IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU088 of 2019
[In the High Court at Suva Case No. HBC 224 of 2016]

BETWEEN	:	**BANK OF BARODA**
		Appellant
AND	:	**FUNWORLD CENTER (FIJI) LTD**
		Respondent
Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Dayaratne, JA**
Counsel	:	**Mr D. S. Naidu for the Appellant** **Mrs A. Chand for the Respondent**
Date of Hearing	:	**04 November 2022**
Date of Judgment	:	**25 November 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Lecamwasam JA.

Lecamwasam, JA

[2] This is an appeal preferred by the Defendant-Appellant against the Judgment of the learned High Court Judge at Lautoka dated 23rd day of September 2019.

[3] The case concerns a claim for damages, brought by the original Plaintiff (Respondent before this court who will hereinafter be referred to as the Plaintiff-Respondent) against the original Defendant (Appellant before this court who will hereinafter be referred to as the Defendant-Appellant). The claim is in relation to damages caused to the Plaintiff-Respondent's hotel and other articles during the time the Defendant-Appellant was in possession of the hotel under the purported mortgagee sale.

[4] It is common ground that the Plaintiff-Respondent had borrowed a sum of $4million in 2008 from the Defendant-Appellant. The land on which the hotel is situated was pledged as security against the above sum. The Defendant-Appellant took possession of the hotel and premises under cover of mortgagee rights on 17th October 2014, evicting the Plaintiff-Respondent and its employees. However, as the Plaintiff-Respondent had paid a sum of $3million in redemption of the mortgage on 7th November 2014, the Defendant-Appellant returned possession of the hotel to the Plaintiff-Respondent on the same day.

[5] After possession of the hotel was returned, the Plaintiff-Respondent had a stock-taking, which had revealed some missing items as well as damage caused to the hotel by the Defendant-Appellant. This had prompted the Plaintiff-Respondent to claim damages (general and special), exemplary damages, and interest, for the loss caused to the hotel.

[6] The Defendant-Appellant disputed the claim for damages of the Plaintiff-Respondent and raised a counter-claim for a sum of $622,262 at the time of filing its statement of defence. It was asserted that the counter-claim was the balance amount payable under the mortgage with interest, at the rate of $150.00 per day from 5th January 2017.

[7] With this background, parties went to trial, at the conclusion of which the learned High Court Judge made the following orders:

1. *There shall be judgment in favour of the Plaintiff in the sum of $150,000.*
2. *The Defendants counter claim is dismissed.*
3. *The Defendants will pay summarily assessed costs of $3000 to the Plaintiff.*

[8] Being aggrieved by the above decision, the Defendant-Appellant filed the instant appeal dated 19th February 2020 on the following grounds of appeal;

1. *That the Learned Trial Judge misdirected himself in awarding damages of $150,000.00 to the Respondent/Plaintiff when they failed to prove their loss, in particular:-*
    a. *The Respondent/Plaintiff failed to adduce any evidence either in the form of inventory or otherwise as to the items lost/stolen/missing.*
    b. *The Respondent/Plaintiff failed to adduce evidence as to income and expenditure in the form of audited accounts.*
    c. *The Respondent/Plaintiff failed to quantify its loss including failing to establish whether such items were partly or fully damaged and failing to consider the overall age, condition and depreciation of such items.*
    d. *The Respondent/Plaintiff failed to introduce any evidence that such items became lost/stolen/missing as a result of Appellant/Defendant's possession of the mortgaged property.*
2. *The Learned Trial Judge misdirected himself on the question of "onus of proof" and in accepting the evidence of the Respondent/Plaintiff's witness without giving any valid or justifiable reasons as to why they were believed.*
3. *The Learned Trial Judge misdirected himself in application of the law relating to mortgagee sale and where mortgagee takes possession of the property.*
4. *The Learned Trial Judge wrongly applied Order 88 of the High Court Rules to this action.*
5. *The Learned Trial Judge failed to appreciate the impact of Section 79 of the Property Law Act Cap 130 and misdirected himself on the application of the same.*
6. *The Learned Trial Judge erred in law and in fact in dismissing the Appellant/Defendant's Counter-Claim despite evidence being led on the same through DW1.*
7. *The Learned Trial Judge failed to appreciate the impact of Section 80 of the Consumer Credit Act 1999 and misdirected himself on the application of the same.*
8. *The Learned Trial Judge was incorrect in finding that the conduct of the defendant during its possession and control of the mortgaged property amounted to willful default and negligence.*
9. *The Learned Trial Judge was incorrect in awarding damages when the Learned Trial Judge found in his judgment dated 23rd September 2019 [para. 38] that "plaintiff did not sufficiently explain how they came into those figures".*

[9] It is common ground that the Defendant-Appellant had taken possession of the hotel on 17th October 2014. The Defendant-Appellant maintains the position that it had issued notice on the Plaintiff dated 22nd September 2014 requesting the outstanding amount to be

paid within 7 days from the date of the notice, failing which it would exercise its rights under the mortgage bond.

