

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 98 of 2013

BETWEEN : **MADHAVAN PRINTERS LIMITED** a company incorporated in Fiji and having its registered office in Labasa.

PLAINTIFF

AND : **FIJI DEVELOPMENT BANK** a body corporate duly established under the Fiji Development Act and having its registered office at Suva.

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. Vinit Singh for the Plaintiff
Mr. Devanesh Sharma with Ms. Nancy Choo for the Defendant

JUDGMENT

- [1] The Plaintiff commenced this action by way of a Writ of Summons, issued on 10 April 2013.
- [2] As per the Statement of Claim, the Plaintiff claims the following reliefs against the Defendant:
- A. Damages for breach of contract in the sum of \$46,246.66.
 - B. Damages for unconscionable conduct under the Commerce Commission Decree 2010.

- C. Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act from 18 January 2011.
- D. Costs of this action on an indemnity basis.
- E. Such further or other relief as this Honourable Court deems just and equitable in the circumstances.

[3] On 8 May 2013, the Defendant filed their Statement of Defence; whereas on 27 September 2013, the Plaintiff filed a Reply to the Statement of Defence.

[4] The Minutes of the Pre-Trial Conference record the following:

AGREED FACTS

1. The Plaintiff was at the relevant times the Lessee of the Lease described as Crown Lease No. 4077 being Lot 22 on Plan M.2275 ("the Lease").
2. On or about June 2005 the Plaintiff was advanced certain facilities by the Defendant which the Defendant secured by way of a registered mortgage over the Lease, being Mortgage No. 601113 ("the Mortgage").
3. On or about 17 June 2010 the Plaintiff requested the Defendant for a settlement sum to discharge the Mortgage in order for the Plaintiff to complete a sale and give an unencumbered title to Shelesh Vishwamantra James Madhavan and Edith Arti Madhavan ("the Purchasers").
4. By its letter dated 9 November 2010 the Defendant provided a settlement letter to the Plaintiff under which it advised the Plaintiff that the sum of \$157,572.93 was payable by the Plaintiff to the Defendant and upon payment of which the Defendant would discharge the Mortgage.
5. The said amount was stated by the Defendant to be owing as at 30 November 2010 with further interest accruing on it at the rate of 11.84% per annum.
6. By a letter dated 16 December 2010 from its solicitors, the Plaintiff objected to the said sum as being a correct settlement sum.

7. Over the period 21 December 2010 and 13 January 2011, further communication ensued between the Plaintiff and the Defendant with respect to the settlement amount where the Defendant made some adjustments to the settlement amount.
8. On 13 January 2011, the settlement amount provided by the Defendant was \$162,085.00.
9. The Plaintiff paid the settlement sum to the Defendant and the Defendant discharged the Mortgage.

ISSUES TO BE DETERMINED

1. Whether sometime in 2010 the Plaintiff entered into an agreement to assign its interest as Lessee in the Lease to the Purchasers.
2. Whether the Plaintiff maintained its objection to the settlement amount provided by the Defendant despite the adjustments, but proceeded to settle with the Defendant under protest.
3. Whether the Plaintiff had objected to the settlement sum provided by the Defendant due to the following charges being included by the Defendant in the settlement sum:

<u>Particulars</u>	
Litigation Fees	\$10,777.68
Arrears Fees	\$31,177.23
Interest on undrawn amount of \$38,000.00	\$ 2,501.75
Commitment Fees	\$ 1,487.52
Security/Demand/Other Fees	\$ 515.30
Service Fee	<u>\$ 247.21</u>
Disputed amount	<u>\$46,246.66</u>

4. Whether the Defendant had authority to levy the charges itemized in issue 3 upon the Plaintiff or whether the Defendant imposed the said charges on the Plaintiff in breach of the loan contract between the parties and without pre-contractual disclosure of the details of the said charges to the Plaintiff.
5. Whether the Defendant's actions amount to unconscionable conduct contrary to Section 76 of the Commerce Commission Decree 2010.
6. Whether the Plaintiff is entitled to the reliefs sought by it in its Statement of Claim.

