the confines of the specific banker/customer relationship between Baroda and WCB.

[27] The overall impression from the evidence was that the practice of holding cheques for WCB was not a routine part of banking services, or at least not a usual part of Baroda's services for its customers. As such, it is not a "normal charge" in the sense intended in the facilities letter, which might, for example, draw on the terms published for Baroda's services which did not include cheque holding fees. Accordingly, we do not consider there was authority to make the charges within clause 11(iv) of the facilities letter.

(ii) Implied term

[28] If clause 11(iv) of the facilities letter did not extend to the charges in issue, then Baroda contended for an implied term that would authorise the charges to be made. For WCB, Mr Patel objected to this point being taken on appeal as it had not been pleaded in Baroda's statement of defence. In response, Mr Krishna submitted that the prospect of an implied term was adequately raised in Baroda's statement of defence. The pleadings he cited did not allege the circumstances in which an implied term arose, and perhaps more materially, what the terms of such an additional provision would have been.[5] Nor did Mr Krishna attempt to articulate the precise wording of an additional term that Baroda contended should be implied. Presumably it would be to the effect that Baroda was also entitled to charge appropriate fees for additional services it agreed to carry out at the customers' request in return for, in this case, a charge of $25 per cheque per day.

[29] WCB also objected to any consideration of an implied term as not being tenable when the facilities letter included what is commonly referred to as an entire agreement provision in clause 13(ix) (see [13] above).

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5 Statement of defence dated 13 February 2014 at [8], [12](b) and [17](b).

[30] Both objections have some validity. However, to the extent that Baroda's argument for an implied term can be analysed without prejudicing WCB's position, it is preferable to include an analysis on it.

[31] Mr Krishna submitted that a term could be implied by adopting the test for doing so in *Bathurst Resources Ltd*:[6]

> [116] To conclude, the principal points that govern the implication of terms are as follows:
>
> (a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.
>
> (b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.
>
> (c) While the task of implication only begins when the court finds that the text of the contract does not provide for the eventuality, the implication of a term is nevertheless part of the construction of the written contract as a whole. An unexpressed term can only be implied if the court finds that the term would spell out what the contract, read against the relevant background, must be understood to mean.
>
> (d) As with the task of interpreting a contract, the inquiry for the court when considering the implication of a term is an objective inquiry – it is the understanding of the notional reasonable person with all of the background knowledge reasonably available to the parties at the time of contract that is the focus of this assessment. The court is tasked with the role of constructing the understanding of that reasonable person.
>
> (e) Thus, the implication of a term does not depend upon proof of the parties' actual intentions, nor does it require the court to speculate on how the actual parties would have wanted the contract to regulate the eventuality if confronted with it prior to contracting.
>
> (f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.

[32] We do not accept that an implied term to the effect that Baroda would hold cheques where necessary to avoid dishonour in return for a fee of $25 per cheque per day meets

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6 *Bathurst Resources Ltd v L & M Coal Holdings Ltd*, above n 4, at [116] (footnotes omitted).

the primary requirement of necessity. This was an aspect of the banking arrangements that had been undertaken from the mid-1980s until 2004 without any specific charge for doing so. It may possibly constitute an arrangement the parties agreed to that ran alongside the services covered by the facilities letter, despite the "entire agreement" clause in the facilities letter, but it is not necessary to craft an implied term to be included in the facilities letter when there had been an alternative.

[33] It appears the commercial reality was that Baroda was no longer prepared to cover for WCB on the representation imputed to it each time it delivered its cheque to a payee (significantly FRCA) that the cheque would be honoured on presentation, without being paid for its service in holding rather than dishonouring such cheques. Mr Krishna's argument was on the implicit premise that an implied term entitled Baroda to charge what it wanted to for the service and that it had no obligation to provide a breakdown of the activities covered by any individual charge. The inclusion of any provision to that effect would certainly not pass the requirement for necessity when inconsistent with the specificity of the charges in the facilities letter, which relevantly reflected a published schedule of charges.

(iii) Estoppel

[34] The fallback position for Baroda was that the course of conduct of the parties in the period from 2005 to 2010 gave rise to an estoppel against WCB that precluded it from claiming after the event that it should not have been charged for Baroda holding cheques for which there were not cleared funds.

[35] WCB took the pleading point that Baroda had sought to justify retention of the charges in its statement of defence in reliance on an estoppel arising out of the course of WCB's conduct where it was advantaged by Baroda providing the service, whereas its submissions should be read as advancing a case for an estoppel arising specifically out of the request in WCB's 7 April 2005 letter and the agreement in the facilities letter. However, we cannot see any material detriment to WCB in having to meet a claim to an estoppel arising on this different basis. Mr. Krishna's oral submissions were not confined to those documents. There can be no suggestion that the evidence

called would have been different. It is not an aspect of the dispute that was addressed in the High Court judgment.