[10] Upon the failure of the Plaintiff-Respondent to pay the outstanding amount as requested, and on the strength of the above letter, the Defendant-Appellant had entered the hotel on 17th October 2014. The learned High Court Judge in his judgment declares this entry illegal. On consideration of the facts of this case, it is clear that the Plaintiff-Respondent had been in default of bank instalments for a very long period, which no doubt permits the Defendant-Appellant to exercise its right of a mortgagee sale. However, it can only exercise its rights within the confines of the law. The Defendant-Appellant had failed to comply with the requirements of Section 79 of the Property Law Act 1971, which permits a mortgagee to sell the mortgaged property, albeit at the expiration of 30 days from issuing notice on the defaulting party. The initial issuance of notice by the Defendant-Appellant is in keeping with the requirements of Section 77 of the Property Law Act. However, the Defendant-Appellant had not allowed for the expiration of the requisite 30 days before executing the sale as required under Section 79 of the Act.

[11] The failure of the Defendant-Appellant to comply with the above requirements had caused an otherwise regular action to be irregular, as correctly observed by the learned High Court Judge. Had the bank waited at least till 22nd October 2014, its conduct would have been without blame.

[12] During its period of possession of the property, i.e. from 17th October to 7th November 2014 the Defendant-Appellant had come to some form of agreement to sell the hotel to Tappoos Limited. As a result, Tappoos had placed its own security (Evergreen security) within the hotel premises during the above period to ensure the safety of the premises it intended investing in. Understandably, the Plaintiff-Respondent had been denied entry during this period and had no access to the premises. The Plaintiff-Respondent had inspected the rooms of the hotel and the premises after regaining possession. The action for damages was filed subsequent to this inspection. As per evidence adduced before the High Court, the Plaintiff-Respondent claimed that even though it had made a complaint to

the police prior to instituting action, the police had not taken steps on the basis that the matter is a civil dispute.

[13] With that background, I now advert my attention to the missing/loss items claimed by the Plaintiff-Respondent. I am apprised of three inventories filed by the Plaintiff-Respondent. As suggested by the Defendant Appellant in his written submissions, a careful scrutiny of the inventory starting from pg.112 to 118 reveals there are minor discrepancies in regard to a few of the items. The learned High Court Judge in his judgment has refused to rely on the above inventories on the basis that those inventories were unaudited and unsubstantiated.

[14] However, we should not forget the fact that the inventories were prepared by the General Manager, who is a responsible official of the Plaintiff- Respondent. It is accepted practice for organizations to do their own inventory without relying on auditors or accountants to furnish official audit reports immediately. The employees of the hotel have to first be satisfied that certain items are in fact missing, for which purpose an inventory is useful. PW1, being the General Manager and the person who prepared the inventory, in his evidence spoke to the truth of these inventories. Therefore, having regard to regular business practices, the said inventories cannot be rejected on the basis that those are unaudited and unsubstantiated, merely because those are not signed or audited by an audit officer.

[15] While I am satisfied that some items had been lost during the relevant period, in order not to fall victim to complacency, I will now examine the said inventories thoroughly. I find that the inventory starting from p.112 and the inventory starting from p.354 are more or less identical except for the fact that the list in p.354 contains 112 items in addition 28 items listed under the heading MAINTENANCE.

[16] On comparison of the items in the inventories at pgs.110 and 112, I have found only one discrepancy in relation to the inventory of larger items. The said difference in figures is

only 1, i.e. *79 units of item No. 1* (Akita televisions) at pg.110 are inventoried as missing, while the figure for the same item under item *No.41 in 112 is listed as 14 available out of 94, denoting 80 units* as missing. This illustrative lapse in calculations can be purely attributed to human error. The majority of the other items listed as missing show no such discrepancies in numbers. For instance, *97 electric kettles are listed as lost under item No. 2 in 110,* which identical number is reflected in *112 under item No.32*. The same is true for blenders, shower curtains, blankets, and mini-fridges, with both inventories reflecting identical numbers as missing. The only significant discrepancy is in relation to pillows. *Item No. 12 under 110 lists 72 missing pillows*, while *item No.8 under 112 lists no pillows* as missing.

