IN THE FIJI COURT OF FIJI

CIVIL JURISDICTION

CIVIL APPEAL NO. 19 OF 1991
(Civil Action No. 239 of 1981)

BETWEEN:

CARPENTERS FIJI LTD — APPELLANT

-and-

RAM JEET — RESPONDENT

Mr. V. M. Mishra for the Appellant
Dr Sahu Khan for the Respondent

Date of Hearing : 3rd February, 1993
Date of Delivery of Judgment : 15th April, 1993

JUDGMENT OF THE COURT

This is an appeal from a decision of Justice Sadal given on 18th January 1991. A number of matters of law have been argued on the appeal, and we believe that it is desirable to set out the facts in some detail.

Before doing so we should mention that the action was commenced in May 1981. It appears to have come before Justice Dyke for hearing in April 1987, six witnesses gave evidence and the matter was adjourned for submissions. That hearing was never completed because of the resignation of the Judge. It was heard again by Justice Sadal in April 1989. In that hearing the certified copy of evidence given before Dyke J was admitted in evidence as an exhibit, although it was noted that the previous trial Judge had not checked it. Presumably that evidence was

treated as evidence of the facts in the hearing before Sadal J. This was not objected to on appeal, so we have done likewise.

The case involved the purchase of a truck, a bill of sale, repossession, sale and a claim by the plaintiff (appellant) for recovery of moneys owing under the bill of sale. The defendant (respondent) was, at the time of the events hereafter related, a labourer; it is obvious that he was not versed in commercial matters. He bought the truck to do some contract carrying from the proceeds of which he intended to pay for it. The actual purchase price of the truck was $7000. To enable him to finance the purchase he entered into a bill of sale with Carpenters on 18th December 1978, which was duly registered. The amount for which the company agreed to sell the vehicle to him as stated in the bill of sale was $7747.00 made up of $7000 plus insurance $616.00 and costs of the bill of sale $131.00. The reason for this amount was not explained in the bill of sale nor were its component parts anywhere therein expressed. The bill of sale recites that the defendant had paid a deposit of $2583.00 thereby reducing the amount to $5164.00. It then proceeds to provide for payment of "a sum in lieu of interest thereon" of $1051.19 in addition; the total sum of $6215.19 was payable by monthly instalments of not less than $282.00. The bill of sale in one place states that the price of $7000.00 is or is to be less 2 1/2%, but that seems to have been conveniently overlooked. Indeed it appears that on the day the bill of sale was signed and the deposit of $2583.00 paid, the defendant paid a further sum

of $350.00, said on the receipt to be "Commission on AJ719" (the truck registration number). The evidence was that it was not commission, but handling charges for "changing battery and cleaning car" (record p94). Fortunately or unfortunately it seems that the defendant saw a solicitor about the bill of sale before he executed it but after he had paid the deposit and the sum of $350.00, so that no challenge on the basis that the defendant did not have the slightest idea how after paying a total sum of $2933.00 to buy a truck for $7000 he finished up owing $6215.19 was likely to succeed.

A policy of insurance was dated 17th January 1989. It is said that the proposal was signed by the defendant. This appears to be 17th December 1978, the day before the execution of the bill of sale.

Within weeks the vehicle was involved in an accident. The defendant has been criticised for claiming that it had been so involved when it had not. But it appears quite clearly that it was involved in an accident. It left the road while being driven in February 1989 and impaled itself on a rock, and had to be pulled back by a tractor, whereupon it would not start, and was towed to one of Carpenter's repair shops. In ordinary language that is certainly an accident. The defendant went to the insurance company, got a form, and had it filled out by someone who is now dead. What was stated in the form we do not know.

We shall come back to the evidence of what might then have happened. At this stage it can be recounted that while in Carpenter's repair shop the vehicle was to an extent dismantled - at any rate the engine was taken out. The time for payment of the first monthly instalment of $282 arrived and passed without payment being made. There had been a statement sent to the defendant by Carpenters which the defendant said he received in January 1979 (record pp94-5, 96). It appears to be a statement as at 1st January 1979. It sets out the debits and credits (with a number of crossings out) and says: "Your payments are up to date thank-you" (sic). In the column "Amount Due" the figures "0.00" have been typed, then crossed out and the figures "282.00" written in. It is somewhat confusing to say the least, or misleading, seeing the first instalment of $282 was not due until 31st January (record p86). Be that as it may, the defendant did not pay the instalment due on 31st January 1979, or any other instalment. It is said that he was sent a notice of default in March 1979; no copy was put into evidence and we simply do not know whether the defendant received any such notice or not.

