

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: **HBC 269 of 1999**

BETWEEN : **FML RESORT LIMITED**
1st PLAINTIFF

ROBERT MCLAUHLAN
2nd PLAINTIFF

AND : **NBF ASSET MANAGEMENT BANK**
1st DEFENDANT

: **PERMANENT SECRETARY FOR LANDS**
2nd DEFENDANT

: **PAPAGENO RESORTS LIMITED**
3rd DEFENDANT

: **ATTORNEY GENERAL OF FIJI**
4th DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. D. Sharma with Mr. S. Deo for the Plaintiff**
: **Ms. M. Fono with Mr. J Baledrokadroka for the Defendant**

Date of Hearing : **28 April 2020**

Date of Judgment : **24 July 2020**

JUDGMENT

DAMAGES: Assets not accounted by mortgagee in possession – Counterclaim for recovery of loans – Limitation of action – Case remitted by the Court of Appeal for set off – Whether entirety of cross appeal allowed by the Court of Appeal – Pre & post judgment interest on damages – Burden of proof – Section 4, Law Reform (Miscellaneous Provisions) (Death & Interest) Act 1935 – Section 25 of the Limitation Act 1971

The following case is referred to in this judgment:

a. Dominion Insurance Ltd v Sea Island Paper and Stationary Ltd [1998] FJCA 17, ABU No 0008U.97S (15 May 1998)

1. The plaintiffs' action pre-dates this millennium, having been filed on 2 June 1999, in the High Court of Suva, which, after trial, delivered judgment dated 13 February 2015 dismissing the plaintiffs' claim for damages for the loss of chattels and the 1st defendant's counterclaim for residual debts out of loans granted by the National Bank of Fiji, which was taken over by the 1st defendant. That judgment was appealed, and the Court of Appeal by its judgment dated 8 March 2019 allowed the plaintiffs' (appellants before the Court of Appeal) 3rd and 4th grounds of appeal and rejected the 1st, 2nd and 5th grounds of appeal. Their Lordships also allowed the 1st defendant's cross appeal, but this must be taken with a caveat as the Court of Appeal appears to have dealt only with the question of limitation, on which ground the High Court had initially dismissed the 1st defendant's counterclaim for recovery of loans granted to the 1st plaintiff.
2. In view of the plaintiffs' 4th ground of appeal being allowed, and the consequential grant of damages in a sum of \$390,000.00, the Court of Appeal remitted the case to the High Court to make a determination as to the set off to be effected from the monies due to each other from the plaintiffs and the 1st defendant. The Court of Appeal made no determination as to the sum payable to the 1st defendant on the basis of its counterclaim. Their Lordships' judgment has reduced the contest before this court to one between the plaintiffs and the 1st defendant as the other parties did not seem to be affected by the Court of Appeal's decision.

The action as filed originally

3. By their writ of summons, the plaintiffs (along with co-plaintiffs who are not parties to these proceedings anymore) had sought special damages in a sum of \$390,000.00 and interest on general and special damages. Their claim was that there were boats, equipment, plant & machinery, furniture and fittings on Malawai resort and that the first defendant – as the mortgagee in possession – had not accounted for these items upon taking possession of the resort from the plaintiffs. Their position was that these items were not secured under any bill of sale or security, and should have been handed over to the plaintiffs, but that the 1st defendant had failed to do so. The defendants, by their counterclaim, sought *inter alia* to recover a sum of \$4,606,553.10 from the plaintiffs – as monies to be recovered from loans advanced to the plaintiffs – together with interest at the rate of 13.5% from 1 June 2000 to the date of payment and post judgment interest at the rate of 5% until payment. The High Court by its judgment dated 13 February 2015, dismissed the plaintiffs’ action and the counter claim of the 1st defendant; hence, the plaintiffs’ appeal and the 1st defendant’s counter appeal.