[17] I believe it is obvious that taking inventory in a large hotel comprising 200 rooms is an onerous task even under ideal circumstances. The Plaintiff-Respondent had caused inventory to be taken in a tense situation, immediately after regaining possession of the premises, as witnessed by PW 2- the former bank manager of the Defendant-Appellant. Given the urgency of the task and the environment that prevailed, minute differences in inventory would have been inevitable. I cannot therefore, agree with the learned High Court Judge rejecting the inventories merely because those were not audited and therefore unsubstantiated.

[18] Be that as it may, the inventories raise other issues besides the above. As per the inventory, some heavy items such as TV sets, tables, washing machines, fridges etc. were missing. It is pertinent to mention that the prospective buyer, Tappoos Limited placed security guards from Evergreen, presumably for the safety of the hotel. It is unimaginable that Tappoos would have permitted the removal of any item from the hotel thereby diminishing the value of the property which was especially to the detriment of the intended buyer. Added to which is the fact that heavy items such as the above cannot be transported without a large vehicle and without the knowledge of the security personnel employed by Tappoos. As per the evidence of PW1, the security personnel had not allowed anyone to enter the premises. Hence it is beyond my comprehension the manner in which some of the large items were transported out of the premises.

[19] Further, in relation to the inventory that appear under paragraph 11 in pg.22 of the Statement of Claim which runs to 108 items, PW1 has categorically stated in evidence at p.527 of High Court Record that, while he did the stocktaking, the costing was done by the lawyers, due to which he is unaware of the actual loss. Upon being questioned by the counsel for the defence as to the accuracy of the stocktaking on the basis that the stock sheet does not include many relevant items, PW1 responded with: *"My stock sheet was right but the stock sheet that was in the writ, I don't know who prepared that one"*. In the absence of PW1's authentication of the stock sheet that is before this court at pg. 22, there is no other evidence to substantiate the same. As there is no evidence to substantiate the preparation of the said inventory, it is not safe for this court to act on it. Therefore, I am compelled to reject the said inventory.

[20] The above inventory is identical to the inventory in pg.354 onwards. Yet, there are grave discrepancies between the inventory in p.22 and that in 110. For instance, the number corresponding to the missing televisions in p.22 is 135 as opposed to the 79 in pg.110. Similarly, the number corresponding to the missing mini-fridges is 85 in p.22 whereas it is 26 in p.110. Due to these discrepancies that cannot be credited to human error nor have been satisfactorily explained on any other basis, I refuse to act on the inventory of pg.22 and 110.

[21] Even though I reject the inventories due to the inconsistencies between them, I am satisfied that some damage has been caused to the hotel. I am aided by the evidence of PW2, who in his evidence at pg.533 has stated that, when he visited the hotel on the request of Mr Imraz, (General Manager of the hotel-PW1) he had observed some items such as TVs and kettles were missing from the rooms and that some of the locks were damaged. He further states that the wires which connect the TVs to the power outlets were cut and that the damaged locks showed some evidence of force being used. However, the Defendant-Appellant asserts that the alleged damage to the Chandelier was pre-existing. No evidence has revealed the exact day or even the approximate period of time in which the damage was caused to the chandelier. The generality of the above evidence suggests that significant

damage has been caused to some of the rooms of the hotel. Therefore, although the Plaintiff- Respondent has failed to prove the exact damage or the value of the damage by way of inventory, I am satisfied that certain damage has been caused to the hotel during the relevant period.

[22] In addition, the loss of income resulting from cancelled reservations claimed by the Plaintiff- Respondent must also be taken into consideration. The Plaintiff- Respondent has had to cancel all the reservations made for the relevant period, i.e. from 17th October to 7th November as evidenced in pgs.148-176 of Vol.1. In the absence of the said evidence regarding the above reservations being challenged in court by the Defendant-Appellant, I presume those entries to be correct. The Plaintiff was deprived of the opportunity to accommodate prospective clients, which undoubtedly led to the loss of substantial income.

