IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL APPEAL NO: HBA 17 of 2017

BETWEEN : **GYANENDRA NAMBIA** f/n Krishna of Waimalika, Sabeto, Nadi

APPELLANT
(ORIGINAL FIRST DEFENDANT)

A N D : **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva.

1ST RESPONDENT
(ORIGINAL PLAINTIFF)

A N D : **THE ATTORNEY GENERAL** sued on behalf of Lautoka Rural Local Authority and Nadi Rural Local Authority.

2ND RESPONDENT
(ORIGINAL THIRD PARTY)

A N D : **NARENDRA KUMAR NAIR** f/n Krishna of Waimalika, Sabeto, Nadi.

3RD DEFENDANT
(ORIGINAL SECOND DEFENDANT)

Appearances: Mr. Nazeem Sahu Khan for Appellant
Vijay Naidu for 1st Respondent
Ms. Faktaufon for the 2nd Respondent
Hearing: 19 May 2019
Date of Ruling: 16 August 2019

R U L I N G

INTRODUCTION

1. This is an appeal of a ruling dated 01 September 2017 of the Magistrates Court sitting in Lautoka. Following a trial, the learned Magistrate, Raramasi Salakubou, entered judgment in favour of FDB in the sum of $32,973.77. The judgment was entered jointly and severally against Nambiar and Nair.

2. The Attorney-General was the third party in the proceedings. He was being sued for and on behalf of the Lautoka Rural Local Authority and the Nadi Rural Local Authority.

3. The Fiji Development Bank (**"FDB"**) had filed its claim on 19 April 2011. What it sought to recover was the balance of monies owing to it by Gyanendra Nambiar (**"Nambiar"**) and Narendra Kumar Nair (**"Nair"**) pursuant to a loan agreement. Nambiar had borrowed the total sum of $23,000-00 from the FDB on 01 March 2005. His first payment was due on 31 March 2005 and his last on 28 February 2012.

4. The borrowed money was to be applied principally to purchase livestock and to set up a piggery farming project. The said project was to be run on a residential lease which Nambiar and Nair had over some *i*-taukei land known as Laukomomo No. 6 Lot 2 in the District of Sabeto Area 1874 Square Meters *i*-TLTB No. 6/10/6256.

5. The following securities were given by Nambiar for the loan.

   (i) mortgage in favour of FDB over the lease
   (ii) bill of sale in favour of FDB over some vehicles
   (iii) a guarantee by Nair

6. Nambiar could not keep up with the loan repayments of $475-00 per quarter.

GROUNDS OF APPEAL

7. There are twelve grounds of appeal. I would summarize these as follows:

   (i) the first set of grounds of appeal relate to the alleged err on the part of the Learned Magistrate in failing to consider that FDB had been negligent.

   (ii) the second set of grounds of appeal all swirl around the basic allegation that the Learned Magistrate had failed to take into account that Lautoka Rural Local Authority as well as the Nadi Rural Local Authority were also both negligent.

(iii) the third set of grounds of appeal are general allegations about the Learned Magistrate not properly evaluating the body of evidence.

FDB NOTICES

8. FDB issued the following notices to Nambiar and Nair:

Date	Nature of Correspondence	Details
05/08/09	Letter to Nambiar	Arrears of $300 as at 31/07/09. Debt Balance $31,371.46.
11/09/09	Letter to Nambiar	Arrears of $775 as at 31/08/09. Debt Balance $31,697.46.
01/12/09	Letter to Nambiar	Arrears of $1,250 as at 31/11/09. Debt Balance $2,726.77
05/01/10	Letter to Nambiar	Arrears of $1,250 as at 31/11/09. Debt Balance $33,123.77

9. Nambiar and Nair both failed to remedy the default. FDB then instituted civil proceedings in the Magistrates Court on 19 July 2011 to recover the balance of monies owing.