THE PLAINTIFF'S CASE

[5] During the trial the Plaintiff called the following two witnesses to testify on its behalf:

- (1) Reverend Philip Madhavan (Managing Director of the Plaintiff Company), and
- (2) Seci Talanavesi (Manager Policy and Research at the Reserve Bank of Fiji)

[6] During the course of the Plaintiffs' case the following exhibits were tendered to Court:

- P1** - Copy of Letter of Offer from Fiji Development Bank dated 22 October 2004.
- P2** - Copy of Bill of Sale dated 3 June 2005.
- P3** - Copy of Guarantee dated 3 June 2005.
- P4** - Copy of Debenture dated 3 June 2005.
- P5** - Copy of Mortgage No. 601113 dated 3 June 2005.
- P6** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 4 May 2006.
- P7** - Account Statement from 1 January 2004 to 24 April 2012.
- P8** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 7 August 2006.
- P9** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 5 April 2007.

- P10** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 16 April 2007.
- P11** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 1 August 2007.
- P12** - Letter from Madhavan Printers Ltd to Fiji Development Bank dated 15 November 2007.
- P13** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 29 November 2007.
- P14** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 5 August 2009.
- P15** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 4 September 2009.
- P16** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 3 November 2009.
- P17** - Letter from Madhavan Printers Limited to Fiji Development Bank dated 17 November 2009.
- P18** - Writ of Summons in Action No. 65 of 2009 undated.
- P19** - Ex-parte Notice of Motion and Affidavit in Support, in Action No. 65 of 2009, dated 18 December 2009.
- P20** - Order in Action No. 65 of 2009 dated 18 December 2009.
- P21** - Acknowledgment of Service in Action No. 65 of 2009 dated 7 January 2010.
- P22** - Letter from the Office of the Prime Minister to Fiji Development Bank dated 14 January 2010.
- P23** - Inter-parte Notice of Motion in Action No. 65 of 2009 dated 10 February 2010 (Filed on 11 February 2010).
- P24** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 3 March 2010.
- P25** - Affidavit of Kunal Naidu in Action No. 65 of 2009 dated 20 April 2010.
- P26** - Letter from Fiji Development Bank to Madhavan Printers Limited dated 7 May 2010.

- P27 - Letter from R Patel Lawyers to Kohli & Singh dated 28 May 2010.
- P28 - Letter from Kohli & Singh to Messrs R Patel Lawyers dated 29 May 2010.
- P29 - Letter from Madhavan Printers Limited to Fiji Development Bank dated 5 June 2010.
- P30 - Letter of Offer from ANZ Bank dated 10 June 2010.
- P31 - Letter from Kohli & Singh to R Patel Lawyers dated 10 June 2010.
- P32 - Notice of Discontinuance in Action No. 65 of 2009 dated 11 June 2010.
- P33 - Copy of Settlement Authority dated 16 June 2010.
- P34 - Letter from Parshotam & Co to Fiji Development Bank dated 17 June 2010.
- P35 - Letter from Fiji Development Bank to Parshotam & Co dated 29 June 2010.
- P36 - Letter from Parshotam & Co to Fiji Development Bank dated 13 July 2010.
- P37 - Letter from Parshotam & Co to Fiji Development Bank dated 9 August 2010.
- P38 - Letter from Fiji Development Bank to Parshotam & Co dated 13 August 2010.
- P39 - Letter from Fiji Development Bank to Parshotam & Co dated 17 August 2010.
- P40 - Letter from Parshotam & Co to Fiji Development Bank dated 13 October 2010.
- P41 - Letter from Parshotam & Co to Fiji Development Bank dated 1 November 2010.
- P42 - Letter from Fiji Development Bank to Parshotam & Co dated 9 November 2010.
- P43 - Email from Subhas Parshotam to Mohammed Jaffar dated 14 December 2010.
- P44 - Letter from Parshotam & Co to Fiji Development Bank dated 16 December 2010.