What was called a seizure notice was dated 19th April 1979 and sent to the Bailiff. There is no direct evidence that it was served, but this can be inferred; at any rate there was no denial. The vehicle was seized in its dismantled condition at the Carpenter's garage. Work on it was stopped. By letter dated 15th June 1979 the defendant was given notice of intention to sell and informed that he would be required to make up any

shortfall. The letter was returned unclaimed. The vehicle was then sold "as is where is", with the engine removed. It was apparently sold for $1400. There does not seem to be any evidence of this, but this amount was allowed as a credit to the defendant in the amended statement of claim, and there has been no objection to it.

Some other confused history should be mentioned. The documents seem to make it clear that the vehicle was brought to Carpenter's repair depot on 2nd February 1979. A copy of a job sheet bearing that date is in evidence; it is signed by the defendant. The evidence of the garage supervisor is that the defendant gave instructions to:

1) Check and overhaul engine and fix engine knock.

2) Check and repair front brake and fix steering coupling (record p93; exhibit 5). The defendant admits that he signed the job sheet, gave him those instructions "and anything else he found wrong to repair it" (record p98). The supervisor says that there was no mention of an accident, or insurance, or request for a quote. On the other hand the defendant says that he told Carpenter's people both in the office and in the garage about the accident, he was given a claim form which he filled in. He gave evidence (record p64) that "(T)his accident was not reported because the accident was not big". Probably this means he did not report it to Carpenters. However, contrary to what he had previously said, at some time the defendant went to the insurance company, obtained a claim form and had it filled out - not by anyone from Carpenters. There is some dispute as to

whether the defendant consulted or informed Carpenters about the claim. There is no doubt that by 16th February 1979 it was aware because on that date, two weeks after the vehicle had been brought to the repair shop, the repairs supervisor signed a letter addressed to the manager of the insurance company setting out: "The following parts were found damaged on the above vehicle when dismantled". Then followed a list of parts totalling, $1859.55 and the letter concluded: "Your early attention to this matter would be appreciated" (record p84 exhibit 6). It is possible that the defendant was given this list to take to the insurance company at the time he lodged a claim; there is no evidence.

The matter is not made any clearer by a letter from the insurance company dated 18th February 1982, sought after these proceedings had commenced. It stated that the accident had occurred on 8th February 1979 (it happened on or before 2nd February 1979), and that a claim was lodged on 26th February 1979 (the supervisor had sent the list of parts to the insurance company on 16th February 1979). The letter goes on to say that the vehicle was inspected and that on inspection the assessor found that there was damage to the engine only and that was "of normal wear and tear and in no way could have caused by an accident" (sic; record p87 exhibit 9).

The plaintiff's amended statement of claim is as follows:

> *"The Plaintiff claims from the Defendant the sum of $6,101-06 (SIX THOUSAND ONE HUNDRED AND ONE DOLLARS*

AND SIX CENTS) being the amount due and owing under Bill of Sale No. 78/3361 dated the 18th day of December, 1978 details of which as follows:-

Purchase Price		*$7,000-00*
Comprehensive Insurance		*616-00*
Bill of Sale cost		*131-00*
Total Purchase Price		*$7,747-00*
Less Deposit		*2,583-00*
		5,164-00
Less amount received for seizure and sale under Bill of Sale		*1,400-00*
		3,764-00
PLUS ADDITIONAL COST		
(a) Additional Sum	*1,051-19*	
(b) Bailiff fee	*21-00*	
(c) Insurance	*216-50*	
(d) Additional 10% interest charge on arrears of instalment	*821-83*	
(e) Advertising cost	*94-50*	
(f) Parts and Labour cost for repair word done by Plaintiff at Defendant's request including parts	*132-04*	*2,337-06*
		$6,101-06

2. The truck No. AJ719 was repossessed and sold upon the Defendant defaulting on payments as agreed.

3. Demand for payment has been made but the Defendant has refused and/or neglected to pay.

WHEREFORE THE PLAINTIFF CLAIMS:-

(a) Judgment for the sum of $6,101-06 (SIX THOUSAND ONE HUNDRED ONE DOLLARS AND SIX CENTS)

(b) Costs

(c) Any further or other relief which to this Honourable Court may see."

The amount of $216.50 was said at the hearing to be an additional cost of preparing the bill of sale, not insurance. There was a defence and counter claim. Paragraph 2 of the amended statement of defence claims that the bill of sale is

"void for non compliance with the Bills of Sale Act". It gives no details. It goes on to allege that the plaintiff "failed to take and/or neglected to take and/or omitted to take and do all things necessary to recover the loss(es) from the Insurance Company....." (record p9). Nothing else of relevance is to be found in it. Apart from the claim of invalidity (unspecified) how this could possibly provide a defence to the claim is not made clear; the defence goes on to claim that the defendant suffered loss as a result, but this adds nothing by way of defence. The statement of defence then proceeds:

> *"9. THAT further and/or in the alternative the Defendant will seek to set-off the amount (if any)..."*

(record p9). Likewise this adds nothing by way of defence. It can be noted that apart from the claim of invalidity there is no complaint made about any of the amounts specified in the statement of claim.