[36] Mr Krishna relied on the judgment of this Court in *The Public Trustee of Fiji v Nair* as recognising the doctrine of equitable estoppel as applying in Fiji.[7] That judgment adopted the approach to this remedy from the High Court of Australia decision in *Waltons Stores (Interstate) Ltd v Maher*,[8] and in particular the elements required to be made out for an equitable estoppel from the judgment of Brennan J:

> 34. In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

[37] Other formulations of the requirements to establish an estoppel have reduced the number of criteria but essentially cover the same ground. For example, in *Steria Ltd v Ronald Hutchison*, the judgment of Neuberger LJ included:[9]

> [93] When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the Appellant upon which it is reasonably foreseeable that the claimant will act, (b) and act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the Appellant is not held to the representation or promise. Even this

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7 *The Public Trustee of Fiji v Nair* [1997] FJCA 55; ABU10/1996S (21 April 1997).
8 *Waltons Stores (Interstate) Ltd v Maher* (1987-8) 164 CLR 387.
9 *Steria Ltd v Ronald Hutchison* [2006] EWCA Civ 1551.

> formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.

[38] It is sufficient in the present appeal to measure the facts against the six criteria spelt out by Brennan J in *Waltons Stores*.

[39] The file note of the 3 February 2005 meeting and Baroda's letter of 22 February 2005 (see [19] and [20] above) suggest that the parties recognised the practice of holding cheques was a costly but necessary expedient for WCB, where the option of dishonouring cheques for payees such as FRCA and Customs would be disastrous for its business.

[40] Mr Patel was critical of the absence of any bankers' diary notes of later meetings between WCB directors and Baroda throughout the rest of the period until 2010. The evidence of Mr Prasad, a director of WCB, was that they frequently complained about the level of charges for holding cheques, but that evidence stopped short of claiming that WCB ever directed Baroda to stop holding cheques, and instead to dishonour cheques when there were insufficient cleared funds.

[41] Baroda's 22 February 2005 letter suggested it would rather that WCB maintain sufficient funds in its account to avoid the need for Baroda to hold cheques. That did not occur. It is tolerably clear that Baroda would have been aware that WCB wanted the practice to be maintained when they needed it, whilst urging Baroda to reduce the charges for this service. That understanding is sufficient to make out the first of the requirements for an equitable estoppel, namely that Baroda assumed WCB accepted liability to meet the charges Barada was imposing for providing the service, in circumstances where WCB could not later resile in respect of the cost of cheque holding services previously provided.

[42] Further, that the necessity for WCB to have Baroda continue the practice where it was necessary induced Baroda to assume that its charges for the service would be accepted, albeit reluctantly, thereby satisfying the second of Brennan J's requirements.

[43] Next, the course of dealings shows that Baroda continued to monitor WCB's account, and hold cheques instead of dishonouring them, in reliance on the assumption that

WCB would continue to accept that it had to pay Baroda's charges for doing so. This satisfies the third of Brennan J's requirements.

[44] The fourth requirement is that WCB intended Baroda to rely on the assumption that it would continue to charge for holding cheques. Although it may have been unpalatable, that intention can be imputed because both parties knew that WCB inevitably had to present cheques to FRCA (and other creditors) with insufficient cleared funds to meet them and any pattern of dishonouring the cheques would be disastrous. It is, after all, a practice that persisted for many years.

[45] A telling example of how important it was for WCB to avoid the dishonour of cheques given to FRCA was the evidence that Mr Prasad (who was WCB's principal witness and had been a director of WCB in the relevant period) had had his licence as a Customs agent revoked for presenting three cheques to FRCA that bounced. Although the timing of the revocation of his licence was not clear, the effect of this evidence from a Customs manager at FRCA was effectively accepted by Mr Prasad when it was put to him. It is understandable that those dealing with WCB's account at Baroda would have appreciated the imperative for the Customs broker not to get offside with FRCA.

[46] Mr Patel was inclined to suggest that it would have been cheaper for WCB to pay dishonour fees when it had to, than the substantial cheque holding fees that were incurred. However that is unrealistic when a pattern of dishonoured cheques would have been inevitable, likely leading to loss of WCB's ability to continue operating. WCB's concerns over the extent of these fees cannot amount to any intention that Baroda could not rely on its acceptance of the inevitability of the charges being imposed. In that sense, WCB intended Baroda to continue holding cheques on the basis that it would charge for doing so.

[47] The fifth requirement, as applied to this appeal, is that Baroda would incur detriment if it continued providing the service without being paid for doing so. Mr Patel made light of what Baroda did, suggesting that the rules for clearing cheques that apply as between banks in Fiji allow a period of three days to process cheques from the time

of their presentation. On Mr Patel's reconstruction, Baroda was not exposed to any risk or expense if it simply followed the scope of the permitted rules.