[23] As I previously stated, although the Defendant-Appellant had every right to act under the mortgage bond and execute a mortgagee sale, the failure of the Defendant-Appellant to follow the statutory procedure renders its conduct irregular, as observed by the learned High Court Judge. Therefore, in the eyes of the law the mortgagee sale in question is illegal. The execution of the said sale and attendant events caused some damage to the property of the Plaintiff-Respondent in addition to causing financial loss through the loss of income from hotel occupancy during the relevant period. Therefore, I am satisfied that the damages suffered by the Plaintiff-Respondent necessitates due compensation.

[24] This brings us to the question of the quantum of compensation. In relation to the quantum of damages to be awarded in this matter, Richardson, J's observation in **Newbrook v Marshall** (2002) NZLR 606 provides adequate guidance:

> "*where there are variables involved as usually occurs in assessment of business profits or losses, if precise figures had to be proved few plaintiffs could succeed. Where, as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the Court. It is not a matter of*

whether an expert could give a reasoned assessment and could defend the number he or she came up with".

[25] Quoting Lord Mustill in **Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd** [1996] UKHL 3, Richardson J. continues:

"The assessment of damages often involves so many unquantifiable contingencies and unreasonable assumptions that in many cases realism demands a rough and ready approach to the facts."

[26] I am further fortified by the observations of Vaughan William, LJ in **Chaplin v Hicks** [1911] 2LB788 C.A. where he states:

"*The fact that damages cannot be assessed with certainty does not relieve the wrongdoers of the necessity of paying damages".*

[27] On the strength of the above, I am satisfied that this is a fit case where the court must *"do the best it can"* and award a suitable amount of damages to the Plaintiff-Respondent, despite the damage suffered by the Plaintiff-Respondent not being readily quantifiable. Acting on this premise, I have reviewed the damages the learned High Court Judge awarded the Plaintiff-Respondent. After due consideration of the alleged losses suffered by the Plaintiff- Respondent, I set aside the amount of damages ordered by the learned high court judge in his order dated 23.9.2019 i.e. the sum of $150,000.00. I substitute in its place the sum of $100,000.00 in favour of the Plaintiff-Respondent payable by the Defendant-Appellant.

[28] The Plaintiff-Respondent also moved for punitive damages citing the case of **DEVI v NANDAN** [2013] FJCA 104, Civil Appeal No. ABU 31 of 2011, which states:

"*32…. The law is quite clear regarding the granting of punitive damages* ***that there should be some untoward or contumelious conduct or malice on the part of the defendant to justify the award of punitive damages as punitive damages are granted more to punish a wrongdoer*** *rather than with the idea of compensating the person wronged…."*

[29] Given the nature of punitive damages, I do not see any reason to penalize the Defendant-Appellant for its conduct since it resorted to the eviction under the belief that it is entitle to the mortgagee sale, which in fact it was. As I have stated above, the only irregularity on the part of the Defendant-Appellant was the failure to give the required notice of 30 days, which unfortunately rendered the entire procedure illegal. The rationale behind the requirement of giving notice is practical in nature. It is for the other party to prepare to vacate the premises and secure alternative accommodation or to take other incidental steps. The failure to give adequate notice as required is not reflective of any untoward or contumelious conduct or malice on the part of the Defendant-Appellant. Hence, I refuse the grant of punitive damages.

[30] It is also pertinent that the Defendant-Appellant withdrew its' counterclaim at the time of argument before this court. Therefore, any response to the counterclaim will not arise.

[31] For the foregoing reasons, I answer the grounds of appeal as follows:

A. Grounds of appeal 1-5 are answered in the negative. However, the amount of damages awarded is reduced from $150,000.00 to $100,000.00
B. The withdrawal of the counterclaim rendered an answer to Ground 6 redundant.
C. Grounds of appeal 7 and 8 are also answered in the negative.
D. In response to Ground of appeal 9, I state that even when damages cannot be calculated with mathematical precision, in the interests of justice, the court has power to order damages to the aggrieved party in appropriate cases.

[32] For the reasons stated above, the appeal is partly allowed by reducing the amount of damages to $100,000 payable by the Defendant-Appellant to the Plaintiff-Respondent. I order parties to bear their own costs.

Dayaratne, JA

[33] I agree with the reasons and conclusions arrived at by Lecamwasam JA.

Orders of the Court

1. *Appeal allowed in part, by reducing the amount of damages to $100,000.00*
2. *Parties to bear their own costs.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL