

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

Civil Action No. HBC 93 of 2018

**BETWEEN**

**FIJI DEVELOPMENT BANK** a body corporate having its head office at  
360 Victoria Parade, Suva, Fiji

**PLAINTIFF**

**AND**

**ANAND ATILESH CHANDRA** of 16, Fantasy Road,  
Nadi, Company Director.

**1<sup>st</sup> DEFENDANT**

**SUBHAS CHANDRA** of 63, Bryan Road, Fantasy Island,  
Nadi, Company Director.

**2<sup>nd</sup> DEFENDANT**

**Counsel** : Ms. N. Choo & Mr. Wally for the Plaintiff  
Mr. F. Koya & Ms. Takali for the Defendants

**Date of Hearing** : 30<sup>th</sup> August- 1<sup>st</sup> September 2022

**Date of Judgment** : 09<sup>th</sup> March 2023

## JUDGMENT

[1] The Plaintiff filed the writ of summons and the statement of claim, which was later amended, seeking to following orders:

- a. Judgment against the Defendants in the sum of \$8,238,241.66.
- b. Interest accruing thereon from 7<sup>th</sup> March 2018 at following rates until full payment is made.

|                         |                |
|-------------------------|----------------|
| Loan Account No. 161186 | 9.5% per annum |
| Loan Account No. 161215 | 5% per annum   |
| Loan Account No. 161272 | 5% per annum   |
| Loan Account No. 161347 | 8.4% per annum |
- c. Both Defendants to surrender their passports to Court unless they provide free an unencumbered assets of them for a total value of not less than \$8,238,241.66.
- d. A Writ Ne Exeat Civitate be issued and directed to the Sheriff of the High Court, Police Department and Customs and Immigration Department commanding them that in the event the Defendants seek or attempt to depart the Jurisdiction of the Court, they be arrested and produced before the Court.

- e. Costs of this action; and
- f. Any other reliefs this Court deems just and equitable.

[2] The Plaintiff, since 2012 made the following loans and advances to Toa (Fiji) Limited, a company in which both defendants were Directors and Shareholders.

- I. Loan Offer Letter - 14<sup>th</sup> August 2012 - \$4,387,246.00
- II. Loan Offer Letter - 22<sup>nd</sup> August 2013 - \$872,600.00
- III. Loan Offer Letter - 27<sup>th</sup> June 2014 - \$500,000.00

[3] The Defendants provided following list of securities,

- I. 1<sup>st</sup> Registered mortgage over CT 41085 - Mortgage No. 764762
- II. 1<sup>st</sup> Registered mortgage over TLTB Lease 30656 - Mortgage No. 787989
- III. 1<sup>st</sup> Registered mortgage over CT 38874 - Mortgage No. 764763
- IV. Deed of debenture over assets and undertakings of Toa Fiji Limited dated 16<sup>th</sup> October 2012.

Bill of Sale dated 16th October 2012 over,

- V. Fordson Major duel cab utility registration No. FX 188
- VI. Hyundai station wagon registration No. FM 908
- VII. Mazda Sedan registration No. FK 957

Plant and equipment and other items to be purchased

- VIII. Seven motor vehicles as follows,
  - 1 X 3 Ton Freezer
  - 1X Panel Van
  - 2x 3 Ton Truck
  - 3X 4X 4 Mazda Cabs

Bill of Sale dated 16<sup>th</sup> April 2013 over,

IX. Grate Wall Havel H5 Wagon registration No. HB 568

Bill of Sale dated 18th September 2013 over,

X. Dongfeng registration No. HF 445

XI. Guarantee signed by both Defendants dated 16<sup>th</sup> October 2012

XII. Guarantee signed by both Defendants dated 23<sup>rd</sup> September 2013

XIII. Guarantee signed by both Defendants dated 1<sup>st</sup> July 2014

[4] Total loan amounts provided by the Plaintiff to Toa (Fiji) Limited as at 27<sup>th</sup> June 2014 was \$5,759,846.00. According to the Plaintiff the last repayment made by the Company was on 03<sup>rd</sup> March 2015 in the sum of \$22,415.00.

[5] The Plaintiff has served several Demands on the Company and the Defendants as Guarantors but they have failed to make the repayments.

[6] As at 7<sup>th</sup> March 2018 the amounts outstanding were as follows,

|                         |                |
|-------------------------|----------------|
| Loan Account No. 161186 | \$5,343,637.92 |
| Loan Account No. 161215 | \$1,303,202.48 |
| Loan Account No. 161272 | \$975,262.70   |
| Loan Account No. 161347 | \$616,138.56   |

[7] Plaintiff states that the forced sale value of the secured assets would be around \$4,672,800.00 whereas the defaulted amount is \$8,238,241.66. The principal borrower Toa Fiji Limited has been pronounced a wound up company since 01<sup>st</sup> February 2018. Hence Plaintiff initiated this action against the two Defendants.

[8] The Defendant's in their defence state that they provided personal guarantees to the Plaintiff in good faith and they relied upon Plaintiff as a governmental institution and

they expected Plaintiff for its knowledge of local conditions and implementation of certain government policies in relation to the poultry industry. In other words the Defendants state that the parties had a fiduciary relationship and that the Plaintiff breached the same causing loss and damages to the Defendants. Therefore the Defendants sought an order dismissing the claim of the Plaintiff and judgment in favor of them in the sum of \$14,000,000 for the losses.

- [9] The trial lasted for three days. The Plaintiff had one witness and the Defendants called four witnesses to testify. The Plaintiff provided 35 Documents as exhibits. The Defendants exhibited 70 documents during the trial.
- [10] At the end of the trial, Plaintiff's counsel informed Court that they do not seek relief that both Defendants to surrender their passports to Court unless they provide free an unencumbered assets of them for a total value of not less than \$8,238,241.66. And a Writ Ne Exeat Civitate be issued and directed to the Sheriff of the High Court, Police Department and Customs and Immigration Department commanding them that in the event the Defendants seek or attempt to depart the Jurisdiction of the Court, they be arrested and produced before the Court. Therefore the Court will not give consideration on those relief.
- [11] At the outset I must thank both counsel and their co-counsel for their assistance provided during the trial and filing of the written submissions.
- [12] The Plaintiff, Fiji Development Bank [FDB] provided loan assistance to a company by the name of Toa Fiji Limited [Toa] on a personal guarantee given by the two Defendants.
- [13] At the pre-trial conference the parties admitted the following facts:

- I. That at all material time the Plaintiff was a duly incorporated body corporate established under the provisions of the Fiji Development bank Act Chapter 214 and was engaged in the general business of lending.
- II. That the 1st Defendant was at all material times a Director of Toa Fiji Limited.
- III. That the 2nd Defendant was at all material times a Director of Toa Fiji Limited
- IV. That the two Defendants had also signed as Guarantors to loans made by the Plaintiff to Toa Fiji Limited.
- V. That the plaintiff took over the Company's farm as Mortgagee in possession on 11th August 2017.
- VI. The Defendants were returning Fiji residents interested in establishing a poultry farm in Fiji. The Defendants approached the Plaintiff to finance their venture in Fiji. FDB agreed to assist the Defendants personally (upon the Defendants entering *inter alia* into the personal guarantee sued upon) and finance their company, Toa Fiji Limited as the vehicle for the investment.
- VII. The company gave a number of other securities to secure the loans by the Plaintiff.