The defendant also filed a counter claim. The evidence is that while he himself was not able to drive, he bought the vehicle for the purpose of carrying out cartage or haulage contracts. There is evidence from which it can be inferred that the plaintiff was made aware of the reason why he purchased the vehicle or what he proposed to use it for. At any rate the defendant's counter claim, after making allegations that were totally unsupported or denied in the evidence makes this claim:

"18. THAT the Defendant as a result of the actions and/or omissions and/or default of the Plaintiff its servants and/or agents suffered loss and damages."

Particulars under this head claimed loss of earnings under two contracts and, for some reason, $8000 alleged to be the value of the truck. Perhaps it was intended to relate to the alleged wrongful seizure. But the next paragraph of the counter claim claims loss and damages as the result of the wrongful seizure, although it gives no particulars. Apart from the wrongful seizure there is nothing in the counter-claim that would give any hint of the cause of action alleged.

Had the plaintiff moved to strike out the defence and counter claim then, except perhaps as to the claim of invalidity and wrongful seizure, it must have succeeded. As it was the hearing moved off, but to cover what issues was never elucidated. After wandering along, the evidence finished and a number of submissions were put to the trial Judge. He reached a conclusion that on the plaintiff's case, far from it being able to succeed, the defendant was entitled to a credit balance of $5411.54. This is somewhat surprising, to say the least, in the light of the pleadings to which we have referred. We shall come back to the details. By some arithmetic the Judge reached a conclusion that in the plaintiff's case the plaintiff owed the defendant $188.46. To which, for good measure, he added the sum of $350 "which the plaintiffs (sic) have not accounted for", leaving a total amount owing by the plaintiff to the defendant of $538.46. The judgment concluded: "On the counter-claim I

give judgment for the defendant for $538.46 with costs". The matter of loss of earnings was not even mentioned.

The plaintiff's reply and defence to counter claim claimed that the plaintiff was not made aware of any accident until after seizure of the vehicle under the bill of sale, and that if the defendant lodged a claim with the insurance company the plaintiff was not at any relevant time aware of it. This is patently false on the material that we have referred to.

We would draw attention to the fact that the only claim made by the plaintiff was that the amount claimed was owing under the bill of sale. No other contract, express or implied, or other cause of action was alleged as a ground for the indebtedness. As mentioned earlier the only defence to be gathered from what was called an amended defence was one of invalidity of the bill of sale; there was no cause of action pleaded in the counter-claim.

The Judge sought written submissions. Since the defences (except perhaps for one) were non-existent, and there were no issues formulated, the 36 pages of submissions do not assist greatly. We therefore think it best to take the findings of the Judge and see whether, in our opinion, they can be supported on what passed for pleadings and on the evidence adduced.

First of all the Judge found that there had been no accident. He said:

> *"He never reported the accident, if there was one, to the police. He just said his driver had caused the accident. The garage supervisor, Raj Kumar Singh (PW3) said that there was no accident - there was no damage at all to the body of the truck to indicate that there was an accident. So the question as to who should have made the claim to the insurance company does not arise."*

(record p65). Seeing there was no other vehicle involved we do not see the relevance of not reporting. Seeing that it had impaled itself on a rock it does not seem that the absence of damage to the body is of much relevance. The defendant did tell Raj Kumar Singh, Carpenter's supervisor of the claim made to the insurance company because that same person sent off a letter to the insurance company on 16th February 1979 containing a list of damaged parts and seeking early attention to the matter - somewhat peculiar behaviour if he did not know it had been claimed that the vehicle had been involved in an accident. However, for reasons earlier mentioned we agree that the question of who should have made the claim to the insurance company does not arise.