P45 - Letter from Fiji Development Bank to Parshotam & Co dated 21 December 2010.

P46 - Copy of Press Release from Reserve Bank of Fiji dated 20 January 2012.

- [7] Reverend Philip Madhavan was the primary witness for the Plaintiff. He is the Managing Director of the Plaintiff Company and a Minister at the Assembly of God Church.
- [8] The witness testified that the Printing Press was an idea of his late father James Madhavan. The Printing Press had been established in 1952 in Labasa. The witness had joined the firm from the very inception. The press had progressed through the years by purchasing more machines. At one point in time, the name of the Press was Madhavan Printing & Publishing Company. Later the name of the Printing Press was changed to Madhavan Printers Limited.
- [9] In 2004, his family became the sole owners of the Printing Press and a Manager was appointed to look after the operations.
- [10] In 2004, the witness had approached the Defendant, Fiji Development Bank (FDB), for a loan to pay off his 8 other siblings and to buy their interest in the Plaintiff Company. His children were to take over the business once this buyout was completed.
- [11] The witness testified that he intended to pay each of his 8 siblings \$19,000.00 and to buy their interests in the Plaintiff Company.
- [12] Accordingly, the FDB had approved a loan of \$143,000.00 to the Plaintiff. See Copy of Letter of Offer from FDB dated 22 October 2004 (Plaintiff's Exhibit P1). The loan had to be repaid within a period of 10 years. The monthly instalment was fixed at \$1,900.00, covering principal and interest. The initial interest rate applicable to the loan was 9% per annum.
- [13] Clause 3 of the Letter of Offer sets out the security to be given to the FDB for the purpose of this loan. The security comprised the following:

- A. First Mortgage over CL 4077 being Lot 22 on Plan M 2275 Light Industrial Subdivision being 18.3p with a commercial double storey thereon - Plaintiff's Exhibit P5.
- B. Bill of Sale over machines owned by the company - Plaintiff's Exhibit P2.
- C. First Debenture over assets of the company including uncalled capital - Plaintiff's Exhibit P4.
- D. Adequate All risk & Insurance Cover over (A), (B) & (C) above respectively with the Bank's interest noted thereon.
- E. Joint and Several Guarantee by the directors of the company for total liability - Plaintiff's Exhibit P3.

- [14] The witness testified that although \$143,000.00 had been approved, \$38,000.00 from the loan was not drawn by the Plaintiff. Although two cheques were made out for \$19,000.00 each (totalling \$38,000.00) payable to one of his brothers and one of his sisters respectively, these cheques were not presented as these two siblings were overseas and since the monies payable to them could not be taken out of Fiji.
- [15] The witness further testified that he could not recall being given any Brochure of fees and charges by the Defendant during the time the loan was taken. The main document that he could recall that he had received from the Defendant was the Letter of Offer from FDB dated 22 October 2004.
- [16] The witness said that in the years 2006 and 2007, the Plaintiff ran into a lot of financial difficulties. This was due to a downtrend in business and also because it was found that the Manager of the Plaintiff Company had defrauded the Plaintiff of approximately \$200,000.00 over a period of two years.
- [17] As a result, the Plaintiff could not make payments that it was required to do and was not consistent with its repayments to FDB. The FDB made demands for arrears to be cleared and threatened to close down the operations of the Plaintiff if the arrears were not settled.