4. The plaintiffs appealed the judgment of the High Court, and the 1st defendant cross appealed. The grounds of appeal are reproduced below:
 - a. *“That the Learned Judge erred in fact and in law in his analysis and findings of Section 6 of the Land Sales Act, cap. 137 in that he failed to consider relevant case authorities on the issue when an offer was deemed to have been accepted in a mortgage sale and when a contract was deemed to have been made.*

 - b. *That the Learned Judge erred in fact and in law in not upholding the Appellants submission that a contract was made between the 1st Respondent and the 3rd Respondent’s agent Suresh Chandra on 28th November 1997 prior to any Ministerial consent being obtained as was required under Section 6 of the Land Sales Act, Cap 137.*

 - c. *That the Learned Judge erred in fact and in law in holding that the 2nd Appellant had lied and in light of the evidence adduced in Court such a finding was a highly improbable inference.*

 - d. *That the Learned Judge erred in fact and in law in not upholding the Appellants claim for damages for loss of the items that belonged to the 1st Appellant which were left on*

Malawai Resort and which were in the custody and care of the 1st Appellant when it became mortgagee in possession of Malawai Resort.

- e. *That the Learned Judge erred in fact and in law when he failed to appreciate that the 1st Respondent had failed to comply with a Standing Cabinet Policy requirement to advertise and seek offers from indigenous buyers before applying for approval of sale of land in excess of 10 acres to a non-resident from the Minister of Lands."*
5. When this matter was fixed for hearing on the matters specified by the Court of Appeal, the plaintiffs and the 1st defendant made submissions regarding the applicable rate of interest on the damages granted to the plaintiffs by the Court of Appeal, the 1st defendant's cross appeal and on the question of the set off, which the Court of Appeal had directed this court to determine. Submissions were confined to the evidence on record, and fresh evidence was not admitted. Nor did counsel seek to admit fresh evidence.
6. In allowing the appellant's 3rd ground of appeal, the Court of Appeal directed the chief registrar to expunge certain matters on record during the trial before the High Court. That matter did not figure in this proceeding.

The plaintiffs' claim of interest on damages

7. When the Court of Appeal held with the appellants on the 4th ground of appeal and granted them a sum of \$ 390,000.00, the judgment made no reference to either pre or post-judgment interest. However, interest on the damages awarded to the plaintiffs is now a matter of contention before this court. The plaintiffs argue that an interest rate of 6% per annum on \$390,000.00 would be reasonable and that this court is competent to make such an award.
8. The plaintiffs cited the case of *Dominion Insurance Ltd v Sea Island Paper and Stationary Ltd*¹ in which the Fiji Court of Appeal awarded 13.5% per annum as interest on special damages. Although the object and purpose of special damages was discussed, that case is not quite on point in regard to the question on interest in this proceeding.

¹ [1998] FJCA 17, ABU No 0008U.97S (15 May 1998)

9. The 1st defendant submitted that the plaintiffs had not prayed for any specific interest rate, and that their claim in the High Court was for damages only. On the other hand, it was submitted, the 1st defendant had clearly sought pre and post-judgment interest and had specified the rates that should apply to its claim. Therefore, the 1st defendant contended, that only post-judgment interest at the rate of 4% could be granted to the plaintiffs in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, and not pre-judgment interest, arguing that as this element of interest was not specifically prayed for, the Court of Appeal did not make an order on the payment of such interest.
10. Both parties rightly agreed that they are bound by section 4 (1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, which provides that every judgment debt shall carry interest at the rate of 4 % per annum from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.
11. Post-judgment interest is payable to a successful claimant irrespective of whether or not the court specifically makes such an award of interest. As regards, pre-judgment interest, the controversy remained with the plaintiffs asking for interest at the rate of 6% from the time of filing action until the date of judgment.
12. The Court of Appeal, in dealing with the issue of damages payable to the plaintiffs, must be presumed to have given heed to the attendant question of interest on the damages the plaintiffs were awarded. Their Lordships have not made an order concerning interest. Unlike post-judgment interest, pre-judgment interest will not apply unless there is a specific order by court. This court has no jurisdiction to traverse a matter which the appellate court must be taken to have considered in the course of making an order on the substantive claim. Moreover, the direction by the Court of Appeal to this court is only to effect a set off by considering the sums due to the plaintiffs and the 1st defendant from each other. In those circumstances, this court will not make an order as to pre-judgment interest on the damages granted to the plaintiffs.