The next matter dealt with was whether the bill of sale was fraudulent and void. Section 7 of the Bill of Sale Act Cap 225 provides, so far as relevant here:

> *"7. Every bill of sale to which this Act applies shall be duly attested, and shall be registered, within seven days after the making or giving thereof*

> *if made or given in Suva, or within twenty-one days if made or given elsewhere than the city of Suva, and shall set forth the consideration for which such bill of sale was given; otherwise such bill of sale shall be deemed fraudulent and void."*

The Judge said:

> *"It is the defendant's argument that consideration was not truly statèd and it must be held to be void. PW1, Michael Low stated that credit price of the truck was $7747.00. He said $7000 was for the truck, $131 was for bill of sale cost and $616.00 was for insurance. One could see that at the back of the bill of sale it was stated that cash price was $7000.00 but the credit price is $8051.19. This could not be true. The additional sum of $1051.19 is charged in "lieu of interest" but in fact it is the interest as stated by PW1. This is not true consideration. Bill of costs of $131 ought not to have been added to be price simply because no debt in respect of the bill of sale costs became due and payable until after the execution of the bill of sale. Also the insurance of $616 could not be added to the consideration. True consideration was not stated."*

(record p66). The Judge held that the bill of sale was fraudulent and void because it did not truly state the consideration.

We think it preferable to set out the part of the bill that relates to consideration so that there can be no doubt about its actual terms or to what our reasons for judgment relate. After the date and the names and description of the parties it proceeds:

> *"WHEREAS the Mortgagor has requested the Mortgagee to sell to the Mortgagor the chattels described in the schedule hereto for the price of $7,747.00 (SEVEN THOUSAND SEVEN HUNDRED AND FORTY SEVEN DOLLARS) which the Mortgagee has agreed to do upon the Mortgagor now*

paying to the Mortgagee a deposit of $2,583.00 (TWO THOUSAND FIVE HUNDRED AND EIGHTY THREE DOLLARS)and entering into these presents to secure the payment of the balance thereof namely the sum of $5,164.00 (FIVE THOUSAND ONE HUNDRED AND SIXTY FOUR DOLLARS)

NOW THIS INDENTURE WITNESSETH that pursuant to the premises AND IN CONSIDERATION of the Mortgagee at the request of the Mortgagor agreeing to accept payment in the manner hereinafter provided of the said sum of $5,164 (FIVE THOUSAND ONE HUNDRED AND SIXTY FOUR DOLLARS) now owing by the Mortgagor or the Mortgagee (as the Mortgagor hereby acknowledges) AND IN CONSIDERATION of all other present and future indebtedness of the Mortgagor to the Mortgagee whatsoever for goods supplied or work done. THE MORTGAGOR DOTH HEREBY GRANT ASSURE TRANSFER ASSIGN AND SET OVER to and unto the Mortgagee ALL AND SINGULAR the said chattels together with all the tools wheels tyres tubes passenger bodies seats spare parts equipment fittings attachments and accessories now and hereafter thereto appertaining or belonging or used in connection therewith TO HAVE HOLD RECEIVE AND TAKE the said chattels unto the Mortgagee absolutely SUBJECT nevertheless to the proviso for redemption hereinafter contained AND THE MORTGAGOR hereby COVENANTS with the MORTGAGEES as follows

The Mortgagor will pay to the Mortgagee the said sum of $5,164.00 (FIVE THOUSAND ONE HUNDRED AND SIXTY FOUR DOLLARS) together with a sum in lieu of interest thereon (hereinafter called "the additional sum") fixed at $1,051.91 (ONE THOUSAND AND FIFTY ONE DOLLARS AND NINETEEN CENTS) on the last day of each month...."

The truck involved here was described in the schedule.

Unassisted by authority we would have thought that the bill of sale set forth the consideration, viz $7,747.00, referred to the deposit of $2,583.00 and the balance payable viz $5,164, and then went on to stipulate as the first covenant that the defendant would pay that sum together with a further sum of $1,051.19 "in lieu of interest". Leaving on one side any question of merits, the fact is that the defendant entered into

such a covenant and had this thing explained to him before he signed it. Having set out the consideration the bill records a promise to pay it, along with the additional sum which was not the consideration but a sum in lieu of interest.

In reaching the decision that he did, the Judge dealt with the matter of repairs and the mortgagee's sale of the vehicle in its unrepaired condition for $1400. He decided that the truck ought to have been repaired by the company before it was sold, and that had it been properly repaired it would have fetched $7000 upon sale. "I find that the depreciation in value of the truck from $7000 to $1400 is an item that must be borne by the plaintiffs."

We do not wish to elaborate on our surprise at this aspect, nor to examine the reasons which led the Judge to reach this extraordinary conclusion. The simple facts are these.

The defendant had the vehicle towed to the company's repair depot and gave instructions for the repairs to be done. He signed an authority for this purpose. There is no evidence that any of the repairs were required as the result of an accident, and the only evidence is to the contrary. It probably does not matter anyway. The repairs were commenced. The defendant defaulted in payment of the first instalment due under the bill of sale, and attempts to contact him were unsuccessful. The

vehicle was then repossessed. Work on the repairs ceased, not surprisingly. There is no evidence at all that the defendant sought to have or demanded that the repairs be completed.