10. As to why Nambiar could not service the loan, he argues that it was because *i*-TLTB had re-entered the lease.

i-TLTB'S POSITION LEADING TO RE-ENTRY OF LEASE

11. As I have said, the lease in question was a residential lease. Nambiar was operating a piggery on the land over which the residential lease in question was granted. That use was contrary to the purpose for which the land was demised under the lease.

12. The evidence is clear that *i*-TLTB gave a Notice to Nambiar and Nair of their breach. It also imposed a penalty.

13. *i*-TLTB gave Nambiar and Nair a chance to rectify the breach. This was to be done by lodging an application to change the lease from a residential to a light industrial lease. *i*-TLTB even went to the extent of obtaining the landowners' consent, and

also pledged its support of a rezoning. The only proviso was that Nambiar and Nair pay up the penalty and also obtain the approval of the Rural Local Authority. Nambiar and Nair failed to comply. It was only then that *i*-TLTB re-entered the lease.

14. Below is the relevant chronology:

Date	Nature of Correspondence	Details
22/08/05	Notice to Nambiar & Nair	*Recent i-TLTB inspection revealed breach of residential lease by operating a piggery thereon. Remedy breach within one month and pay $1,000 in penalty OR risk termination of lease.*
06/02/06	Nambiar's & Nair's Application To Change Lease Class from Residential to Light Industrial.	*This is referred to in i-TLTB's Letter of 24/02/06.*
24/02/06	i-TLTB Letter to Nambiar & Nair	*Landowners support application to change lease class from residential to light industrial. i-TLTB will support the application subject to:* *(a) Payment of $1,000 penalty fee* *(b) Approval of Local Authority* *(c) Comply with the above in 8 weeks, failing which i-TLTB will proceed with termination as per Legal Notice of 22/08/05*
24/02/06	Notice Under Section 105 Property Law Act to Nambiar & Nair	*i-TLTB suspending further action to terminate lease due to Nambiar's and Nair's interest in regularizing their use of the land. $1,000 penalty must still be paid.*
07/07/06	NOTICE OF RE-ENTRY	*On account of breaches as stipulated in 22/08/05 Notice.*

15. Nambiar said in his evidence that he did inform FDB of *i*-TLTB's requirement. I note that he only gave a rather broad and loose sweeping statement to this effect, as follows. He was not pressed about who in fact gave him that advice, or where the statement was given.

> *FDB said that it is not a problem – you don't have to pay if anything happens then we will see in the Court because they have given us the approval.*

CASE AGAINST THE RURAL LOCAL AUTHORITIES

16. The case against the Rural Local Authorities appears to swirl around the allegation that the Secretary of the Lautoka Rural Local Authority (**"LRLA"**) had endorsed the LRLA consent on a plan which Nambiar had submitted for approval.

17. The evidence of Nambiar in chief is that, after he obtained that approval, he then took it to FDB which then started releasing him the money[i]. Later, as it turned out, he would find out when the Nadi Rural Local Authority (**"NRLA"**) issued him a Public Health Nuisance Notice that his locality fell within the NRLA. In cross examination, Nambiar said he had no idea that his locality fell within the NRLA jurisdiction rather that the LRLA.

18. The evidence suggests that Nambiar had been undertaking some pig farming on the land in question, albeit on a smaller scale, well before he approached FDB for a loan. Nambiar gave evidence in chief that when he applied for a loan with FDB, FDB asked him to obtain a letter of recommendation from the Department of Agriculture, which he did (DEX1). The recommendation from the Department which is dated 22 October 2004 stated:

> *Mr. Gyanendra is a well-known small-scale piggery farmer. He has a thorough knowledge in piggery farming for the last 14 years. He is an interested pig farmer and has capabilities to do piggery farming on a large scale. As there is always a market for pigs locally, there is no problem with the marketing structure (current market – Fiji Meats, local buyers).*

19. The report actually stated that Nambiar started pig farming in 1990 with 2 sows and in 2000, his stock number had increased to 30. When his lease expired in 2001, he sold all his stock. However, when his lease was renewed later in the same year (2001), he resumed pig farming with 2 sows. At the time of the report, his stock had increased to 4 sows.