- [18] On 16 November 2009, a Bailiff from FDB had come to the business premises and locked the doors of the Plaintiff. The witness had then written a letter to FDB on 17 November 2009 (Plaintiff's Exhibit P17), appealing to them to reconsider their decision.
- [19] Thereafter, the Plaintiff had engaged Kohli & Singh Lawyers to act for them and to obtain an injunction against the Defendant from the High Court of Labasa (Civil Action No. HBC 65 of 2009). This is confirmed by Plaintiff's Exhibits P18 to P21. Accordingly, on 18 December 2009, the High Court had granted the Plaintiff an injunction restraining the Defendant from interfering with the Plaintiff's peaceful possession of its land and building and also restraining the Defendant from stopping the Plaintiff from operating its printing business from the said premises.
- [20] An Inter-Parte Notice of Motion was filed in Court on 11 February 2010 (Plaintiff's Exhibit P23), seeking a dissolution of the above Ex-Parte Injunction obtained by the Plaintiff.
- [21] Eventually, the Court proceedings were fully discontinued on 11 June 2010 and the injunction was dissolved (Plaintiff's Exhibit P32).
- [22] The witness further testified that he had also written to the Prime Minister's Office seeking redress. Based on the said communications, The Permanent Secretary to the Prime Minister had addressed a letter to the Chief Executive Officer of FDB, dated 14 January 2010 (Plaintiff's Exhibit P22).
- [23] The witness testified that since the Plaintiff was still in arrears to the FDB, he decided to refinance the loan obtained from FDB and transfer the property owned by the Plaintiff (Crown Lease No. 4077) to his son and daughter-in-law. For this purpose a loan from ANZ Bank was to be obtained. Letter of Offer from ANZ Bank, dated 10 June 2010, was tendered to Court as Plaintiff's Exhibit P30.

- [24] It is an Agreed Fact that on or about 17 June 2010 the Plaintiff requested the Defendant for a settlement sum to discharge the Mortgage in order for the Plaintiff to complete a sale and give an unencumbered title to Shelesh Vishwamantra James Madhavan and Edith Arti Madhavan ("the Purchasers").
- [25] It is also an Agreed Fact that by its letter dated 9 November 2010 the Defendant provided a settlement letter to the Plaintiff under which it advised the Plaintiff that the sum of \$157,572.93 was payable by the Plaintiff to the Defendant and upon payment of which the Defendant would discharge the Mortgage. The said amount was stated by the Defendant to be owing as at 30 November 2010 with further interest accruing on it at the rate of 11.84% per annum.
- [26] It has also been agreed that by a letter dated 16 December 2010 from its solicitors, the Plaintiff objected to the said sum as being a correct settlement sum. Over the period 21 December 2010 and 13 January 2011, further communication ensued between the Plaintiff and the Defendant with respect to the settlement amount where the Defendant made some adjustments to the settlement amount.
- [27] Accordingly, it has been agreed that on 13 January 2011, the settlement amount provided by the Defendant was \$162,085.00 and that the Plaintiff paid the settlement sum to the Defendant and the Defendant discharged the Mortgage. The loan to FDB was fully paid off on 18 January 2011.
- [28] The next witness called by the Plaintiff was Seci Talanavesi, Manager Policy and Research at the Reserve Bank of Fiji. He had joined the Reserve Bank in 2002 and served in his current role since July 2013.
- [29] The witness testified that the role of the Reserve Bank of Fiji was to regulate the banking industry for those banks that were licensed under the Banking Act. The Defendant Bank was not one of the banks licensed under the Banking Act and as such did not fall under the jurisdiction of the Reserve Bank of Fiji.

[30] The witness tendered to Court a copy of Press Release from the Reserve Bank of Fiji, dated 20 January 2012 (Plaintiff's Exhibit P46) – titled Removal of Select Bank Penalty Fees and Charges.

[31] That was the case for the Plaintiff.

THE DEFENDANT'S CASE

[32] Salote Tavainavesi, Manager Legal Services FDB was the sole witness who testified on behalf of the Defendant.

[33] During the course of her evidence the following exhibits were tendered to Court by the Defendant:

- D1 - Application for Consent to Mortgage.
- D2 - List of Total Arrears and Interest from June 2010 until January 2011.
- D3 - Demand Letter dated 16 December 2009.
- D4 - Demand Notice under the Bill of Sale dated 16 December 2009.
- D5 - FDB Fees and Charges Brochure (Effective from 2 February 2004).
- D6 - Website printout of FDB showing the fees and charges (Effective from 1 June 2013).