[48] That makes light of what was done. The frequency of the charges suggests that WCB was issuing cheques not covered by cleared funds on an ongoing basis. It would have absorbed time and effort for bank staff, and no doubt required periodic review by supervisory staff. Prolonging the processing of WCB's cheques could, over time, have impacted on Baroda's reputation with other banks.

[49] It is unrealistic for WCB to suggest that it was a service Baroda should have continued to provide without charge. Accordingly, it was a situation in which Baroda would suffer a detriment if, after five years of doing it, it was belatedly told it was a service it could not charge for.

[50] The sixth of Brennan J's requirements, as applied here, is that WCB acted consistently with Baroda's expectation in that it continued to allow Baroda to levy charges for the service. Its periodic complaints about the extent of the fees could not signal that it would no longer pay, because that would bring the practice to an end. In the relevant sense then, it fulfilled Baroda's expectation that it could charge for undertaking the service.

[51] We therefore find that an estoppel does arise which precludes WCB from denying that it accepted liability for the charges from 2005 to 2010. The remedy is, however, one in equity and there are two further issues to be canvassed before applying the consequences of upholding this estoppel.

(iv) Illegality

[52] A number of strands of WCB's case included the claim that it was unlawful for Baroda to impose the charges it had. Essentially in reliance on learning from an ex-bank employee that an internal audit had found that the charges should not have been levied, WCB claimed there had been fraudulent misrepresentation (that requiring the additional element that those involved knew at the time that they were not lawfully entitled to impose the charges), that they were imposed by Baroda and paid by WCB

under a mistake of law, and further that their imposition was in breach of either the Fair Trading or Commerce Commission constraints on Baroda's conduct.

[53] Relevantly to Baroda's claim for an estoppel, WCB submitted that a party that had acted unlawfully could not avail itself of this equitable remedy.

[54] WCB's written submissions did not provide any detail beyond the bald assertion that the charges were unlawful. Mr Patel referred in oral submissions to the evidence of a Reserve Bank officer, but again did not specify the source of any illegality. When WCB complained to the Ministry of Industry, Trade and Commerce by letter dated 29 February 2011, the complaint was of unreasonable charging, not illegal charging.

[55] The High Court judgment cited the evidence of the Reserve Bank officer who had been a witness for Baroda, to the effect that unless disclosed in a brochure published by a bank, fees and charges could not be imposed.

[56] From Baroda's perspective, Mr Krishna referred to the evidence from the same Reserve Bank officer who, in evidence-in-chief, included the following exchange:

> Q: …the RBF consider that the defendant was unlawfully charging or charging fees for the cheque holding?
>
> A: As far as the bank is aware we haven't had any noncompliance issue with the Bank of Baroda in terms of the fees and charges that they have been charging and while in that same light we have taken steps with other banks who have basically not complied and we have directed them certain things to be done whether its refund fees or basically proper disclosures, things like that, that has been taken, whilst for Bank of Baroda we have not had it.

[57] In attempting to rationalise the apparently inconsistent statements from the evidence of the Reserve Bank officer, it appears that the intention of the Reserve Bank, as a matter of practice, was to encourage all banks to publish a complete list of fees in brochures. In order to encourage that practice, the Reserve Bank dealt with banks on terms that charges have to be approved by it before they could be promoted publicly and thereafter recovered. However, that is a distinctly different matter from the law

providing that contractual freedom to charge fees not authorised by the Reserve Bank are unlawful.

[58] There is nothing in the Reserve Bank of Fiji Act 1983 that could apply to render charges that are not published in brochures issued by a bank as being illegal, or in any sense unenforceable on that ground. The delegated legislation under that Act covers matters such as the provision of currency and Capital Markets conduct, but we have been unable to find any provisions purporting to regulate the terms on which banks may contract with their customers.

[59] There is a general provision in s 8 of the Banking Act 1984 in the following terms:

> 8.–(1) The Reserve Bank shall establish a General Reserve to which shall be allocated at the end of each financial year of the Reserve Bank-
>
> > (a) 100 per cent of the net profits of the Reserve Bank whenever the General Reserve does not exceed 50 per cent of the authorised capital of the Reserve Bank;
> >
> > (b) 50 per cent of the net profits of the Reserve Bank whenever the General Reserve exceeds 50 percent of the authorised capital of the Reserve Bank until the General Reserve is equal to the authorised capital of the Reserve Bank;
> >
> > (c) 25 per cent of the net profits of the Reserve Bank or such lesser sum as may be necessary to increase the General Reserve to twice the authorised capital of the Reserve Bank whenever the General Reserve exceeds 100 percent but does not exceed 200 percent of the authorised capital of the Reserve Bank:
>
> Provided that the General Reserve May be increased beyond such amount at such rate and to such extent as may be agreed between the Minister and the Reserve Bank.
>
> (2) After appropriate allocations have been made to the General Reserve under subsection (1), the remainder of the net profits for the financial year shall be applied to the redemption on behalf of the Government of any securities held by the Reserve Bank which have been issued in accordance with subsection (5) of section 6.
>
> (3) The balance of the net profits for the financial year remaining after all allocations and applications under subsections (1) and (2) have been made shall be paid to the Consolidated Fund as soon as practicable after the end of each financial year.
>
> (4) No deduction under subsection (2) shall be required to be made nor shall any payment under subsection (3) be made, if, in the judgement of the Board, the assets of the Reserve Bank are, or after the deduction or payment, would be, less than the sum of its liabilities and paid-up capital.

[60] That provision could not, of itself, render the contested charges to be unlawful. Nothing more specific by way of constraints in statutory or delegated legislation was suggested as doing so.

[61] In WCB's extensive submissions filed in the High Court in 2017, references were made to potential non-compliance with the provisions set out in the Fiji Code of Banking Practice, issued by the Association of Banks in Fiji. That code is the product of a process by an industry body to promote good standards by its members (including Baroda) but its provisions do not have the effect of law. At most, conduct inconsistent with its provisions could be said to be contrary to good banking practice on the basis that its provisions reflect what indeed is good banking practice.

[62] Accordingly, we can find no operative constraint on Baroda's entitlement to charge cheque holding fees that would have rendered them unlawful, or charged by it illegally.

(v) Unconscionability

[63] A prominent part of Mr Patel's argument for disallowance of the challenged fees was that the bank was acting most unfairly in imposing them: that its insistence on charging at $25 per cheque per day was not negotiable in a commercial relationship with very unequal bargaining power as WCB did not have the asset backing to take its banking elsewhere. Requests for greater detail in the breakdown of the charges were ignored and Baroda unfairly exploited a situation that WCB was forced to acquiesce in.

[64] Mr Krishna responded that WCB knew from the outset of charging for the service what it was costing and wanted Baroda to hold cheques rather than dishonour them. Further, that the bank statements identified the charges accurately and on each day that charges were imposed. He drew attention to the statement endorsed at the foot of the bank statements in terms:

> Please advise any discrepancy or change of address promptly to the bank.

[65] Mr Patel focused in particular on the charges imposed in 2006 as the starkest example of the unreasonableness and unfairness of Baroda's conduct. His arguments raise the

issue of whether there was an unconscionability about Baroda's conduct that disentitles it from invoking the estoppel that we are satisfied would otherwise apply.

[66] Unconscionability usually arises in cases of estoppel as a factor held against the party denying an estoppel, to reinforce the inequity of that party retaining a position inconsistent with the estoppel asserted against it. See, for instance, in *National Westminster Bank plc v Somer International (UK) Ltd*:[10]

> "[67] …the test is whether it would be unconscionable and inequitable for the recipient of moneys mistakenly paid to retain the moneys having regard to what the recipient did in reliance on the representation made to him."

[67] However, unconscionability can be raised also against the party asserting the estoppel if good conscience would be troubled by the party pleading an estoppel retaining all the benefits that would flow from it. Although dealing with estoppel by conduct, the observation of Deane J in *The Commonwealth v Verwayen* is apposite:[11]

> "The doctrine of estoppel by conduct is founded upon good conscience… The most that can said is that "unconscionable" should be understood in the sense of referring to what one party "ought not, in conscience, as between (the parties), to be allowed" to do (see Story, Commentaries on Equity Jurisprudence, 2nd Eng. ed. (1892), par. 1219; Thompson v. Palmer, at p 537)…"

[68] There is also the prospect that complete enforcement of an estoppel could result in the party having the advantage of it being unjustly enriched, where that concern should not result in the estoppel being denied, but rather a remedy crafted that avoids its application leading to unjust enrichment.

[69] The financial statements for WCB record net fee income for 2006 of $471,908. In that year, Baroda charged $93,580 for cheque holding fees, in addition to $43,450 for cheque dishonouring fees. Putting the latter category to one side, this expense on holding fees constituted some 19.8 per cent of WCB's income. Certainly, the ratio is not necessarily the most reliable indication of the reasonableness of Baroda's charges as it is more a reflection of the state of WCB's solvency. The evidence does not include any useful detail on the volume of cheques or gross amounts transacted through the account, but the comparison with fee income does give some approximate

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10 *National Westminster Bank plc v Somer International (UK) Ltd* [2002] 1 All ER 198 (CA).

11 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 440.

indication. From the bank statements there appears to have been a real measure of financial pressure throughout the whole of the period in question, with WCB existing near, and sometimes over, the limit of its agreed overdraft for substantial periods of time.

[70] Bearing in mind the limit on its reliability as an indication of the relative reasonableness of the charges, it is instructive to compare the ratio for 2006 with that for the following three years. The records in evidence show:

Year to 31 December	Net fee income	Cheque holding charges	Percentage of income
2007	$459,887	$50,450	10.9%
2008	$436,518	$36,845	8.4%
2009	$335,569	$17,850	5.3%

The average percentage of the cheque holding fees as a portion of income over those three years was 8.2 per cent.

[71] As to WCB's criticism of inadequate detail to justify Baroda's charges, one example will suffice. In the period from 11 to 18 January 2006, Baroda dishonoured numerous cheques, charging $6,400 for doing so. Then on 19 and 20 January 2006, it charged cheque holding fees of $3,350, presumably starting without a backlog of cheques presented for payment that could not be met within the overdraft because of the extent to which cheques had been dishonoured in the previous week. The $3,350 charged over two days represents 134 decisions to hold a cheque, either initially, or for a subsequent day or days. That appears substantially out of proportion to the volume of cheques recorded in the bank statements.

[72] Looked at over the 2006 year, the cheque holding fees of $93,580 represent 3,743 cheque holding decisions (the total does not divide equally by 25, but that is the nearest number). Assuming the charge was only made on days when the decision was made to hold or continue holding a cheque, that would mean (omitting weekends and bank holidays) approximately 250 days at an average of almost 15 decisions per banking day. Even if Baroda presumed to attribute such decisions to every day of the year, it still represents a little over 10 such decisions for every day of the year. That, too, is a statistic materially out of proportion to the volume of cheques processed for the account.

[73] We find that Baroda's conduct in levying the cheque holding fees in 2006 involved a level of unconscionability that disentitles it to rely on the estoppel that is made out, that otherwise precludes WCB from denying liability for those cheque holding charges.

[74] The scope of equitable relief should fit the equities of the particular circumstances in which it is being assessed. Mathematical precision is not a pre-requisite. On this aspect of the litigation, we choose the percentage of income represented by the cheque holding fees in the three later years as an appropriate, if inexact, proxy for the level of fees that are reasonably recoverable. The calculation is: 8.2% of $471,908 = $34,268, resulting in the non-recoverability of the remaining $59,312 charged as cheque holding fees in 2006.

[75] The next issue is whether the elements of Baroda's conduct found to be unconscionable for 2006 were present in other years to an extent that it should be denied the benefit of the estoppel it has made out, in some or all of the other years in issue.

[76] There are examples of charges from time to time that appear out of kilter with the volume of traffic through WCB's account, but overall a distinction can be drawn between the seemingly unexplained excesses in 2006, and the materially lower charges in the later years, both in their total amounts and as a proportion of the volume of WCB's business (as reflected in its levels of annual income). Without expert banking evidence on a prudent banker's responsibilities in managing an account for an undercapitalised business, there can be no certainty as to the extent of management it required for Baroda. It is safe to assess Baroda's position on the basis that it was an account that required constant or regular monitoring. The practice of withholding cheques would certainly not have been a risk-free proposition, as Mr Patel characterised it.

[77] We are not persuaded that Baroda's conduct in the other years in issue reflected unconscionability so as to disentitle it to reliance on the relevant estoppel.

Outcome

[78] In summary, Baroda's appeal succeeds in making out an estoppel that prevents WCB from denying liability for the charges it incurred in having Baroda hold cheques on its behalf to prevent dishonour, except to the extent of $59,312 of the charges imposed in 2006.

WCB's appeal

[79] WCB appealed against two aspects of the High Court judgment. It is convenient to consider the second of them, as they were advanced, first.

Rejection of the claim for $44,490 labelled as "dishonour fees"

[80] The disputed charges claimed back by WCB were labelled by Baroda in WCB's bank statements as two different types. Primarily, as cheque holding charges, which were ruled unreasonable by the Judge and have been addressed in dealing with Baroda's appeal.

[81] The smaller component of the disputed charges was for those items described in the bank statements as dishonour fees. In the years in question, they totalled $44,490. WCB claimed that Baroda could not make out that cheques had indeed been dishonoured to justify these charges, and that they were instead disguised or mislabelled additional charges for holding its cheques. The Judge held this claim was not made out, given that the evidence did not establish that these charges were indeed misdescribed when they ought instead to have been additional cheque holding fees.

[82] Mr Patel criticised the inadequacy of the information provided by Baroda in the bank statements which made it impossible for WCB to discern which cheques had been dishonoured. Without that information, WCB was not in a position to dispute the charges. He invited analysis of the size and timing of examples of the charges for dishonouring cheques, arguing that it was inherently unlikely that the number of cheques that would need to have been involved to justify such large charges, had actually been dishonoured on the dates the charges were made.