The 1st defendant's claim for the recovery of residual debts

13. The 1st defendant explained its claim in this way: the plaintiffs were customers of the National Bank of Fiji (the predecessor of the 1st defendant); significant sums were loaned to the plaintiffs in 1992 and 1993; following default, recovery action took place including the mortgagee sale of the plaintiffs' resort, but a significant debt remained even after such recovery action.
14. The 1st defendant claimed that the plaintiffs owed a sum \$951,814.84 as residual debts even after recovery action was taken. As the Court of Appeal has allowed the cross appeal, the 1st defendant submitted, the starting point for the determination of the set off, is an examination of the cross appeal and ground number 4 of the plaintiffs' appeal, without a re-visitation of the evidence on record.
15. However, the plaintiffs contended that there was no evidence to show that a sum of \$951,814.84 was due and that the mortgage secured a principal sum of no more than \$200,000.00. The plaintiffs submitted that the mortgage was fully discharged with the sale of the resort, which raised a sum of \$415,000.00. These sums relating to the principal sum of the mortgage and the sale of the resort are not in dispute.
16. The plaintiffs also contended that the 1st defendant in its counterclaim had not asked for an off set and as such a set off cannot be permitted unless it was properly pleaded. That contention cannot be considered tenable as it is the Court of Appeal that has directed a set off to be done between the sums payable to the respective parties, and the propriety of such a set off cannot be contested in this court. Whether there are sums to be set off is the question that this court needs to consider.
17. The first defendant's amended cross appeal filed on 18 December 2018 set out several grounds of appeal. These are reproduced below:
 - a. *"That the learned trial Judge erred in fact and in law by holding that the 1st Respondent's counterclaim was statute barred by the Limitation Act; and*

- b. *That the learned trial Judge erred in fact and in law by failing to consider the effect of section 25 of the Limitation Act on the limitation period applicable to the 1st Respondent's counterclaim;*
- c. *That the Appellants have no locus standi to pursue their claim that the agreement between the 1st Respondent and 3rd Respondent was in breach of section 6 of the Land Sales Act [Cap 137] as they were not privy to the said agreement;*
- d. *That the Appellants have no locus standi to claim that the 1st Respondent breached the Cabinet policy which required the advertising of the sale of land in excess of 10 acres locally for the benefit of potential "indigenous Fijian" buyers before selling the land to a non-resident;*
- e. *That the 2nd named Appellant has no locus standi to pursue his claims against the 1st Respondent of fraud, misrepresentation and bad faith in conducting the mortgagee sale of the property as he was not privy to the mortgage agreement between the 1st named Appellant;*
- f. *That the Appellants' claim that the agreement between the 1st Respondent and 3rd Respondent was in breach of section 6 of the Land Sales Act [Cap 137] is moot as the 3rd Respondent has acquired an indefeasible title to the property;*
- g. *That the Appellants have led no evidence to prove that the agreement between the 1st Respondent and 3rd Respondent was in breach of section 6 of the Land Sales Act [Cap 137];*
- h. *That the 1st named Appellant made no attempt to redeem the mortgaged property pursuant to section 72 of the Property Law Act [Cap 130];*
- i. *That the 1st Respondent was not bound to accept any proposal by the 1st Appellant other than payment of the full balance of the debt to redeem the mortgaged property pursuant to section 72 of the Property Law Act [Cap 130]; and,*
- j. *That the motive of the 1st Respondent in exercising its right to mortgagee sale is an irrelevant consideration as the 1st Respondent was entitled to exercise the said right".*

18. The 1st defendant sought the following orders in its cross appeal:

- a. *“That the finding by the learned trial Judge that the 1st Respondent’s counterclaim is statute barred by the Limitation Act be set aside;*
 - b. *That the Order dismissing the 1st Respondent’s counterclaim be set aside;*
 - c. *That the 1st Respondent’s counterclaim be upheld;*
 - d. *That pursuant to the 1st Respondent’s counterclaim:*
 - The 1st named Appellant pay to the 1st Respondent*
 - i. *The sum of \$951,814.84 (Nine Hundred and Fifty One Thousand Eight Hundred and Fourteen Dollars, Eighty Four Cents);*
 - ii. *Interest at a rate of 13.5% per annum from 16 October 1998 until payment is made; and*
 - iii. *post Judgment interest at a rate of 5% until payment is made or alternatively;*
- the matter be referred back to the Honourable High Court for the assessment of damages on the 1st Respondent’s counterclaim”.*

19. The plaintiffs submitted that the Court of Appeal only considered whether the counter claim was statute barred and answered that question in the negative. They submitted that the Court of Appeal had not allowed the order seeking a direction for the plaintiffs to pay the 1st defendant the sum of \$951,814.84 together with interest at the rate of 13.5% per annum from 16 of October 1998. They contended that the Court of Appeal would have had to look at the totality of the evidence in order to make a determination on this ground. This position seems correct as the Court of Appeal’s judgment makes reference only to the question of limitation urged in the cross appeal.

Effect of the allowed cross appeal and the question of proof

20. In view of the submissions made on behalf of the 1st defendant, it is apt to look at the Court of Appeal’s consideration of the grounds in the parties’ notices of appeal and cross appeal. Upon a plain reading of the judgment, it is obvious that the Court of Appeal has considered each of the grounds urged by the plaintiffs and rejected all but grounds 3 and 4.

21. The 1st defendant argued that its cross appeal was granted without limitation and, therefore, it is open to the High Court to determine the exact sum owed on its counterclaim and to cause a set off against the relief sought by the plaintiffs i.e: \$390,000.00 plus interest.
22. The 1st defendant's cross appeal is against the ruling of the High Court, which rejected the counterclaim for residual debts on the basis it was time barred in terms of section 25 of the Limitations Act 1971. The section states that for the purposes of the Limitations Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counter claim is pleaded.
23. Under the heading "Determination of the Cross –Appeal", the Court of Appeal had this to say:

"The 1st Respondent's (the original 1st Defendant Bank) cross-appeal is against the ruling of the High Court declining the counter-claim for residual debts owed to it. The learned Judge declined the said counter claim on the basis that it was time-barred in terms of Section 25 of the Limitation Act".
24. Thereafter, on the question of limitation, the Court of Appeal proceeded under two headings: "Chronology of Events", and "The Limitation Act – Section 25", before reaching its conclusion.
25. The Court of Appeal held that the plaintiffs' alleged liability arose on 16 October 1998, about 16 months prior to the institution of action on 2 June 1999; the claimed liability being the payment of residual debts after the sale of the mortgaged property. On that reasoning, the Court of Appeal, by its judgment of 8 March 2019, concluded "*that the cross appeal is entitled to succeed*".
26. Although the Court of Appeal judgment is phrased in those terms and the judgment of 8 March 2019 decrees that, "*The cross appeal of the 1st Respondent (in the main appeal) is allowed*", the only aspect of the cross appeal which appears to have been considered by the Court of Appeal was the High Court's rejection of the counterclaim by citing section 25 of the Limitation Act 1971. The Court of Appeal concluded that the cross appeal is entitled to succeed and made this

direction: *“However, in view of Order 2 above, in the context of Ground of Appeal No.4 the matter is remitted back to the High Court to make a determination as to what sums of money are to be set off”*. Order 2 of the judgment stated: *“Grounds of Appeal Nos. 3 and 4 are allowed”*.