Now the position in law as we understand it, and assuming that the bill of sale was not void, was this. Carpenters was at all relevant times the owner of the vehicle. The bill of sale was a mortgage of a chattel by which the mortgagor in express terms transferred the vehicle to the company; it contained the usual provision permitting the defendant to retain possession and the usual proviso for redemption. It does not matter that in the insurance policy the defendant was described as owner and "Carpenters Motors" (whatever that is) as mortgagee. At law Carpenters owned the vehicle. Upon lawful repossession it was the owner in possession and entitled to sell. As lawful owner in possession it was entitled to sell "in such manner and in all respects" as it might think fit (bill of sale clause 7, record p71). It owed no duty to the mortgagor to repair, restore or do anything else, except to conduct a bona fide sale. In the event of there being a deficiency after credit had been given for the proceeds of sale, the mortgagor was required to pay it to the mortgagee (clause 8, p72).

The repairs which the defendant had asked Carpenters to carry out were the subject of a different contract; they had nothing to do with the bill of sale. If there had been a breach of that contract by Carpenters for failure to repair then the

defendant would have been entitled to damages. Naturally enough he made no such claim. It would have been fairly difficult to sustain, to say the least, when the owner had lawfully taken the vehicle back into its possession because of the defendant's default and had ordered the repairing to stop, as was the case. A suggestion that Carpenters was required to complete the repairs to the vehicle or alternatively to give the defendant a credit of $5600 ($7000 less $1400) is simply not sustainable. At one stage the Judge said this:

> *"From 2nd February 1979 the truck was in possession of the plaintiffs. They had the right to sell it but before selling it they clearly owed a duty to the defendant to repair the truck properly and to maintain it in that condition until sale. There is no evidence from the plaintiffs that they ever did this.*
>
> *I think that what I am concerned with is what was the truck's probable value if the plaintiffs carried out proper repairs. I see no reason why the truck should not have been restored by the plaintiff to its value when it was sold to the defendant i.e. $7000.*
>
> *I am satisfied that the plaintiffs repossessed themselves of the defendant's truck whilst it needed repairs; on being properly repaired it would have realized $7000. I do not accept defendant's valuation of the truck at $8000. The plaintiffs failed to properly repair it and whilst it was in their possession its condition deteriorated to such an extent that it was sold for $1400.*
>
> *I find that the depreciation in value of the truck from $7000 to $1400 is an item which must be borne by the plaintiffs."*

(record p67). Nothing of this nature was pleaded and no basis was advanced to support these conclusions. Except for the reference to $8000 we are not able to agree with any of it.

We must make reference to some of the particulars of claim and the various items dealt with by His Lordship.

It will be recalled that the defendant at the time of entering into the bill of sale paid the sum of $350 handling fees and received a receipt for the same. This had nothing to do with the bill of sale. Naturally it was not mentioned in the plaintiff's claim - it had been paid. It was not mentioned in the defence or counter claim. It was not mentioned in the defendant's written submissions. Yet the Judge, having reached a figure of $188.46 owing by Carpenters to the defendant, proceeded: "To this sum it must be added $350 which the plaintiffs (sic) have not accounted for". No reasons, nothing. We will not say more.

One main reason for not allowing the plaintiff's claim in respect to certain items claimed was a finding that the bill did not state the consideration and hence was rendered void pursuant to s.7 set out earlier herein.

There seem to be three reasons why the Judge considered or counsel suggested that the bill did not set forth the consideration and hence fell foul of s.7. They were (i) that the two sums for costs and insurance could not be added to the $7000 so as to make up the consideration for which the bill was given (ii) that the "additional sum" was part of the consideration and was not stated as such (iii) the "additional

sum" was in fact interest and not "a sum in lieu of interest" rendering untrue the consideration.

As to (i), we know of no reason, and were not referred to any authority that would establish, why the costs and insurance could not legally be made part of the consideration for the bill. The simple legal analysis of a common law mortgage whether of real or personal property is that the proposed mortgagee agrees to provide money to enable the proposed mortgagor to acquire the property, on the basis that when he does so the mortgagor will immediately sell or assign the property to the mortgagee for the amount that the parties agree upon, with a right for the mortgagor to buy it or have it transferred back to him (the equity of redemption) often, as in this case, upon payment of that amount by instalments. The price that has to be paid to enable the mortgagor to acquire the property is incidental only; the consideration between mortgagor and mortgagee, whoever it might move from or to, is the amount which the parties agree is to be paid by the mortgagor to the mortgagee to obtain the benefit of being able to acquire the property by means of the money lent to him.

Now why the parties cannot agree that that amount is to include the costs that the mortgagee has incurred or will incur to have the documents prepared, stamped (which one might imagine could not be incurred until after execution) and so on, and the cost of insurance cover for the first year of the mortgage, we

are unable to understand, and we have not been told why. The bill contained a provision (clause 14) requiring the defendant to insure the vehicle and keep it insured. It is clear that the policy was to be effected by the company, and it was, on 18th January 1979 (record p.78). One presumes that the premium did not become payable until after the bill was executed. Anyway, there is no reason why the sum to be paid by the company as the premium could not be included in the loan and form part of the consideration. Here, the price at which the mortgagee or grantee was prepared to do business with the mortgagor, $7,747.00, the consideration, was the amount for which the mortgagor could acquire the vehicle, $7000.00, plus the mortgagee's costs and the cost of insurance. Instead of asking the mortgagor to pay those sums separately they were added in as part of the consideration and became payable by instalments. There is no reason why not.

At the risk of being tedious, because the matter does not warrant pursuit, an analogy could be drawn between this and the case where the owner of unencumbered and uninsured property wishes to borrow a sum of $x on the security of his property. A mortgagee agrees to lend him the money on the security of his property but on the basis that the amount covered by the mortgagee is to be $x plus a nominated sum for his costs and the costs of insurance which he, the mortgagee, will pay. The consideration for the mortgage is not $x, but an amount that is $x plus the amount for costs and insurance. And if the

mortgagor is prepared to agree it does not matter when the document recording it is executed by him.

As to (ii), the suggestion is that the sum of $1051.19 - "a sum in lieu of interest (hereinafter called "the additional sum") fixed at $1051.19..." formed part of the consideration, and hence that the bill did not correctly state the consideration. But it is clear from the terms of the bill itself that it did not. There is no law which says that interest on the consideration is itself to be regarded as part of the consideration. The sum in question was clearly a capitalisation of interest so that it could be paid by instalments, thus avoiding continuous calculations of interest on balances of capital outstanding, and payments made accordingly. It was separately described and dealt with; it was not in the body of the deed but contained in the first covenant. We know of no reason why, and were not given any reason why, a capital sum representing interest on the balance of money owing after deducting the deposit from the consideration should itself be treated as part of the consideration. We do not believe that in this case it should be.

As to (iii) above, the matter does not arise if the sum of $1051.19 is not to be treated as part of the consideration, as we have decided. But to suggest that the description that it was charged "in lieu of interest" when it was in fact interest is misleading in some fashion is not something that we feel we should pass by sub silentio.

It would appear to us that this sum of $1051.19 has been calculated on the basis of simple interest on the sum of $5164.00. This is the evidence (record p.61), although we rather feel that a repayment period of 22 months and not 24 should have been used. Later herein we shall refer to a provision in the bill in which it is stated that the additional sum of $1051.19 "is equivalent to interest at the rate of 19% p.a. if instalments are paid promptly" (record p.73). Whilst we have not done the arithmetic, we have no reason to suppose that this is not correct, and it was not the subject of challenge. This means that the sum of $1051.19 was an up-front sum to equate with interest payable at 19% on a diminishing capital, that is to say $5164.00 reducing by instalments of $282.00 per month.

In disallowing this sum the Judge seems to have relied upon and followed a decision of Kermode J in the case of Carpenters Fiji Ltd v Bali Mohammed (Civil Action 449 of 1984) to be found in Vol 1984 Civil Actions p.260). It would seem that that case involved a bill of sale the printed terms of which appear to be the same as in the present case; it certainly included a sum described as a "sum in lieu of interest" and "additional sum". In that case his Lordship said (p.264):

> *"The "additional sum" earlier referred to is the second matter which calls for comment. It is not in fact a sum "in lieu of interest" and that statement in the Bill of Sale is misleading if it is not in fact, a false statement. The sum is in fact three years interest calculated in advance at 10% on the balance sum owing...."*

We would not take such a harsh view of the description. Interest is normally paid or credited at the end of a period, calculated on the balance as it exists at the end of the period or calculated on a daily or some other periodical basis for the period for which the interest is to be credited or debited. "Interest" in ordinary parlance is never something that is payable in advance. In the case before Kermode J, as in the present one, the rate of interest, if payable in a conventional way over the period involved in repayment, was stated, viz 19%. Payable immediately on the amount owing it was said to work out at 10%. By agreement between the parties, a lump sum of that amount was to be paid at the time the principal amount was lent.

We have no difficulty in describing something agreed to be paid as a lump sum at the time of entering into the bill and before interest in its conventional sense began to accrue as something "in lieu of interest", particularly as no "interest" in that sense would be payable thereafter (except where there was default).

Incidentally the whole of the amount stated to be in lieu of interest was allowed as a valid charge by Kermode J. (pp.271-272) in the case we have referred to.

The claim for $1051.19 the Judge dismissed in the following two sentences (record p.66)

> *"The additional sum of $1051.19 is charged in "lieu of interest" but in fact it is the interest as stated by PW1. This is not true consideration."*

For reasons we have tried to explain we do not agree.

The Judge adverted to another matter that he relied upon to make the finding that he did. That was the terms of that part of the document which appeared at the very end, just before the attestation. They were:

> *."In compliance with instructions from the Central Monetary Authority, the mortgagor states that:*
>
> *Cash price $7,000 less 2 1/2%*
> *Credit price $8,051*
>
> *The additional sum is equivalent to interest at the rate of 19% p.a. if instalments are paid promptly."*

Apart from the fact that it sets out the cash price (not the consideration), the credit price, which is the cash price plus the additional sum of $1,051.19 already mentioned, and asserts that these are what "the mortgagor states" (i.e. the defendant), this is not explained. No questions were put to any witness about it. But in the passage from the reasons for judgment quoted above the Judge seems to regard it as indicating that the bill did not state the "true consideration", and hence contravened s.7 (supra).

While this aspect may be unexplained, we do not think that it has any bearing on the matter of whether the bill of sale set

forth the consideration for which it was given. The bill of sale does so, in the manner we have already quoted. If for some reason at the end of the bill of sale it refers to the cash price and additional sum, the sum referred to in the first covenant, and explains how the additional sum has been calculated, we are not able to agree that the bill of sale does not set forth the consideration for which it was given.

While we are satisfied that this portion of the bill has nothing to do with the matter of consideration, we might mention that it was the case in 1978, when this bill was executed, that the Central Monetary Authority of Fiji existed, having been set up pursuant to the Central Monetary Authority of Fiji Act, No. 1 of 1973. It had certain powers with respect to banks and financial institutions. It had powers, inter alia, to prescribe and monitor the maximum rates of interest. But by s.37 these powers were able to be extended to "any person having as a principal object of his business the extension of credit". We have not been able to find any Gazette publication or written notice which related to the extension of credit by means of bills of sale. The terms of the relevant portion of the bill of sale under scrutiny in this case would perhaps enable one to infer that in 1978 there was some form of extension. However, as the particular portion of the bill of sale in question has nothing to do with the matter of consideration it is not necessary to pursue this matter further.

If we have reached the wrong conclusion about the bill stating the correct consideration, and subject to what we are about to explain, the consequences would have been that at least some of the money claimed by the plaintiff could have been owing, notwithstanding that s.7 provides that the bill should be void and unenforceable. This result is said to flow from what was decided in the case of Faiz Mohammed Khan Sherani v Latchman & Others 14 FLR 31 (CA), known as Latchman's case. In that case the Court of Appeal appeared to hold that even if the consideration was not stated in the bill as required, s.7 did not operate to destroy the bill, but only to render the security unenforceable; as such that would deny the grantee mortgagee the right to seize the goods covered by the bill, but leave on foot the covenants in the bill, including the covenant to pay any monies owing. It was said in that case that fraudulent and void meant a fraud on creditors of the grantor, and hence void as against them, to the extent that the grantee's security over the goods did not exist. Non compliance with s.7, according to the decision in Latchman's case, left the covenants in the bill intact, so that the personal covenant to repay remained, and if necessary, could be sued upon. The statement of claim in this case alleged money owing under the bill of sale, so that it was adequate in any event to seek recovery of moneys owing under the covenants.

But if s.7 did apply, and the Judge proceeded on the basis that it did, we feel that it is not irrelevant for us to state what we consider would be the ensuing situation.

The vehicle had been delivered by the defendant to Carpenters repair depot. He gave instructions and authority to carry out repairs and what was necessary. Carpenters commenced to do so. There is no complaint or allegation that it was not properly in the process of doing just this. The defendant failed to make the first payment due under the bill of sale. Notices were sent to him. It does not matter whether they were properly sent or not, because they were a preliminary to a seizure which, upon the above premise, the company had no right to make. A notice of seizure was sent, and served, as we have said earlier. Failure to pay resulted in seizure and the cessation of repairs. But the vehicle was seized in a dismantled state, and that state had nothing to do with the bill of sale; it had resulted from instructions from the defendant. He did not come near the place. A notice of sale, which did not have to be sent by registered post, was returned unclaimed. If the company was under any obligation to continue the repairs, it was one arising under the contract, not the bill of sale. If it was in breach of that obligation, an action for damages would lie. Quite clearly in this case the defendant would have had no chance of success; he did not bring any such action for damages for breach of contract. That was simply not raised. So the company seized the goods in the state they were in, and sold them as such.