[14] The Plaintiff's witness Ms. Karolina Rosavalala, Team Leader at Asset Management Division at FDB stated that she has been with the bank for the past 18 years and that she is aware of the facts of this case. She stated that on 14<sup>th</sup> August 2012 FDB approved to provide finance facility to Toa for a total sum of \$4,387,246.00 by way of a term loan (Account 161186) \$3,387,246.00 and ISEFF Facility \$1,000,000.00. ISEF abbreviations used for Import Substitution and Export Finance facility. This facility is mainly design for the projects that will involve in importing and exporting. Toa as the borrower accepted this offer on 03<sup>rd</sup> September 2012 and the two Defendants became individual guarantors. The loan facility was provided for a period of 10 years in order establish an integrated chicken processing plant at Uciwai, Nadi. Toa provided two land mortgages No. 764762 and 764763 on 16<sup>th</sup> October 2012. Toa also provided a Debenture for the amount \$4,387,246.00 on 16<sup>th</sup> October 2012.

- [15] On 16<sup>th</sup> October 2012 the two Defendants signed a personal guarantee in the sum of \$4,387,246.00 for the amount taken by the debtor (Toa). This document was exhibited as P6.
- [16] On 22<sup>nd</sup> August 2013 FDB provided another term loan (No. 161272) of \$872,600.00 for the construction of chicken sheds. The total loans with this new term loan brought to \$5,483,849.61 as per exhibit P7. As new securities for this additional amount secured, the first Defendant provided mortgage No. 787989 an ITLTB land title on 23<sup>rd</sup> September 2013 together with fresh personal guarantee by the two Defendants.
- [17] On 27<sup>th</sup> June 2014 the Plaintiff provided another 5 year term loan (No 161347) of \$500,000.00 to Toa in order to purchase chicken feed. The total loans of Toa came to \$6,362,948.89 as per the exhibit P9. The two Defendants provided a fresh guarantee (P10) for the total amount of loans \$6,362,948.89 taken by Toa on 1<sup>st</sup> July 2014.
- [18] At this stage of the trial, the Plaintiff's counsel provided four documents later marked as exhibit P11, relating to the closing account balances as at 24.08.2022 of four loan accounts. The counsel for the Defendants did not object for this evidence.
- [19] The witness stated that the debtor company failed to pay the loan back to FDB. A demand notice was issued by FDB (P12) to both Defendants as sureties on 14<sup>th</sup> June 2017 claiming the unpaid sum of \$8,269,346.56.
- [20] The FDB stated that the Defendants came to the bank seeking assistance to make payments. According to the witness before the bank went on full recovery, they provided assistance. A consultancy report was prepared by Mr. Don MacLellan to make an assessment on the business operations, issues, challenges and determine the sustainability of the business. On 30<sup>th</sup> November 2015 FDB wrote to Toa proposing a two year reintegration program outlining 9 broad terms and conditions (P16). Based on this letter Toa prepared a 'Strategic Business Plan' (P14) with a projected cash flow for the years

2016 to 2018. The letter on 30<sup>th</sup> November stated that the further funding will be finalized based on the business plan. In this business plan Toa proposed an upgrade of CAPEX equipment and suggested some items be funded by FDB worth of \$212,980.

- [21] The witness stated that FDB wrote (P18) on 02<sup>nd</sup> February 2016 to Toa to inform the status of the 4 loan accounts as they have gone in to arrears in the following manner.

|                    |                          |                          |
|--------------------|--------------------------|--------------------------|
| Account No. 161186 | - balance \$4,860,076.40 | arrears - \$1,004,278.04 |
| Account No. 161215 | - balance \$1,228,080.97 | arrears - \$67,200.00    |
| Account No. 161272 | - balance \$922,172.61   | arrears - \$135,800.00   |
| Account No. 161347 | - balance \$560,587.37   | arrears - \$151,270.00   |

- [22] In the letter FDB further informed that “the Bank’s proposed rehabilitation plan has not progressed much following various meetings with you due to time taken to submit information and construct a satisfactory business plan. The revised proposal submitted by Jay Lal indicates some favorable position in year 2 & 3 but more details like the cost of hiring or building more sheds to achieve overall target has not been addressed. The 2014 & 2015 financials is important for the whole rehabilitation plan. The bank has completed its hindsight review of the loan account and concludes that the financial dilemma situation is the direct result of the lack of total control of the business operation which relates to management capabilities and capacity”.

- [23] The FDB further stated “with the above circumstances, it has made the rehabilitation plan difficult and we are forced to consider a final way forward for the company. We request that you advise the bank urgently of any immediate plan of action that will minimize further expenses and maximize the recovery of the investment. The other option is for the company to work with Bank is exercising its rights to liquidate the assets. We wish to remind the Company that the Bank as the 1<sup>st</sup> Debenture holder have all the right over all assets on or off the property belonging to the company, including plant, machinery, vehicles, building, stock, money, debtors, books of accounts, license, etc...”



- [24] The witness stated that on 02<sup>nd</sup> February 2016 Demand Notice was issued by the bank against Toa for the payment of \$7,570,917.35 and interest. The Bank further authorized the witness to seize the Great Wall H5 wagon registration number HB568.
- [25] According to the letter (P20) dated 10<sup>th</sup> February 2016 addressed to Toa by the FDB it was clear that both parties had a meeting on 8<sup>th</sup> February 2016 and agreed to consider any proposal from Toa to have material change to the current status of Toa without prejudice to the Demand Notice. In this letter the FDB asked Toa to fulfil five conditions.
- [26] On 31<sup>st</sup> January 2017 Acting Manager Asset Management Unit of FDB issued a letter (P21) informing the account balances of four loan accounts of Toa and requesting the debtor to pay \$300,000 by 31<sup>st</sup> March 2017 as per a decision made by the FDB Board in its meeting on 25<sup>th</sup> January 2017. The Bank informed that this payment is inevitable otherwise they will proceed with recovery process.
- [27] Witness stated that a response (P22) has been received on 6<sup>th</sup> February 2017 by FDB from the 1<sup>st</sup> Defendant as the Director informing their inability to pay the \$300,000 therefore to reconsider the decision. Mr. Deve Toganivalu the CEO of FDB emailed (P23) on 13<sup>th</sup> February 2017 in response to Toa informing that they haven't paid monthly interest for 12 months and \$300,000 only represents approximately 6 months of accumulated payments by Toa. He further informed that the FDB is seriously considering foreclosure of Toa in the event of not meeting the payment deadline.
- [28] The witness stated that the debtor did not meet the payment schedule and was struggling. The Bank wrote another letter to Toa on 07<sup>th</sup> June 2017 (P25) requesting Toa to provide a firm commitment within 7 days with strong evidence as to how the company can turn the business to a sustainable level and Toa to make the down payment of \$350,000 and ability to meet normal monthly repayments. The Bank informed that they shall serve Demand Notice in the event Toa fail to satisfy the conditions.

- [29] On 12<sup>th</sup> June 2017 the 1<sup>st</sup> Defendant wrote (P26) to FDB to inform their inability to make the \$350,000 payment and requesting the Bank to restructure their loans. He further explained the difficulties the business has faced due to the shortages in working capital. The witness stated that probably they were trying to have the account restructured so they could start on a new slate and start a new repayment and also they were trying to get an Investor to Invest in their partnership or their Company so as to assist with the Project.
- [30] On 18<sup>th</sup> June 2017 Toa again wrote (P27) to FDB reemphasizing the need to restructure the loans. In that letter Toa stated that in the event of refusal to restructure, the company seek further time to identify a potential buyer as mortgagee sale will not be beneficial to either party according to their opinion. Further to that the Company brought another matter in this letter pertaining to a board member of FDB Mr. Wella Pillay. The letter states, "Many times negative board decision are being motivated by Mr. Wella Pillay I am not sure as to why Wella Pillay is present in Board meeting is where discussion pertain to TOA. The reason being, he has broiler sheds in glugged finance by BSP owned lease to the competitor. I had discussed this with your manager". I will be addressing this issue later as Mr. Pillay was called by the Defendants.
- [31] The witness confirmed that a Demand Notice was served on Toa on 4<sup>th</sup> July 2017 as per the letter dated 7<sup>th</sup> August 2017 (P28). The FDB informed the Toa that they have declined to withdraw the Demand notice and therefore notifying the Company that the bank will proceed with the sale of property to recover the debt. This letter has been copied to both Defendants.
- [32] Letter by Toa (P29) in reply to the 7<sup>th</sup> August 2017 request the bank to release the remaining balance of Blast Freezer based on the consultant's report. Further the company wrote that at that moment they are fully stocked with breeder stock, fertile eggs and broiler stock in the farm and immediate closing would waste all their livestock.

- [33] The email exchanges (P30, 31) dated 08<sup>th</sup> to 11<sup>th</sup> August 2017 between Toa and FDB confirmed that Toa had working capital issues and they were unable to generate sustainable level of income. The witness explained the arrangement between the bank and the company "That FDB had mentioned to the Company was for them to provide their financials, the Company was also to need to work in capital needs and also that the bank would finance the blast but on are progress payment. So it reached the bank first, they released the deposit and required certain documentation before it could consider the release of the balance".
- [34] Toa also tried to buy time from the bank informing that they have an investment banker from overseas who is keen to invest on Toa. Toa wanted to meet the board and on several occasions it was declined by the bank (P32). Toa then approached Permanent Secretary of Ministry of Industry, Trade and Tourism to get a meeting with FDB on 18<sup>th</sup> August 2017. However no one turned up for this meeting (P33).
- [35] The witness further stated that on 23<sup>rd</sup> August 2017 the bank requested further documentation from Toa to facilitate the payment for the Blast Freezer. However this was not accepted by Toa informing the bank that it is too late and they do not wish to increase the debt levels (P34).
- [36] Witness also stated about the involvement of the Government in the project. The allegation was the government pulled out from the funding of the ten sheds and then Toa was force take additional loan from FDB. The witness explained that usual practice of the Bank is that they provide loans based on the proposals given to them. Initially when the bank gave the fund in for the initial part, they took a mortgage and so when the bank considered for the funding for the boiler sheds, that it was are new separate location, and therefore they took a mortgage over that. The witness identified a 'Stop Work Notice' issued on 7<sup>th</sup> August 2013 by the Ministry of Environment (P35) against the constructing of one chicken shed in Uciwai Nadi. Witness stated that this clearly shows that the company had gone ahead to start the chicken sheds, before the bank provided further loan

for the ten sheds in absence of the assistance from the government. Therefore the witness was of the view that it was company's decision to have the ten sheds and therefore they cannot blame the Commissioner Western Division and the Government for pulling out from any prior agreement. Witness stated that there was no action taken by the company against the Government or Commissioner Western Division for such breach.

[37] Witness further stated that the Company always had and was informed to get independent legal advice on any borrowings from the bank. She requested, under the guaranteed documents in which the Company Directors have provided guarantee for this borrowing. The bank had exhausted its recovery action from mortgage and is now seeking the Court's approval to recover the debt in terms of the currently that they hold.

[38] During cross examination witness stated that according to the transaction details of loan account No. 161186 there has been sale of farm property taken place on 10.12.2020 for \$1,486,238.53. She agreed that the Writ has not been amended to reflect this said sale of property.

[39] Secondly the Defendant's counsel suggested that the Bank did not comply with Section 80 of the Consumer Credit Act during the notice period and that there was no actual notice given to the Defendants. The witness stated that she is not in a position to confirm if the bank had issued this notice, she could confirm that they had issued various arrears letters pertaining to this debt.

[40] Witness did not have exact information to explain the delay in sale of mortgage property of Toa. She stated that her understanding as to how the length of time it took for them to dispose the mortgagee sale was the unfavorable offer that they got with regards to this pledge asset. She stated "Usually the bank would continue with our mortgagee sale I would advertise it in the papers and we would have it on private sale as when the offers come this is usually taken before a committee who deliberates on the office and make that

decision with regards to which offer the bank accepts. So, if you asking if I am privy to that information I am sorry, I am not".

- [41] The witness was questioned on whether there was a potential buyer introduced by the company and the witness stated that if they were provided with such information the reason for not having any consideration may be due to the amount of time the bank has allowed the company, and that the bank was in the process of mortgagee sale.
- [42] The reason for bringing in a consultant according to the witness was to provide a report due to the arrears accumulated by the company and the information of the operations were not given to the bank to understand the direction of the business.
- [43] The witness was asked about the delay in providing finance to the Blast Freezer, and whether it caused a negative impact of Toa's operations in order to come out of the debt. And the witness stated "No, I disagree that the blast freezer would have made a difference the blast freezer is just one part of the process in the letters and emails that we have read previous that has been presented there are other issues that the company face. Supply of eggs, the feed cost, the lack of working capital these are all the things that that is apart from the blast freezer. The blast freezer and also if you look at the consultant report the capex equipment listing the blast freezer is one of the many equipment's that have been listed. That had the consultant has provided that would assist and if I may with regards to the consultant report that is the consultant together with the directors they you know the directors were assisting him he acknowledges them in that report. So, he did not work in isolation".
- [44] The counsel for the Defendants questioned whether the \$500,000 given by the bank was swiftly disbursed to the company to purchase chicken feed. The witness stated that every loan comes with conditions where the company needs to fulfill before any progressive claim is released. If the conditions were met, then there was no delay in releasing the payments.

[45] The witness further stated that the bringing Government's assistance to this project was initially presented to FDB by the company and that she has no evidence to say that it was the Government's initiative to push Toa to get in to the loan arrangement with FDB. Important to note following proceedings before the Court,

Ms. Takali: Witness I put to you that the representation made by the government was to the bank. In your evidence in chief you had stated that it was just the government and the defendants. I am putting it to you now that there is a letter from Commissioner Western, a representative of the government to the Manager of Fiji Development Bank that is what I am putting to you. It was not just between the defendants and the government.

Ms. Karolina: My understanding of this letter is, this is the Commissioner Western confirming that there is an arrangement in place between Toa and the farmers or and the office, the government. So, this is what that letter says. It does not say it is...

Ms. Takali: Yes, so there was correspondences and there was representation made by the government to FDB

Ms. Karolina: A letter from the government's office to FDB advising of the arrangement. That is what this letter states.

[46] The witness stated that though the company informed to FDB about a potential buyer for 10 Million dollars, the bank had already proceeded to mortgagee sale. According to the email exchange the witness stated that the bank has informed about informing the outcome of the mortgagee sale. The witness stated "whilst it was in advertisement, there was a tender closing date so my understanding of this email is that we have, this is happening post when the tender closed. The directors have highlighted a voluntary sale for \$10million, they have only said it. There is no indication here to say that there is an arrangement or what are the other things to confirm this in evidence".

[47] The Defendants also highlighted the difference between the amounts reflected in (P26) Demand letter and the Writ. During re-examination the witness stated the following,

Ms. Choo: Is that amount currently owed or it's been claimed after taking into consideration and after filing of the claim, currently owed by the guarantors?

Ms. Karolina: That is correct.

Ms. Choo: Is that your claim before the court? After mortgagee sale and after every, whatever recovery actions taken, the current debt term stands at 7.42million, is that what you are asking from the court?

Ms. Karolina: Yes.

[48] That was the only witness of Plaintiff. The 1<sup>st</sup> Defendant Mr. Anand Chandra Managing Director of Toa gave evidence during the Defendants case. He stated that poultry farming was their family business and they have sufficient experience. The witness stated that they have noticed there is a market for poultry in 2012 and wanted to supply fertile eggs. However following a meeting they had with Commissioner Western Division they embarked on this project which is now before the Court. He stated that the Government gave a guarantee to the bank and Toa was given the loan by FDB.

[49] Mr. Chandra explained with documentary evidence (Exhibits) to the Court how they completed the project infrastructure very clearly. When Toa started to produce chicken the company faced with a problem. They did not have the broiler sheds to keep the chicken. Witness stated "while we have the hatchery getting ready. When I say we it is us and FDB Bank had realized that there was no boiler shed coming out. There was nothing happening. What then happened is we went to FDB and said what we are going to do about this and we a bit of trouble because we don't have nowhere to put this birds. So FDB, we went with our losses at that point of time but we had only have 70% of infrastructure and we have the birds there as well they were laying eggs. We had birds

in the hatchery which they were laying eggs. However, we do not have any sheds. Then FDB then decided that why don't we put our own sheds up and they approved us for sheds and only thing I was supposed to do the 1<sup>st</sup> shed. We had to put the 1<sup>st</sup> 25% down which was the 1<sup>st</sup> shed to build and do the ground works on that then this money can come in. So we were told that the sheds we can started prior that was part of our understanding with FDB it was our 25% down to our share and then they would built the remain of the sheds. So this is how we came and they gave us this loan".

[50] Despite the fact that everything in place, witness stated that they had repayment issues due to the delay in getting the broiler sheds. Witness stated "How we make the money is through boiler sheds. If we don't have boiler sheds how we supposed to run the business. When we start, there was a worried of us as investors what is going to happened. We went to FDB many occasions and had discussed this what is going to happen. They always had said that they going to assist us. I mean you can look at how many Notices they have given us and besides and we didn't do payments because we couldn't do, besides they still gave us loans and there were certain times where we did put our money in as well".

[51] Mr. Chandra stated that after the Government representation fell through, FDB then came in to assist with the sheds being built. However the operations had several issues and the company couldn't keep up with the repayments. At one point the bank was asking the payment for \$7,570,195.53. The Defendant went back to the bank and discussed a way out and then the bank had, decided there going to work with Toa.

[52] The company went in to a distribution agreement with Ashabhai expecting a solution to the problems they faced in operations. This was done without a Blast Freezer which will allow more production of frozen meet and the witness stated that they have seen some progress in business during 2017. Nevertheless on 31<sup>st</sup> January 2017 FDB requested (P21) a down payment of \$300,000.



- [53] Witness also explained an incident where there was leaking of Toa's confidential information to its competitors.
- [54] On 29<sup>th</sup> November 2017 witness received a letter from FDB (D23) to 30 day notice to vacate the premises. Witness stated "This is the final notice for us to vacate the property after that we have to move our property on the 31<sup>st</sup> of December. This is the letter, we try to negotiate with them, and everything we could do. I was in Suva almost all week with them trying to negotiate how we can about this but they wanted the 300,000. They somehow had thought that we had 300,000 spare that we can just take out and give. At that point of time, we did not, we had exhausted all our money. The last time, the money we had invested prior to that was the last money that I had saved for our family was used and there was nothing, we couldn't do nothing. So on 31<sup>st</sup> December we had to pack up and we did just left".
- [55] During cross examination the Defendant stated that he provided the guarantees voluntarily and that he had time to take independent legal advice before signing the said documents. Mr. Chandra admitted that 2019-20 was the pandemic period and he did not obtain any valuation report during this period. The Plaintiff's counsel questioned whether the government's assistance that was promised was for 10 farmers and not to Toa and the witness answered affirmatively. However witness's position is that they agreed with the bank to have their own sheds as the 10 farmers' sheds did not take place. Witness agreed with the condition of providing formal agreement between Toa and 10 contracted farmers, articulating the responsibilities of each party in respect of providing 100,000 square feet shed. A formal confirmation of the funding arrangements of 10 contracted farmers,
- [56] Witness blamed the bank for causing this problem. He stated "Simply the bank was showing me a dream. The bank was going to help me do this. They agreed to do this, we said we can get out of this. Then to a blast freezer they said we get the blast freezer then we put money in. Every time we were in problem, we put money in. Obviously the bank was the leading on, simple".

- [57] He further stated that in 2017 when the bank took over the mortgage they tried to introduce a potential buyer. However the bank asked them to wait as they were in the process of tender in order to sell the property. According to the 1<sup>st</sup> Defendant the bank never come back. Witness also mentioned that prior a winding up action was filed against Toa by Pacific Feed. However this debt was paid by Toa to get back in the operations. The Defendant's position was that the company was doing well in year 2017. When questioned, whether the company paid any debt installments, he said they couldn't.
- [58] The witness stated that there was a conflict of interest by the FDB as Mr. Wella Pillay, board member who was engaged in poultry business, sat in the board meetings where decisions were made against Toa.
- [59] Mr. Pillay gave evidence during Defendant's case. He stated that he was appointed to the FDB board in 2015 and serves till to date. He was aware of the loans given by FDB to Toa. He stated that his company has an agreement with Rooster Chicken Company to provide Chicken sheds. When questioned he stated that he did not disclose this to FDB as he was just the landlord of a similar business. Later he admitted that he was called by the board chair to have a meeting on his failure to disclose.
- [60] During cross examination witness stated that they only receive information papers at the board level and that Toa did not take any objections to his presence in the FDB board.
- [61] Mr. Surendra Prasad was called next by the Defendants. He stated that he has served 32 years at FDB. He stated that the letter dated 31<sup>st</sup> January 2017 (DE 20) was signed by him subsequent to a decision by the FDB board. He did not know the board members who took this decision. He further stated that the decision by the board was a collective decision.
- [62] Ms. Saren Patel was the Defendant's final witness. She was the General Manager at Toa. In her evidence Ms. Patel stated that there were discussions with Ministry of Economy

prior to starting Toa project and they have stated that they could provide funding for the local farmers to work with Toa. Based on that Toa expanded their operations and FDB provided loans. However later when the project started Toa was informed that there is no funding coming in for the farmers. Toa had to make a decision whether to stop the project based on this decision. However FDB provided assistance and they continued. She explained the operations and the difficulties faced similar to the evidence of Mr. Chandra. It was highlighted that based on the consultant's report Toa expected help from FDB to facilitate CAPEX items. However the rehabilitation program did not eventuate. The FDB subsequently closed down their business without giving much time to find workable solutions. Witness also mentioned about Mr. Wella Pillay's presence in FDB board. She stated the valuation she received (DE 28) for Toa was above what FDB received when they sold assets.

[63] During cross examination Ms. Patel stated that the bank did not understand the nature of their business as they had to deal with livestock. And usually it takes time to produce results. Also she believes that the bank should have assisted the business as a development partner. She accepted that they may have delayed submitting the financial reports of the company in 2014-2015, however it was never defaulted. Witness stated that they could not make any instalment payments to the bank as they put their earnings back to the company for operations.

### Analysis

[64] The parties agree that the Plaintiff was a duly incorporated body under Fiji Development Bank Act 1966 and was engaged in general business of lending. Section 18 (1) (b) of the Act states that the bank shall have the powers to lend money on such terms and conditions as it may determine.

[65] It was also agreed that the Defendants approached the Plaintiff to finance their venture to establish a poultry farm in Fiji. Toa Fiji Limited was the vehicle for the investment which

the Plaintiff agreed to finance based on the Defendant's personal guarantee. The company provided number of securities to the Plaintiff.

- [66] The Plaintiff provided three loans to Toa under four separate accounts. The first loan of \$4,387,246.00 was provided by the 14<sup>th</sup> August 2012 offer letter under two accounts. Term loan No. 161186 for \$3,387,246.00 and ISEFF facility No. 161215 for \$1,000,000.00. Both Defendants signed Guarantee (P6) on 16<sup>th</sup> October 2012 and did not provide any security under this agreement by the guarantors.
- [67] By 22<sup>nd</sup> August 2013 letter the Plaintiff provided another loan to Toa for \$872,600.00 under term loan No. 161272. The total loan amount was increased to \$5,483,849.61 and the two Defendants signed another guarantee (P8) for the said amount on 23<sup>rd</sup> September 2013. The first Defendant provided a 3<sup>rd</sup> party mortgage over NLTB lease.
- [68] Further on 27<sup>th</sup> June 2014 the Plaintiff provided the final loan of \$500,000.00 to Toa under Term Loan account No. 161347. The total loan facility risen up to \$6,362,948.89. The two Defendants provided the final personal guarantee (P10) for the total sum on 1<sup>st</sup> July 2014.
- [69] The oral and the documentary evidence provided before this Court by the Plaintiff establishes that the debtor company defaulted the loan installment payments and on 14<sup>th</sup> June 2017 the bank issued a demand notice against the two Defendants as the sureties to the loans obtained by debtor company. This had been the final demand notice before the institution of this action as there was another Demand issued against the debtor company in 2016 which the Plaintiff later did not action upon.
- [70] The Plaintiff stated that they have found out that the debtor company has been wound up by another creditor. The fact that Toa had been wound up was admitted by the 1<sup>st</sup> Defendant in his letter dated 6<sup>th</sup> February 2017 addressed to the CEO of FDB (P22). He further stated that the creditor in that case has been paid in full. However the Court notes

that there is no evidence to ascertain that the debtor company took any action to reverse the legal implications of the winding up. This means Toa has been declared insolvent.

[71] The Defendants takes up the view that they provided the personal guarantees to the Plaintiff as a governmental institution with an expectation that FDB will enhance and promote government policies as a development bank. Defendants state that they depended on FDB to oversee the government's undertakings to erect chicken sheds and in the event of breach of the undertakings that the FDB would properly provide advice including the gravity of the financial problems to the Defendants.

[72] Does that mean there has been any fiduciary relationship between FDB and Toa?

[73] According to **Snell's Equity** 30th Edition paragraph 6-05:

"Fiduciary relationship arises where one person has undertaken to act for another in a particular manner in circumstances giving rise to a relationship of trust and confidence. The distinguishing feature of such a relationship is the fiduciary's duty of loyalty. Thus he must act in good faith, he must not profit from his position and he must not place himself in a position where his duty and his interest may conflict."

[74] In **Hospital Products Ltd v United States Surgical Corporation** [1984] HCA 64; (1984) 156 CLR 41, 96, 103 Mason J described the "critical" feature of fiduciary relationships as being: "that the fiduciary undertakes or agrees to act for or on behalf or in the interest of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense". In the same case, Dawson J observed that "a fiduciary relationship exists when one party is in a position of reliance upon the other because of the nature of their relationship and not because of a wrong assessment of character or reliability. That is to say the relationship must be of a kind which of its nature requires one party to place reliance upon the other; it is not sufficient that he in fact does so in the particular circumstances". And "moreover a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately by accepting terms

which are insufficient to safeguard his interests. Where a relationship is such that by appropriate contractual provision or other legal means the parties could adequately have protected themselves but have failed to do so there is no basis without more for the imposition of fiduciary obligations in order to overcome the short comings in the arrangement between them."

[75] In the 14<sup>th</sup> August 2012 Loan Offer Letter addressed to Managing Director of Toa the Plaintiff provided pre disbursement conditions as special conditions to the offer. That is to,

- I. Provide a formal agreement between Toa (Fiji) Limited and 10 contracted farmers, articulating the responsibilities of each parties in respect of providing 100,000 sqft shed floor area and weekly throughput of 30,000 chicks to meet the processing requirement for one year.
- II. A formal confirmation on the funding arrangement of 10 contracted farmers in terms of supplying the sheds to include a timeline on the construction completion that should support the Company's project timeline.

[76] The Defendant's view is that the two specific conditions involved Government into the project and undertakings were given by the Commissioner Western Division. Letter dated 25<sup>th</sup> October 2012 (D1) was given to the Manager, FDB Nadi office by the Commissioner Western Division. The letter states that they are considering funding 10 farmers to have chicken sheds by April 2013 in order for them to be contracted by Toa. The Court notes that this arrangement did not take place.

[77] Nevertheless the special conditions mentioned above was clearly imposed on Toa. At no point the bank indicated that these conditions are to be fulfilled by the bank solely or jointly. Therefore it is incorrect to assume that the Defendants or their company exclusively depended on FDB to oversee the government undertakings as to the creation of certain chicken sheds. Defendant's exhibit (D30) is a clear indication that the bank did

not work beyond the terms and conditions of the offer, it was Toa who approached the officials of Ministry of Finance to provide the funding confirmations from the farming units.

[78] It is also clear from the loan offer letter (P1) that Plaintiff provided this loan on Toa's request. Further it states for the company to seek independent financial and legal advice before accepting the terms and conditions of the offer. This confirms that the Plaintiff did not act beyond its role of finance provider to become an 'investment adviser' to the company.

[79] In **Timms v Commonwealth Bank of Australia**; [2004] NSWSC 76 (24 February 2004) whereby in determining the Plaintiffs claim of breach of fiduciary duty and negligence against the Defendant bank the Court said "Cases in which a bank lending to a customer comes to occupy a fiduciary position in which it must prefer the customer's interests to its own are rare. Fiduciary responsibility arises only where the bank's role is seen to extend beyond that of finance provider into the area of advice

[80] Relevant principles in this area are conveniently and, accurately summarised in the judgment of Kiefel J in **Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd** [2003] FCA 1516 (18 December 2003). Her Honour said, that "The existence of a relationship, as earlier discussed, may be relevant to the question whether a person has a reasonable expectation that they will be told of something and whether, in the absence of that advice, the conduct of the other party may be misleading".

[81] In **Golby v Commonwealth Bank of Australia** (1996) 72 FCR 134 at 136 Hill J said: "Although, as Mason J in **Hospital Products Ltd v United States Surgical Corporation** (1984) 156 CLR 41 at 96 suggested, the categories of fiduciary relationship are not closed, the relationship of banker and customer is not one of the accepted fiduciary relationships. It is not a critical feature of a banker/customer relationship that the banker undertakes or agrees to act for or on behalf of or in the interests of its customer in the exercise of some

power or discretion affecting the interests of the customer in a legal or practical sense. When a customer defaults in the repayment of a mortgage, a banker is entitled to exercise the powers in the mortgage for the banker's own interest, at least so long as the banker acts in good faith in exercising the power of sale. Absent therefore some special feature, such as the giving of advice in *Smith*, there is no reason to erect a fiduciary relationship between banker and customer when that relationship is essentially one founded in contract.'

[82] Having considered the legal principles discussed and the evidence before the Court, I am satisfied that there was no fiduciary relationship existed between the Plaintiff and Toa when Toa accepted the first loan offer. The understanding of getting government funding to setup 10 outside farms only existed between Toa and the counterparts of that arrangement and the Plaintiff did not play a role in those events. Therefore I am of the view that there was no need for a further endorsement or ratification for the personal guarantees given by the two Defendants.

[83] However when the company realized that they are not going to fulfil the two special conditions in the first offer letter, the company approached the Plaintiff again. The following evidence led before this Court.

Ms. Choo: Can you please advise the court what is that loan offer that dated 23/08/2013?

Ms. Karolina: This is the further loan of \$872, 600, that was approved to TOA Fiji Ltd.

Ms. Choo: What was the purpose of this additional loan?

Ms. Karolina: The purpose of this further loan was to construct sheds, the broiler sheds

Ms. Choo: This additional loan was taken for the constructions of the broiler sheds.

Ms. Karolina: Yes.



Ms. Choo: Could you advise the court why was the additional funds taken for the broiler shed?