27. Although the Court of Appeal has, in seemingly broad terms, stated that the cross appeal of the 1st defendant is allowed, its order to that effect must be understood in the context of the overall judgment, which has considered almost solely the question of limitation; the basis on which the High Court rejected the counterclaim by its judgment. Neither the High Court nor the Court of Appeal made specific findings in regard to the counterclaim. In those circumstances, the 1st defendant’s submission that the cross appeal is allowed in its entirety is misconceived. Allowing the cross appeal, in terms of the Court of Appeal judgment has to be taken to mean there is no bar of limitation in determining the counterclaim, and must not be understood as granting substantive relief on the counterclaim.
28. Counsel for the 1st defendant argued that all that this court has to do is to make a simple calculation through setting off the sums contained in the respective notices of appeal. She submitted that the Court of Appeal having seen the evidence on the record and after considering the respective arguments had ruled that the 1st defendant is entitled to judgment on its counterclaim. The court’s view though is that such a simplistic argument is not well conceived. A reading of the judgment of the Court of Appeal, in its entirety, reveals of no such relief being given by their Lordships. It seems clear that instead, the Court of Appeal, by remitting the case, intended the High Court to consider and evaluate the evidence and make the necessary findings in order to make the set off.
29. The difficulty of the 1st defendant seems to be the paucity of evidence in support of its claim, a point insistently advanced by the plaintiffs. The plaintiffs submitted that the witness was unable to prove the composition of the debt of \$900,000.00, and that no bank statements or breakdown of sums loaned were produced at the trial. That position seems correct. No evidence seems to have been led on the sum claimed to be outstanding as the residual debt. There was no evidence that a demand notice was sent on the residual debts. No evidence of

significance was led to establish the counter claim. There was no explanation by the 1st defendant as to how the proceeds of \$415,000.00 by sale of the resort was applied in extinguishing the plaintiffs' alleged debts. In cross examination, the 1st defendant's witness admitted that the sum of \$951,814.84 was incorrect. This unhelpful evidence from the 1st defendant's point of view is at page 198 of the High Court record containing the proceedings of 6 February 2014.


30. The 1st defendant's witness, Mr. Bogi Earnest Basilio, said in cross examination that the sum of \$4,606,553.10 claimed in the counter claim was the amount due under the FML group (page 197 of the High Court record). The witness confirmed that was not the amount owed by FML Resorts Limited, and that the figure claimed was incorrect. He also agreed in cross examination that the counterclaim did not specify which of the plaintiffs owed money to the 1st defendant. Mr. Basilio said that the "accounts" (which may be a reference to the claimed debt) have been written off, but that it was still in the bank books. He conceded in cross examination that he could not corroborate the 1st defendant's claim. When Kotigalage, J, the trial judge, posed the question as to why records that showed the debt as outstanding were not produced in court (page 231 of the High Court record), the witness gave no explanation to the court's query.
31. The 1st defendant was obliged to bring to the attention of court the evidence that it relied upon. Unfortunately, this did not happen, notwithstanding the court's inquiry during the hearing; the unsatisfactory response being that the evidence was all out there on record. The matters that should have been adduced in evidence were within the knowledge of the 1st defendant, and the bank's witness was unable to explain why such critical evidence – assuming that such evidence was in the possession of the bank – was withheld. Instead, the 1st defendant relied on the judgment of the Court of Appeal to insist that its counterclaim was successful by implication from the success of its cross appeal. In my view, the 1st defendant's understanding that its burden has been discharged by the Court of Appeal judgment is mistaken. This court has evaluated the evidence on record, and concludes that no set off is required. The burden of proving the counterclaim on a balance of probabilities was upon the 1st defendant. This it has failed to do. For these reasons, the 1st defendant's counterclaim is declined.

Order

- A. The 1st defendant's counterclaim is dismissed.
- B. The plaintiffs are entitled to post judgment interest at the rate of 4 % per annum on the sum of \$390,000.00 awarded by the Court of Appeal from the time judgment was entered.
- C. The parties will bear their own costs.

Delivered at Suva this 24th day of July, 2020




M. Javed Mansoor
Judge

Solicitors:

R. Patel & Co: for the plaintiffs

Jamnadas & Associates: for the 1st defendant