[83] The evidence of Mr Prasad, WCB's primary witness, focused on the process for dealing with the wrong category of cheques, namely those drawn by WCB's clients. These would be banked by WCB with Baroda and subsequently, if at all, dishonoured elsewhere by the bank used by the client that drew the cheque. That is, when WCB deposited a cheque received from a client, a credit would be shown on WCB's account with Baroda, and then if the client's cheque was dishonoured (by its own bank) the credit would be reversed and a dishonour fee charged. However, that process would not apply where it was WCB's cheque that it had issued to a creditor whose bank had then presented it to Baroda. The dishonour involved was on the occasions when Baroda, instead of holding WCB's cheque in anticipation of its account coming within the overdraft limit, elected to dishonour WCB's cheque. The schedule of charges listed $25 per cheque as the fee for doing this.

[84] WCB's solicitors issued a letter before action to Baroda, indicating the claims that would be made if liability was not accepted. In reply to that letter dated 10 January 2014, the head of the Baroda branch explained the options open to Baroda when a WCB cheque was presented to it for payment at a time when there were insufficient funds within the overdraft limit to meet the cheque. The bank could:

- pay out on the cheque allowing the account to exceed the overdraft limit (in which case an account overdrawn fee would apply); or

- hold the cheque in anticipation that cleared funds would become available to meet it (attracting a cheque holding fee); or

- dishonour the cheque, returning it to the bank that had presented it.

[85] That letter stated:

> "For our valued customers like your client, we hardly return any clearing cheque unpaid for financial reason which would have caused market disrepute of the firm (whereby the account is exempted from charging dishonour fee) and such cheques are held back in our custody for the guaranteed passing/ payment of the same as soon as balance in the account permits within next two – three days. (whereby the account is not subjected to any additional penalty interest) During such period we provide implied guarantee about honouring of the cheque to the presenting banker while bearing risk/ responsibility for the custody of the cheque.

[86] The statement that Baroda "hardly return any clearing cheque unpaid" is inconsistent with the extent of charges imposed on WCB, ostensibly for doing so. The total charges over the six years in issue here of $44,490 is the cost of some 1,779 dishonourings, at $25 each which equates to an average of 296 dishonourings per annum. That does appear an unusually high number, especially given the likelihood that Baroda appreciated the particular sensitivity of dishonouring a cheque payable to FRCA, so that it would do more than with other payees to avoid any dishonouring. It appears that cheques to FRCA would have been a substantial majority of the cheques issued by WCB.

[87] However, WCB's appeal in respect of these charges is that the Judge was wrong not to accept its claim that they were incorrectly labelled, rather than the overly excessive amount of charges for dishonouring its cheques. Instead, its claim was that they were in fact additional charges imposed for holding, rather than for dishonouring cheques.

[88] Baroda opposed this ground being considered on appeal, given that the challenge is to a finding of fact and that WCB did not mount its argument on the basis that the Judge's finding was so unreasonable that no reasonable person, acting judicially, could have made that finding. This submission relied on the appeal in *Chand v Kumar* to the effect that an appellant could not appeal against findings of fact unless the trial judge's finding of fact is unreasonable, so that no reasonable person acting judicially could make such a finding.[12]

[89] Essentially, Baroda submitted that it was reasonably open to the Judge to find that it had not wrongly categorised the cheque dishonour fees so that factual finding could not be reversed on appeal. In reply, WCB disputed that it was challenging a finding of fact based on credibility, but rather that the deciding Judge failed to appreciate the terms on which the original trial Judge had granted permission for WCB to pursue the claim, which led the deciding Judge to determine the point without proper consideration of all the evidence on this issue.

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12 *Chand v Kumar* [2008] FJCA 43; ABU0064.2006S, at [7].

[90] Given the paucity of information provided by Baroda in respect of the charges it imposed, it is difficult to accept its stance that the customer required more than suspicion to make out such mislabelling over such a lengthy period. Nonetheless, there was no evidence adduced for WCB as to the timing and number of cheques its bank had dishonoured. It is not unreasonable to expect it to have maintained some basic record of these occurrences. Without any evidence that any of the fees in question were charged when there had been no cheques returned (dishonoured), it was not an issue on which the onus could be discharged.

[91] Whatever standard of review is applied, we are satisfied that WCB did not make out this aspect of its claim. Whilst it justified suspicions that the sequence and amount seemed more likely to have reflected cheque holding charges when reviewing the totality of the charges well after the event, that would not be enough to discharge the burden of establishing that Baroda had wrongly described those charges in the bank statements.

[92] Accordingly, that aspect of WCB's appeal is dismissed.

Pre-judgment interest

[93] WCB's appeal was filed first and this ground was advanced on the assumption that it would retain at least its entitlement to the amount awarded by the High Court of $208,825. That has not proven to be the case given the measure of success in Baroda's appeal. However, the issue remains relevant given this Court's determination in respect of an unconscionable level of charges for holding cheques in the 2006 year. We accordingly consider the argument for pre-judgment interest as it applies to the sum of $59,312 that was not recoverable by Baroda and deducted by it from WCB's account.

[94] Interest on the amounts of WCB's overdraft were charged on the daily balance compounded daily and charged monthly, at the rates advised by Baroda. Those were 10.5 per cent from 12 December 2005 to 25 February 2013, and 10 per cent thereafter. WCB had claimed pre-judgment interest in its statement of claim, it was included as

an agreed issue, and was addressed in WCB's closing submissions. Although Baroda contended that pre-judgment interest was not a live issue in the High Court, the record is to the contrary. The judgment had failed to address it. It was claimed on terms that the quantum should be compounded daily and charged monthly, to compensate WCB for the extent of interest it had to pay to Baroda on amounts subsequently held not to be owing by it.

[95] WCB submitted that the Judge's failure to address pre-judgment interest was an error of law, likening the circumstances to those in the appeal in *Abbco Builders Ltd v Star Printery Ltd*.[13] The judgment of this Court in that appeal included:

> "[26] The statutory discretion contained in section 3 of the Act empowers the judge to determine whether the evidence reveals that the successful party had been kept out of his money, and whether fairness and justice requires him to be compensated for the deprivation suffered. The trial judge, will be best placed to make such a determination. Thus, the intention of the legislature is that the judge must bring his mind to bear upon the evidence before him, and make a conscious decision as to whether or not going to grant pre-judgment interest.
>
> [27] The complaint of the Appellant is that in this case, the learned Judge overlooked considering the award of pre-judgment interest although it was a live-issue between the parties in court. …Thus, in the absence of any reference whatsoever to pre-judgment interest in the judgment, I am compelled to hold that the High Court has failed to exercise its discretion, and that this amounts to an error of law."

[96] Mr Patel also cited the further observation in that appeal as follows:

> "[50] The significance of the duty of court to exercise its discretion under section 3 of the Act can be appreciated by considering the purpose of awarding interest. The recognised purpose of an award of interest is to ensure a plaintiff is properly compensated for the practical loss he has suffered, by not having the use of its money at the time it was due…."

[97] The case for an award of interest from the date the cause of action arose is arguably even stronger where, as here, the amounts wrongly charged were increased by the extent of interest added to them by Baroda at WCB's expense from the date the charges were imposed, so that WCB would not be fully compensated unless the extent of interest taken by Baroda in addition to unrecoverable fees is also restored to it.

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13 *Abbco Builders Ltd v Star Printery Ltd* [2017] FJCA 104; ABU0087.2015.

[98] For Baroda, Mr Krishna sought to distinguish *Abbco* as arising in different circumstances. However, the reasons he suggested were distinctions without material difference, and the approach in that appeal is equally applicable here where Baroda was effectively in control of how much it charged its customer by way of charges and interest on them.

[99] Baroda's written submissions stated that:

> Allowing pre-judgment interest would be inconsistent with the terms of s 3 of the LRM Act.

[100] The point was not explained in oral submissions and cannot be the case.

[101] WCB's claim for interest does rely on s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. It provides:

> **[LRM 3] Power of High Court to award interest on debts and damages**
>
> 3 In any proceedings tried in the High Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, provided that nothing in this section–
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[102] In seeking an award of compound interest, Mr Patel could not avoid the express limitation in proviso (a) of the section that precludes awards of interest on interest.

[103] There is merit in Mr Patel's point that the costs to WCB of any charges wrongly imposed by Baroda is not only the amount of those charges but also the additional sums of interest that had been applied in respect of the charge. It is not the more usual situation of compensating a successful plaintiff for money it has been kept out of since accrual of the cause of action, but rather an additional cost incurred incrementally by

Baroda recovering from WCB the additional amounts of interest on charges that should not have been made. However, that makes the interest cost an element of the damages incurred, which is not how the argument for compound interest was claimed.

[104] In his oral submissions, Mr. Patel cited passages from Lord Hope's judgment in Saupra Ltd v. IRC[14] recognising that interest might be awarded on whatever basis it had been charged by the party now required to relinquish sums taken from a claimant. Those observations were made in relation to claims in unjust enrichment, which is not a basis for recovery by WCB that we have upheld.

[105] The extent of relief granted to WCB by this judgment invokes equity and a measure of approximation. It is neither feasible nor appropriate to craft a formula for compounding interest on that amount, especially as this is not the case in which to attempt to read down the prohibition on compound interest in s 3, and the issue was not joined on the basis that the damages suffered by WCB included compound interest.