Ms. Karolina: Initially when the bank had considered or approved a loan facility to TOA Fiji Ltd, there was an understanding or a letter, an arrangement with the Commissioner Western, that they would engaged registered farmers. These registered farmers would then contract to TOA Fiji Ltd. So, considering that this did not transpire, the customer TOA Fiji Ltd approached the bank and requested that for the fund can be provided to allow for the constructions of the sheds.

[84] The evidence of this case provides three occasions where Toa received funding from the Plaintiff. And another occasion on 30<sup>th</sup> November 2015 where the Plaintiff wrote to Toa for a Project Refinancing Package. I now consider whether there has been any fiduciary relationship occurred between the parties on those occasions.

[85] I have discussed the events of the first loan offer and acceptance in earlier paragraphs with my conclusion at paragraph 81.

[86] It is clear that on the second and third occasions it was Toa who went to the Plaintiff with a request to further funding in order to build chicken sheds and to have working capital to purchase chicken feed. The both these loans offer were similar to the first. The conditions were imposed on Toa. And the Plaintiff did not obligate itself to perform any acts in Toa's business other than safeguarding Plaintiff's right to recover the loan.

[87] Toa could not meet the conditions of the loan repayments and the four loan accounts went on to arrears. According to the evidence it was Toa who approached the bank for rehabilitation or assistance from bank to defer the loan repayments. According to the witness's evidence and exhibit P16 there has been discussion between the bank and the company for more involved reintegration plan for a period of two years to revive Toa.

Several conditions were placed mainly now for the Plaintiff to have a clear understanding on the direction and performance of Toa. However according to P18 it is evident that Toa failed to fulfil the conditions and therefore rehabilitation program could not progress. Failure to obtain balance money for the 'Blast Freezer' was also due to the noncompliance of the requisition directions placed by the Plaintiff.

[88] I am of the view that at any of the stages discussed earlier, the Plaintiff did not step out from its capacity as the lending bank to promote interests of the client, Toa. During the discussions of the project to refinance, the Plaintiff acted with the only intention to recover the debt. It is clear that all this while Plaintiff has given the opportunity for Toa and the two Defendants to have legal assistance. Yet they ended up as a defaulter mainly due to lack of proper management, according to the Plaintiff. And I do not think that can be remedied by exploring on aspects of fiduciary relationship.

[89] I now move on to address whether there has been any lapse by the Plaintiff in the course of exercising mortgagee's duties in power of sale. It has been discussed in the cases of **McHugh v Union Bank of Canada** [1913] AC 229 and in **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] Ch 949 (CA) at 966 that there are two main duties a mortgagee should observe in selling the mortgaged property. The first is to act in good faith in the conduct of the sale and secondly mortgagee owes a duty of care in the sale to obtain the true market value for the mortgaged property. However the mortgagee does not become a trustee for the mortgagor of its own power of sale.

[90] The Defendants pointed out two instances where Mr. Wella Pillay who had been involved in a similar business and same time acting in the FDB board as a board member and Mr. Surendra Prasad's involvement.

[91] According to evidence it was clear that the FDB board's decision on 25.01.2017 for Toa to pay \$300,000 before 31.03.2017 eventually led to the takeover on 31.12.2017. Mr. Koya questioned Mr. Pillay on section 9(5) of the **Fiji Development Bank Act 1966** where it

states 'Any director who has any financial or personal interest in any matter before it shall disclose such interest to the Board and shall take no part in the discussion on any such matter nor vote thereon'. Mr. Pillay stated that he did not have any interest over a poultry business who became a tenant of his land. I have given my mind to his evidence,

Mr. Koya: So is it understood that the times you sat on the Board for TOA matters, your interest was not disclosed, correct?

Mr. Pillay: It was not disclosed because I wasn't a grower like TOA. I was just a landlord like many other landlords that own sheds rented to Future Farms around Fiji.

.....  
Mr. Koya: And in general if you read that it raises the fact that you have vested interest in business exercise with Future Farms Limited and it's the possibility that the conflict of interest has arisen.

Mr. Pillay: Like I had stated before I wasn't a grower. Fiji Farms is the grower. I was only a landlord renting sheds to Fiji Farm unlike TOA who are growers. So I don't see that as a conflict.

.....  
Mr. Koya: Sir, I'd like you to focus on this particular part of the Act in the sense are you versed with Section 9 of the Act where it basically states that any Director who has financial personal interest in any matter before shall disclose such interests to the board and take no part in the discussion of any such matter nor vote thereon. Were you aware of this Section, Sir?

Mr. Pillay: Yes.

Mr. Koya: And like you stated earlier in your personal opinion because you are giving evidence, did you see it not fit with your level of education and success that this would be applicable to you on the basis of discussions of TOA?

Mr. Pillay: No, because when you look at conflict of interest, financial conflict of interest, it basically means if you have shares or something of that nature, you have financial interest in poultry farms. I had no financial interest. All I was, was a Landlord. And on a worst case scenario when I had vacated my shed, you know, this happens with a landlord and a tenant, I didn't see it as a conflict at all. Because I had no financial interest in Fiji Farms.

[92] The Court is of the view that Mr. Pillay's company only had landlord-tenant relationship with the farmer. In the absence of any further evidence to show Mr. Pillay's involvement beyond the duties of a landlord's the Court decides that his mere presence in the FDB board does not constitute an act of bad faith by the Petitioner.

[93] Further FDB's request to pay \$300,000 by 31.03.2017 was not an act of bad faith. From the correspondence it is clear that at this point in time Toa failed to honor installment payments at least for 12 months and the arrears was accumulating in to \$1,314,211.49, \$120,000.00, \$238,611.39, \$270,125.00 under the 4 loan accounts (P21). The manner the Plaintiff acted, is beyond the expected fairness.

[94] 'Duty of Care' that a mortgagee should exercise should be reasonable care in obtaining the best price available at the time of the sale. The mortgagee may decide the time of the sale. In **Silven Properties Ltd v Royal Bank of Scotland PLC** [2003] EWCA Civ 1409 it was stated that the mortgagee is not obliged to wait until the market picks up. Also in the case of a moveable chattel the mortgagee has no duty to take care to sell at the place where the best price is available, because to take chattel from one place to another will inevitably take time and mean sale is deferred; **Micheal v Miller** [2004] EWCA 282. However the legal principles do not excuse mortgagee from its duty to act fairly to expose the property to the market to obtain the best reasonable price available. The duty extends not only to the mortgagor but to guarantors as the implications of getting a higher price would lessor the liability under the guarantee.