[34] Witness Tavainavesi testified that she has served as Manager Legal Services at FDB since 1999. She is also a Barrister & Solicitor of the High Court of Fiji.

[35] The witness testified at length to the history of the loan transaction between the Plaintiff and the Defendant.

[36] She testified that Brochures of the fees and charges were prominently placed at the Defendant's premises for the benefit of its customers. She said that the bank's decision on its fees and charges are final and if a customer was dissatisfied they could opt for refinancing.

[37] That in summary was the Defendant's case.

[38] At the conclusion of the hearing both Counsel for the Plaintiff and Counsel for the Defendant were granted time to file written submissions. Accordingly, the parties filed detailed written submissions, which I have had the benefit of perusing.

ANALYSIS AND DETERMINATION

[39] Based on the facts of this case the primary issue for determination by this Court is whether the Defendant had authority to levy the charges amounting to \$46,246.66 upon the Plaintiff as itemized below or whether the Defendant imposed the said charges on the Plaintiff in breach of the loan contract between the parties and without pre-contractual disclosure of the details of the said charges to the Plaintiff.

Litigation Fees	:	\$10,777.68
Arrears Fees	:	\$31,177.23
Interest on undrawn amount of \$38,000.00	:	\$ 2,501.75
Commitment Fees	:	\$ 1,487.52
Security/Demand/Other Fees	:	\$ 515.30
Service Fee	:	<u>\$ 247.21</u>
Disputed amount	:	<u>\$46,246.66</u>

[40] The onus is on the Plaintiff to prove the case against the Defendant.

[41] It is admitted that the Plaintiff had defaulted in its loan repayment obligations to the Defendant. Philip Madhavan, who was the Managing Director of the Plaintiff Company and the primary witness for the Plaintiff, admitted to this fact. However, he explained the reasons as to why the Plaintiff went into default of its loan repayment obligations.

[42] Philip Madhavan testified that he could not recall being given any Brochure of fees and charges by the Defendant during the time the loan was taken. The main document that he could recall that he had received from the Defendant was the Letter of Offer from FDB dated 22 October 2004.

[43] However, as per Plaintiff's Exhibit P6, which is a letter from the Relationship Manager Northern FDB, addressed to the Managing Director of Madhavan Printers Limited, dated 4 May 2006, it is confirmed that the new fees and charges Brochure for the FDB, which was to be effective from 1 June 2006, was being enclosed with the said letter. Furthermore, it is stated in the said document that the bank has increased the variable interest rates for all its customers by 1% with effect from 1 May 2006.

[44] Similarly, as per Plaintiff's Exhibit P8, which is another letter from the Relationship Manager Northern FDB, addressed to the Managing Director of Madhavan Printers Limited, dated 7 August 2006, it is stated that the variable interest rates for all customers were being increased by a further 1% with effect from 1 August 2006.

Litigation Fees of \$10,777.68

[45] The Defendant claims that the said litigation fees were pursuant to the action filed by the Plaintiff against the Defendant in the Labasa High Court – High Court of Labasa Civil Action No. HBC 65 of 2009.

[46] In the terms and conditions of the Mortgage No. 601113, dated 3 June 2005 (Plaintiff's Exhibit P5) it is stated that 'Enforcement Expenses' means and includes any expenses reasonably incurred by FDB or their agents after a breach of any covenants, undertakings or promises of this mortgage which gives rise to:

- (a) FDB taking possession of the property or taking any other action to enforce this mortgage; and/or
- (b) preserving or maintaining the property (including insurance, rates, rents and taxes) payable for the property; and/or
- (c) FDB taking any legal proceedings for the recovery of the secured money.

[47] The Defendant claims that the right to claim Enforcement Expenses lies within the Mortgage Contract itself, and as such it is a contractual right. Thus the Defendant submits that it was justified in claiming these expenses from the Plaintiff.