20. His claim is that the Secretary of the LRLA was negligent in endorsing consent on his plans.

21. I accept that the Learned Magistrate did not direct his mind to the above points. If he had, he would have had to confront the question whether or not the Secretary

LRLA's approval was the proximate cause of his loss, his loss being the re-entry of his lease by *i*-TLTB.

22. The evidence appears to suggest that the approval was hastily obtained in order for FDB to release the funds to Nambiar. It was still incumbent upon Nambiar to regularize his compliance after he received the funds.

23. The law requires Nambiar to obtain the consent of the *i*-TLTB as well as any other consent required under any other written law before carrying out the piggery operation (see further below).

24. The evidence of **DW3** Niko Nadolo, Senior Assistant Health Inspector with the LRLA states that the procedure is that when an applicant submits an application with any rural Local Authority, the application should be accompanied by a set of plans already endorsed by the *i*-TLTB or the Director of Lands, depending on whether or not the land is a state lease or an i-taukei lease. The Rural Local Authority concerned then carries out an inspection. They then prepare a report and then forward it to the Director of Town & Country Planning for further scrutiny. If the DTCP consents, it will then endorse its consents on the documents which is then sent back to the Rural Local Authority for approval.

25. **DW3** said the approval which the plaintiff relied on was a dubious one and not a proper one. It did not have the *i*-TLTB consent or the DTCP consent.

26. I must say that it is hard to believe that Nambiar did not know that his locality fell within the jurisdiction of NRLA rather than LRLA considering that he had been living on the land since 1990. That is neither here nor there.

27. At the end of the day, the <u>proximate cause</u> of Nambiar's inability to service the loan was the fact that *i*-TLTB had re-entered the lease, lawfully. *i*-TLTB re-entered the lease after Nambiar failed to pay the $1,000 penalty fee. The LRLA's approval of Nambiar's plan does not even feature remotely in this chain of causation.

<u>ALLEGATION AGAINST FDB</u>

28. Nambiar alleges that FDB was negligent:

(i) in granting him that loan when it knew that the land was a residential lease and when no required consent or approval had been granted by *i*-TLTB or by the Rural Local Authority to build and operate the piggery on the said land and when the land had not been rezoned for that purpose, and

(ii) in advising him not to pay the $1,000 fine levied by *i*-TLTB.

29. As to (i) above, Nambiar alleges that he relied and acted on the advice of FDB and contributed $10,000 of his own equity together with $23,000 loaned from FDB to build the piggery. It would appear that FDB was aware that the lease in question was a residential lease at the time when it granted the loan to Nambiar. Nambiar argued that FDB should have first required him (Nambiar) to obtain the regulatory consents of *i*-TLTB and Rural Local Authority before granting him the loan and that, as a lending institution, FDB was obligated to follow a Responsible Lending Conduct Obligations (**"RLCO"**) to customers and borrowers.

THE LAW

30. The relationship between FDB and Nambiar is primarily a contractual one. It arose out of their mortgage/loan agreement. Nambiar however, is not asserting liability against FDB based on any aspect of their loan agreement. Rather, he is asserting a tortious liability based on the common law of negligence. No argument is raised about any implied duty imposed under any Fiji statute.

31. Nambiar's basic allegations are:

(i) that FDB should have advised him (Nambiar) to first obtain the regulatory consents before actually advancing him the money.

(ii) FDB was negligent in misadvising him not to take heed of *i*-TLTB's request to

32. I underscore the phrase "should have advised him" to emphasise that FDB actually rendered no advice of any kind to Nambiar, in terms of regularizing compliance with planning laws.

Was FDB Negligent In Not Advising Nambiar To Obtain i-TLTB's & NRLA Consent Before Releasing The Money?

33. Generally, a cause of action in negligence requires an injured party to establish the existence of a duty of care and that the said duty was in fact breached, which breach was the proximate cause of the damages suffered. The first question is whether or not a lender such as FDB owes a borrower a duty of care and if so, what is the nature of that duty?

34. Nambiar, says that he relied on and acted on the advice of FDB and contributed $10,000 of his own equity together with $23,000 loaned from FDB to build the piggery. As to the nature of the advice, no clear evidence was given.

35. In **Finch & Anr v Lloyds TSB Bank plc & Ors** [2016] EWHC 1236 QB, one of the issues raised was whether a Banker, as lender, owed a duty in contract or in tort to advise a borrower about a potentially onerous clause in the loan agreement in question.

36. I will not now discuss how Pelling J QC approached the contract issue in that case. Suffice it to say that the breach of contract argument relied on some concept of "duty" which section 13 of the English Supply of Goods and Services Act 1982 allegedly implies into every English contract.

37. However, in terms of the duty in tort, Judge Pelling QC summarized the basic common law position at paragraph 52. He started by saying that generally, a bank is under no legal obligation to provide advice. However, if a Bank does provide advice to a borrower in any particular case, then the bank must do so with reasonable care and skill.

> 52. *The Tortious Duty Case*
>
> *I start with a summary of the applicable legal principles. In summary:*
>
> *(i) In general a bank is not under a legal obligation to provide advice but if it gives advice then it must do so using reasonable care and skill – see* ***Woods v. Martins Bank Limited*** *[1958] 1 QB 55 per Salmon J at 71: "I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with*

*reasonable care and skill in each of the transactions to which I have referred."; **Bankers Trust International Plc v. PT Dharmala Sakti Sejahtera (No.2)** [1996] CLC 518 per Mance J as he then was at 533: "... a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly."; **National Commercial Bank (Jamaica) Limited v. Hew** [2003] UKPC 51 per Lord Millett at [22]; and Paget, Law of Banking, 14th Ed., Para 29.7*

38. Pelling J QC then appears to say that, in any given case, whether or not a bank, as lender, owes a duty of care to a borrower in tort, the first question to ask is whether or not the bank has assumed a responsibility to advice. If the answer is *"yes"*, the next question to consider is whether or not that advice was actually relied upon by the borrower.

39. The answer to the above questions, in turn, depends on the reasonable foreseeability of the loss, whether there is sufficient proximity between the parties, and whether it is fair and just in all the circumstances to impose a duty.

*ii) Whether a duty of care in tort is owed in any particular case will depend upon the application of one or more of the usual three tests – that is the assumption of responsibility coupled with reliance test, the three-fold-test (reasonable foreseeability of loss, sufficient proximity between the parties and whether it is in all the circumstances fair just and reasonable to impose a duty) and the incremental test – having regard to the exchanges which cross the line between, and the dealings of, the parties considered in their context – see **JP Morgan Chase Bank v. Springwell Navigation Corp** [2008] EWHC 1186 (Comm) per Gloster J as she then was at [48]-[52] and **Standard Chartered Bank v. Ceylon Petroleum Corporation** [2011] EWHC 1785 (Comm); and*

40. When considering whether or not a Bank/lender has assumed the responsibility to give advice, the Courts must keep in mind that assuming such a responsibility is not the same as advice given in the context of a commercial relationship (as per Pelling J QC citing **JP Morgan Chase Bank**).

iii) In approaching the question using the methodology referred to in (ii) above, there is a distinction to be drawn between the provision of advice in the context of a

commercial relationship and assuming responsibility for that advice – see ***<u>JP Morgan Chase Bank v. Springwell Navigation Corp</u>*** *(ante) at [374].*

41. At paragraph 57, Pelling J QC then went on to say, to clarify the above, that, in general, the relationship between a banker and a customer is not an advisor and client relationship:

In my judgment another relevant contextual factor is that identified in the case law summarized above – in general the bank is <u>not</u> under a duty to give advice. The relationship is generally a banker and customer relationship not an advisor and client relationship. The other contextual consideration is that the alleged duty arose not after the relationship of banker and customer had come into existence but before it came into existence, and in the context of negotiations concerning the terms on which it might come into existence.

(my emphasis)

42. As to when a bank crosses the line to assume an advisory role, Lord Finlay LC in **<u>Banbury v Bank of Montreal</u>** [1918] AC 626 said at p 654:

"While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business ... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advice, but if he takes upon himself to do so, he will incur liability if he does so negligently."

43. The learned authors **Warne & Elliott** in *Banking Litigation* (1999)[ii] opine that a bank will cross that line in circumstances where there has been a request from the customer, which request is accepted by the bank, and advice is given pursuant to the request:

"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given."

44. There is nothing in the evidence from the trial below that convinces me that the FDB had crossed that line that divides the province of bank/customer relationship on the one hand and advisor/client on the other or that FDB had assumed a responsibility to advice.

45. In any event, the advice which Nambiar alleges that FDB gave him, that is, to not pay the fine, would appear to be in the nature of a legal advice. He does not allege an investment or financial advice. It was incumbent upon Nambiar at all material times to comply with the regulatory laws.

Prudent Banker Will Assess Borrower's Capacity To Service The Loan Before Approving & Granting A Loan

46. I accept that a prudent lender, guided by their operations manuals, will take appropriate steps to assess a borrower's capacity to service a loan before approving and granting a loan. A lender would argue that its primary concern is on security rather than loan serviceability.

47. The evidence of **PW1** is that, this assessment is undertaken as part of the lender's due diligence process to minimize its own risk. This assessment is not undertaken for the borrower's benefit, or out of any sense of duty to the borrower.

48. This position, in my view, is subtly made in **Valcorp Australia Pty Ltd v Angas Securities Limited** [2012] FCAFC 22 (8 March 2012)[iii]. I say "subtly" because the Court in that case was not considering the liability of a lender to a borrower. Rather, it concerned a tussle between a lender and a valuer.

49. In **Valcorp**, a lender lent AUS$2.8 million to some borrowers. That loan was secured by a mortgage over an apartment owned by the borrowers. Before making the advance, the lender retained, and obtained from a valuer a valuation of the apartment. The valuer did value the apartment at AUS$3.6 million. Relying on the valuation, the lender advanced AUS$2.88 million to the borrower. In due course, the borrowers defaulted and the lender sold the apartment. However, the lender was only able to realize AUS$1.75 million out of the sale. The lenders sued the

valuer for misleading and deceptive conduct in contravention of section 52 of the Australian Trade Practices Act 1974 (Cth).

50. The courts found that the valuation was indeed negligent and that the valuer did mislead and deceive the lender. However, the lender also negligently contributed to its own loss in not having properly assessed the borrower's ability to service the loan before granting the loan.

51. In other words, in **Valcorp**, the lender negligently contributed to its own loss in failing to realize its full security in a charged property because it had failed to undertake certain serviceability enquiries of the borrowers, prior to granting the loan.

Did FDB Advise Nambiar Not To Comply With i-TLTB's Notice To Remedy The Breach?

52. As I have said above, such an advice as alleged by Nambiar was a legal advice. It was not an investment or financial advice. Without any real evidence, it is hard to accept that FDB would have given such an advice.

53. Nambiar was using the land in contravention of his residential lease. The onus was always on him to regularize his use of the land with all other stakeholders involved, (principally the *i*-TLTB) before commencing the pig farming operation. He did not do so.

54. He had been undertaking piggery farming on the same land since 1990, albeit on a smaller scale.

55. Nambiar was given ample opportunity by *i*-TLTB to remedy his breach and regularize his lease by paying a penalty of $1,000 first and then apply to rezone the land to a light industrial zone. He still did not do so. Consequently, i-TLTB would re-enter the lease.

56. I observe that he was first served a Notice by *i*-TLTB in August 2005. His first Notice from FDB was served in August 2009, some four years later.

57. In the circumstances of this case, had the learned Magistrate directed his mind to this aspect of the case, he would have been asked to determine the credibility of Nambiar's assertion that FDB had advised him (Nambiar) not to take heed of *i*-TLTB's requirements.

58. It is hard for me to comment on credibility at this time on appeal, except to say that in the grand scheme of the factual scenario of this case, the lease agreement was between *i*-TLTB and Nambiar and the onus was on Nambiar to rectify his breach and comply with the law.

59. The evidence, as I have set out above in paragraph 14, is that Nambiar and Nair did apply to *i*-TLTB on 06 February 2006 to change their lease class from residential to light industrial. This step, obviously, was taken following *i*-TLTB's Notice to them dated 22 August 2005. All they needed to do next was to pay the $1,000 penalty. They did not, which resulted on their lease being re-entered and terminated by *i*-TLTB.

60. FDB is under no legal obligation to Nambiar to settle the $1,000-00 penalty levied by *i*-TLTB. If FDB refused to pay that sum, that was its prerogative.

61. In any event, applying the authorities cited above, Nambiar would have to have led evidence to show that he had sought FDB's advice particularly in this regard, that FDB had assumed the role of advisor, and that FDB's advice was relied upon by Nambiar. I have said at the outset, to advise a customer not to take heed of a demand by a regulatory authority is more of a legal nature than a financial or investment advice. It is hard to believe a bank would render such advice freely without itself having the benefit of its own legal advice.

62. I accept that Nambiar had said things to this effect, albeit rather fleetingly in his evidence. All this would have been a credibility issue. Had the Learned Magistrate directed his mind to this aspect of the case, he would have chosen either to believe Nambiar or to not believe Nambiar.

63. At the end of the day, it was always incumbent upon Nambiar to settle that penalty sum and to regularize his compliance with planning laws.

64. Regulation 14(1)(c) of the *i*-Taukei Land Trust (Leases & Licenses) Regulations 1984 forbids any lessee from carrying out any development on the leased land except with the written consent of the i-TLTB and except with any other consent required under any other written law[iv].

65. Regulation 14(2) defines "development" thus:

> *14(2) For the purposes of subregulation (1)(c) "development", in relation to any demised land, includes—*
>
> *(a) the carrying out of any building or engineering works designed to create, alter or add to, any improvements to the land; and*
>
> *b) any use of the land or of any improvements thereto which is different from the purpose from which the land was demised under the current lease.*

(my emphasis)

66. Regulation 14 (1) (d) (ii) gives power to *i*-TLTB to re-enter the lease in the event of a breach of any implied covenant[v].

CONCLUSION

67. There is no merit in this appeal and I dismiss all the grounds of appeal. I award costs in favour of FDB and the Attorney-General's Chambers which I summarily assess at $800-00 (eight hundred dollars) each.

....
Anare Tuilevuka
JUDGE
Lautoka

[i] See page 311 of Record of Magistrates Court.

[ii] This is cited in **National Commercial Bank (Jamaica) Limited v. Hew** [2003] UKPC 51 per Lord Millett at [13].

[iii] See also relevant case summary in https://www.lexology.com/library/detail.aspx?g=36f7e18e-458c-4a8f-b5d3-7528e40ecd44.

[iv] This regulation provides:

> *(c)that the lessee shall not carry out any development on or in relation to the demised land, except with the consent in writing of the Board and except with any consent required by or under any written law in respect of any such development;*

[v] This regulation provides:

> (d)that if and whenever during the term of the lease—
> (ii)there shall be any breach, non-performance or non-observance of any of the covenants on the part of the lessee contained in the lease or implied in the lease by virtue of these Regulations;
>
> then, and in any such case, it shall be lawful for the Board at any time thereafter, and notwithstanding the waiver by the Board of any previous right of re-entry, to re-enter into and upon the demised land or any part thereof in the name of the whole and thereupon the term of the lease shall absolutely cease and determine, but without prejudice to any rights or remedies which may have accrued to the Board against the lessee or to the lessee against the Board in respect of any antecedent breach of any of the covenants contained in the lease.