If there was no right to seize as postulated, then the company committed a trespass to goods and then conversion. So

that any loss to the defendant by reason of wrongful seizure could only have amounted to the loss if any, arising from trespass to goods or conversion. There is no evidence that the goods were sold for other than their proper value. They could not have been used for any cartage purposes until they were repaired. Not only was there no cause of action pleaded, but the Judge made no finding of any loss on the counter claim arising from inability to use the vehicle - rightly in our view. The defendant was credited with the amount realized on sale.

We turn to the remaining submissions that were put to us.

In his submissions, counsel for the defendant claimed that evidence had been given by the credit controller of the defendant that "the defendant was at liberty to pay before the due dates and redeem the chattel. He said his company will make the necessary adjustments" (record p.29). He sought, upon the basis of this evidence, to base a submission on s.11 of the Bills of Sale Act, which, so far as relevant provides:

> *"11. If a bill of sale is made or given subject to any defeasance, or condition, or declaration, of trust, not contained in the body thereof, such defeasance, condition or declaration shall be deemed to part of the bill, and shall be written on the same paper or parchment therewith before registration; otherwise the registration shall be void:..."*

The record containing the evidence has no reference to any such evidence, the Judge does not mention it, and it is

purported to be made the subject of a ground of appeal by this paragraph in the skeleton argument of the respondent (para 4):

> *"The Respondent says that the Bill of Sale was fradulent null and void for non-compliance of the Bills of Sale Act. The relevant Submissions appear on pages 21 to 36 of the Record."*

If it is proper to deal with this aspect on the appeal, it can be done so very shortly. Latchman's case was a case dealing with non-renewal of registration of a bill of sale after 5 years and the consequences of not doing so as provided by s.14. That section provided:

> *"14. The registration of a bill of sale must be renewed, or further renewed, as the case may be, at least once every five years, and, if a period of five years elapse without such renewal or further renewal the registration shall become void."*

The Court in effect held that non-compliance with s.14 caused the registration under s.7 to become non-existant and hence the bill became fraudulent and void. We have already stated what the Court held those words meant; they did not affect the covenants, but only the security. Quite clearly s.11 should be interpreted as having the same effect. If it does, for reasons already given, the defendant is still liable to pay.

For ourselves, we do not think that an indulgence such as that said to have been adverted to by Mr Low would amount to a "defeasance, or condition, or declaration of trust" within the meaning of s.11. It is unnecessary to decide.

A further submission was made to us that the provisions of clause 18 of the bill, which permitted the grantee to charge, simple interest at 10% on any amounts owing by way of instalments of the principal sum, rendered the bill void in the above sense. It appears that the sum of $821.83 listed as one of the items in the statement of claim relates to such a charge. The Judge disallowed it, saying (record p.68):

> *"I also do not allow the claim of ... $821.83 which is claimed as an additional 10% interest charge on arrears of instalment."*

It was, of course, the duty of the Judge to give reasons for his decision. So upon what basis he decided to disallow this part of the claim we have no idea. As we mentioned earlier, the lump sum of $1051.19 was in lieu of interest, and a legitimate charge included in the sum to be repaid by instalments. Why interest on overdue instalments cannot be charged was never explained to us. Why, and under what provision of the law, even if interest charged on overdue instalments were to contain some element of interest upon interest, that renders either clause 18 or the claim here invalid was never explained, and we know of no reason. We do not agree with the disallowance.

The remainder of the items hardly rate a mention. The Judge disallowed the sum of $216.50, said to be additional bill of sale costs. He gives no reason why. There is no provision in the bill allowing further costs to be charged; if it was claimed by the company to be a present indebtness at the time the bill was executed, or a future one, coming within the provision of the deed which refers to the consideration, namely "AND IN CONSIDERATION for all other present and future indebtness of the mortgagor to the mortgagee whatsoever for goods supplied or work done" (see earlier herein) then the bill possibly contravened s.7 and was void. In the statement of claim it was claimed as arising under the bill of sale. But no argument was addressed to us on this aspect, nor the bailiff's fee - $21.00 or advertising costs - $94.50. If we are correct, the repairs $132.04, which the Judge allowed, arose under a separate contract and were not claimable under the bill of sale. The sums were not the subject of appeal or cross appeal and we do not propose to deal with them.

In the result the plaintiff's appeal succeeds. The judgment entered in favour of the defendant on the counter claim for $538.46 with costs is set aside and in lieu thereof there will be judgment entered for the plaintiff in the sum of $6101.06 with costs both in the court below and in this court.

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal.

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Peter Quilliam
Judge of Appeal