Arrears Fees of \$31,177.23

- [48] Arrears fees is said to be a fee (a flat rate) which is charged on all accounts if repayment due is not paid within 30 days of the due date. As per Defendant's Exhibit D5 the arrears fees is \$30.00 or 2.5% of the arrears whichever is higher.
- [49] The Defendant submitted that they were justified in charging arrears fees at the rate of 2.5% from the Plaintiff as stipulated in the said Brochure. This is further reiterated in Plaintiff's Exhibit P6, which is the letter from the Relationship Manager Northern FDB, addressed to the Managing Director of Madhavan Printers Limited, dated 4 May 2006, where the new fees and charges Brochure for the FDB, which was to be effective from 1 June 2006, was being enclosed with the said letter.

Interest on undrawn amount of \$ 2,501.75

- [50] This interest is in relation to the undrawn loan amounting to \$38,000.00. The Plaintiff submitted that although two cheques were made out for \$19,000.00 each (totalling \$38,000.00) payable to one of his brothers and one of his sisters respectively, these cheques were not presented as these two siblings were overseas and since the monies payable to them could not be taken out of Fiji.
- [51] The Plaintiff did not lead any evidence to establish that the Defendant had charged interest in the sum of \$2,501.75 from the Plaintiff in respect of the said undrawn amount. In fact, as per Plaintiff's Exhibit P42, which is a Letter from FDB to Parshotam & Company, dated 9 November 2010, it is stated as follows:

"Moreover, on 22nd December 2009 the Bank has withdrawn undrawn funds of \$39,730.00 hence, the credit entry of \$39,730.00. The withdrawal of undrawn fund does not have an impact on debt balance and it does not attract any interest."

- [52] Further, it is stated in the said letter that the Defendant had agreed to waive the exit penalty fee of \$4,604.00, in respect of the above sum.

Commitment Fees of \$ 1,487.52

[53] As per the Letter of Offer from FDB (Plaintiff's Exhibit P1), Clause 4 (b) makes reference to a Commitment Fee in the following form:

"The borrower shall pay to the Bank a commitment fee of 1% per annum on the principal amount of the loan not disbursed from time to time. Such commitment fee shall accrue three (3) months from the date the terms and conditions of the loan are accepted or such other dates as shall be mutually agreed to by the parties to the respective dates on which amounts shall be disbursed or withdrawn. Commitment fee is to be charged to the account monthly and repayment thereof is to be made as set out in Clause 6 (a) below (which states that Commitment fee must be paid within 30 days after the same is charged to the account)."

[54] Even in the Brochure (Defendant's Exhibit D5) it is stated that a commitment fee of "1% per annum on the principal amount not disbursed from time to time" would be levied from the borrower.

Security/Demand/Other Fees of \$515.30 and Service Fee of \$247.21

[55] The Brochure of Fees and Charges permits such fees to be levied. As per the Letter of Offer from FDB, under General Terms and Conditions, it is stipulated that "All out of pocket expenses incurred by the Bank together with the bank's usual fees in connection with any of its services will be debited to the applicant's account and are payable by the applicant irrespective of whether or not the loan is disbursed."

CONCLUSION

[56] From the above analysis it is clear that the Defendant has imposed the fees and charges amounting to \$46,246.66 on the Plaintiff in terms of the loan contract between the parties and in accordance with the pre-contractual disclosures of the said charges to the Plaintiff.

[57] For all the aforesaid reasons, I am of the opinion that the Plaintiff has failed on a balance of probabilities to establish the case against the Defendant. For the above reasons, I dismiss the Plaintiff's claim made against the Defendant.

FINAL ORDERS

1. This action is dismissed.
2. I order that the Plaintiff pay summarily assessed costs in the sum of Fijian Dollars \$4,000.00, to the Defendant, within one month of this Judgment.



AT SUVA

Dated this 20th Day of August 2020

Solicitors for the Plaintiff : Parshotam Lawyers, Barristers & Solicitors, Suva.
Solicitors for the Defendant : R. Patel Lawyers, Barristers & Solicitors, Suva.