[95] According to the Plaintiff's witness it is clear that the sale of main mortgaged property was completed in year 2020. There has been a delay of almost three years from the repossession of the property. It was highlighted in evidence that delay had been caused due to unfavorable offers. The Plaintiff had taken all necessary procedure to obtain a best price such as sale by calling open tenders. It was also noted that the delay included global pandemic period. During cross examination the witness stated,

Ms. Takali: Thank you, witness and you are also not in a position to explain to this Court why there was a delay in the sale?

Ms. Karolina: As I earlier mentioned the offers that we have received they were with regards to our advertisements.

Ms. Takali: Are you aware of the, if the property was re-advertised following 2017.

Ms. Karolina: If I talk about advertisement the bank had advertised the property had also engaged a real estate had done diligence in trying to dispose sorry trying to put it out there to invite offers that could you know justify or maybe get to track reasonable amounts or but we did got and put it out in terms of our advertisement the dailies, our engagement with the real estate to dispose and yet the offers we got as of the bank decision to dispose it in December, 2020 that's what the bank has decided to do.

[96] It was the position of the Defendants that they had a potential buyer for 10 million however the Plaintiff did not allow that to take place. I must say that evidence in this regard did not satisfy the required burden of proof. The Defendants have stated in their case and suggested to the Plaintiff that they had a potential overseas buyer for an amount of multiple times of the price obtained by the Plaintiff in 2020. However I have noted that there was no progressive approach made by the Defendants to introduce this buyer to the Plaintiff. At least to get into an initial agreement with them. The Defendant points out that

as per D27 email dated 14<sup>th</sup> July 2018 by Mr. Cakacaka, they were waiting for an outcome of the tenders. I don't think this email would have stopped the Defendants to introduce a buyer even in the event that there was no response from the Plaintiff within a reasonable time. I again reproduce part of Plaintiff's evidence given under cross examination,

Ms. Takali: Yes, was there any representation made to you regarding this potential purchase of Toa Fiji.

Ms. Karolina: I won't be able to answer that directly all I can say is in the event if a customer had provided proposal by a prospect buyer the fact that we didn't follow through or didn't provide the necessary evidence or requirements to allow the bank to seriously consider this offer is the result that the bank proceeded continue mortgagee sale. Like I earlier said the bank had a lot of times given the opportunity or allowed the opportunity for the customer to dispose these properties through voluntary sale.

[97] Therefore I am of the view that the Plaintiff has not acted in collusion with a particular purchaser or that there has been any corruption involved by the Plaintiff in selling Toa's properties under mortgage. I could not find any elements of bad faith or failure in duty of care by the Plaintiff.

[98] Now I would like to address a concern raised by the Defendants at the end of the trial. The Defendants state that the debt amount reflected in the Statement of Claim is not correct. The claim that was filed in 2018 carried the amount claimed as \$8,238,241.66. However on the day of the trial the Plaintiff provided following accounts as their balances.

|                         |                |
|-------------------------|----------------|
| Loan Account No. 161186 | \$4,015,246.42 |
| Loan Account No. 161215 | \$1,334,419.93 |
| Loan Account No. 161272 | \$1,437,134.85 |

Loan Account No. 161347     \$640,851.73

- [99] Court notes that this has been disclosed to the Defendants counsel during the trial and the document was submitted without an objection. The total debt claimed by the Plaintiff has now come down to \$7,427,652.93. It could be due to the sale of assets held by Toa. The law on amendments to the pleadings is well settled and the Court can allow it any stage of a trial. The main consideration would be whether it will cause any prejudice or injustice to the other party.
- [100] It would be noteworthy that claims brought by financial institutions like banks have variable accounts. The accounts create interest and other related fees that could always change the final balance. Therefore it is practically difficult for them to amend the pleadings every time there is a change to the total sum claimed.
- [101] In the present case I have noted that the actual sum that has been claimed by the Plaintiff has now reduced. The Plaintiff has not introduced any new claim or cause of action that would have an impact on the rights of the Defendants. Therefore I am of the view no prejudice has been caused by the Plaintiff due to the presentation of actual balances of the four accounts as at the date of the trial.
- [102] The Defendants pointed out another issue where the Plaintiff has failed to adhere to the provisions of **Consumer Credit Act 1999**. In particular section 80 (1) to (4) where a credit provider under the Act has to give notice to a debtor and not to begin enforcement without a prior notice.
- [103] Plaintiff's evidence was clear that the company (Toa), was given several advance notices and had various discussions on the four loan accounts. However the witness of the Plaintiff did not provide a clear response when the issue was raised by the Defendant's counsel under Consumer Credit Act.

[104] I am of the view that the Consumer Credit Act has no application to this case. According to section 6 and 8 of the Act, it applies to the credit contracts entered into by the natural persons. Here the actual credit contract was between the Plaintiff and a company.

### Conclusion

[105] In conclusion I am of the view that the Plaintiff has made their claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It was the responsibility of the two Defendants as per the guarantee documents to know the financial position of their company when providing these guarantees to the Plaintiff. They were involved in the daily operations of the company when it started having losses. However the two Defendants continued to provide guarantees to the Plaintiff.

[106] I am of the view that the two Defendants are bound by the agreements and liable to pay any residual debt of their company, Toa. They now cannot allege that the Plaintiff failed to provide sound financial advice. In fact it was not the Plaintiff's responsibility.

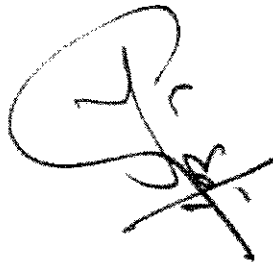
[107] Furthermore for the reasons aforementioned I do not see any merit in the Defendant's defence, counter claim and the alternative cause of action. Accordingly the Court makes following orders.

### ORDERS

1. Both Defendants to pay a sum of \$7,427,652.93 [seven million four hundred and twenty seven thousand six hundred and fifty two dollars ninety three cents] to the Plaintiff within three months of this judgment.
2. The Defendants liable to pay an interest of 5% on the judgement sum [outstanding/ reducing balance] from the date of this judgment until the judgment sum is fully paid.



3. Counter claim and alternative cause of action of the Defendants dismissed and struck out.
  
4. Total Cost of \$ 5000 [five thousand dollars] to be paid by Defendants to the Plaintiff within 14 days.

A handwritten signature in black ink, appearing to be 'Yohan Liyanage', written in a cursive style.

**Yohan Liyanage**

**JUDGE**

At Suva on 09<sup>th</sup> March 2023