[106] Given the approach adopted to quantifying equitable relief, the appropriate starting point for an award of interest on that amount is from 1 January 2017. A crystallisation of the outcome on the 2016 activity by Baroda in charging cheque holding fees could conceptually have occurred on that date. There will be an order for interest from 1 January 2017 on the amount of $59,312 at the rate of 10.5 per cent per annum until 25 February 2013 and at the rate of 10 per cent per annum from that date until the date of delivery of this judgment. Thereafter, the statutory regime for interest on judgment sums is to apply to that judgment sum.

[107] The Court appreciates that this award of interest exceeds the principal sum ordered in WCB's favour. However, that is a reflection of the length of time that has passed since the impugned charges and is not a reason to deny recovery of interest on the appropriate terms.

[14] [2007] 4 AIIER 657

Costs

[108] The High Court awarded $10,000 in costs in favour of WCB. The level of success with its claim has been substantially reduced by these appeals, to an extent that Baroda is entitled to have that order quashed.

[109] Both parties have had a measure of success on their appeals. We consider that costs should lie where they fall in both courts.

[110] Mr Patel made a special plea for his client of modest resources to be relieved of all or some of the substantial disbursements incurred in preparing the record for both appeals. This plea is a valid one. Given the appropriate outcome on costs which leaves both parties to meet their own costs, it is also appropriate that they share that significant disbursement.

[111] We accordingly quash the High Court costs order in favour of WCB and direct that the parties are to bear their own costs in both courts. We order that Baroda is to reimburse WCB for one half of the costs incurred in preparing, printing and binding the record for both appeals.

Orders

[112] *We make the following orders:*

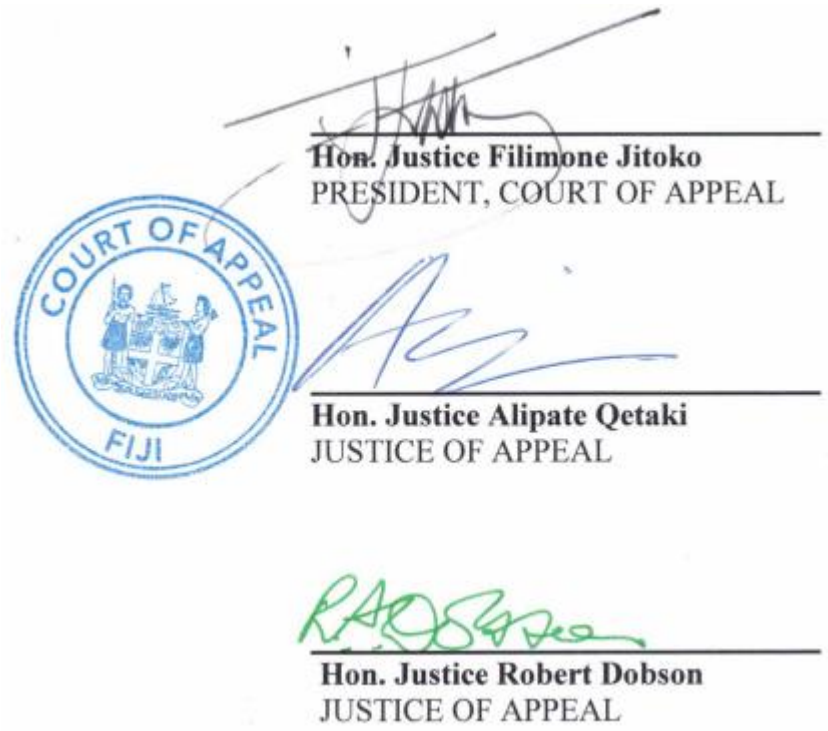
1. *The appeal brought by Baroda is allowed in part. The High Court judgment is quashed and in its place this Court orders judgment for the respondent to that appeal in the amount of $59,312, with interest on that judgment sum to be on the terms ordered in the appeal brought by WCB.*

2. *The appeal brought by WCB is allowed in part. The new judgment sum of $59,312 in favour of WCB is to bear interest from 1 January 2017 at the rate of 10.5 per cent per annum until 25 February 2013, and from that date until the date of this judgment at 10 per cent per annum. Interest from the date of this judgment until payment is to apply in accordance with the statutory*

provisions applying to judgment sums. The other claim in WCB's appeal is dismissed.

3. *The order as to costs in the High Court is quashed. Both parties are to bear their own costs in both courts.*

4. *Baroda, as appellant, is to pay the respondent in that appeal one half of the costs incurred by WCB in preparing, printing and binding the record for both appeals.*



Hon. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Robert Dobson
JUSTICE OF APPEAL

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