

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU0081 OF 2020**  
**[Suva Civil Action No: HBC 98 of 2013]**

**BETWEEN**

**MADHAVAN PRINTERS LIMITED**

***Appellant***

**FIJI DEVELOPMENT BANK**

***Respondent***

**Coram**

Jitoko, P  
Qetaki, JA  
Andrews, JA

**Counsel**

Mr S Parshotam and Ms N Pratap for the Appellant  
Ms N Choo for the Respondent

**Date of Hearing**

14 November, 2023

**Date of Judgment**

30 November, 2023

**JUDGMENT**

**Jitoko, P**

[1] I have read in draft the judgment of Qetaki, JA and agree with his reasons and conclusions.

## Qetaki, JA

### Background

- [2] The appellant (plaintiff in the High Court) is appealing the decision of the High Court at Lautoka made on 20 August 2020 in which its claims for breach of contract were dismissed, and the appellant/plaintiff was ordered to pay \$4,000 costs to the defendant (respondent in this appeal).
- [3] The appellant's action in the High Court was begun by way of a writ of summons, issued on 10 April 2013. In the statement of claim the plaintiff claims the following relief against the defendant:
- A. Damages for breach of contract in the sum of \$46,246.66.
  - B. Damages for unconscionable conduct under the Commerce Commission Decree 2010.
  - C. Interest pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act from 18 January 2011.
  - D. Costs of this action on an indemnity basis.
  - E. Such further or other relief as this Honourable Court deems just and equitable in the circumstances.
- [4] In the notice of appeal and grounds of appeal filed on 23 September 2020, the appellant seeks to set aside the High Court decision and prays that judgment be entered in its favour in terms of the relief sought in the statement of claim. The appellant had advanced three grounds of appeal which are stated below.

### In the High Court

- [5] **Agreed Facts:** The following facts were agreed:

- (i) The plaintiff was at the relevant times the lessee of the lease described as Crown Lease No.4077 being Lot22 on Plan M.2275 (“the lease”).
- (ii) On or about June 2005 the plaintiff was advanced certain facilities by the defendant which the defendant secured by way of a registered Mortgage over the Lease, being Mortgage No. 601113 (“the Mortgage”).
- (iii) On or about 17 June 2010 the plaintiff requested the defendant for a settlement sum to discharge the Mortgage in order for the plaintiff to complete a sale and give an unencumbered title to Shelesh Vishwamantar James Madhavan and Edith Arti Madhavan (“the Purchasers”).
- (iv) By its letter dated 9 November 2010 the defendant provided a settlement letter to the plaintiff under which it advised the plaintiff that the sum of \$157,572.93 was payable by the plaintiff to the defendant and upon payment of which the defendant would discharge the Mortgage.
- (v) The said amount was stated by the defendant to be owing as at 30 November 2010 with further interest accruing on it at the rate of 11.84% per annum.
- (vi) By letter dated 16 December 2010 from its solicitors, the plaintiff objected to the said sum as being correct settlement sum.
- (vii) Over the period 21 December 2010 and 13 January 2011, further communication ensued between the plaintiff and the defendant with respect to the settlement amount where the defendant made some adjustments to the settlement amount.
- (vii) On 13 January 2011, the settlement amount provided by the defendant was \$162,085.00.
- (ix) The defendant paid the settlement sum to the defendant and the defendant discharged the Mortgage.

[6] The plaintiff had produced several exhibits (45 in total) in support of its claims which are listed in paragraph [6] of the judgment at pages 7 to 9 of the record. The list will not be reproduced here.

[7] The appellant had called two witnesses, the first Reverend Philip Madhavan (PW1), who was the primary witness. He is the Managing Director of the appellant and a Minister of the Assembly of God Church. He is a key witness. The evidence he gave was captured by the learned trial judge at paragraphs [8] to [27] of the judgment. These are restated below.

The second witness is Mr Tavanavesi, Manager Research and Policy at the Reserve Bank of Fiji (PW2).

[8] PW 1's evidence at the High court are:

“[8] *The witness testified that the Printing Press was an idea of his late father James Madhavan. The Printing Press had been established in 1952 in Labasa. The witness had joined the firm from the very inception. The press had progressed through the years by purchasing more machines. At one point in time, the name of the press was Madhavan Printing & Publishing Company. Later the name of the Printing Press was changed to Madhavan Printers Limited.*

[9] *In 2004, his family became the sole owners of the Printing Press and a manager was appointed to look after the operations.*

[10] *In 2004, the witness had approached the Defendant, Fiji Development Bank (FDB) for a loan to pay off his 8 other siblings and to buy their interest in the Plaintiff Company. His children were to take over the business once the buyout was completed.*

[11] *The witness testified that he intended to pay each of his 8 siblings \$19,000.00 and to buy their interests in the Plaintiff Company*

[12] *Accordingly, the FDB had approved a loan of \$143,000.00 to the Plaintiff (see copy of Letter of Offer from FDB dated 22 October 2004 (Plaintiff's Exhibit P1). The loan had to be repaid within a period of 10 years. The monthly installment was fixed at \$1,900.00 covering principal and interest. The initial interest applicable to the loan was 9% per annum.*

[13] *Clause 3 of the Letter of Offer sets out the security to be given to the FDB for the purpose of this loan. The security comprised the following:*

- A. *First Mortgage over CL 4077 being Lot 22 on Plan M 2275 Light Industrial Subdivision being 18.3 p with a commercial double storey thereon. Plaintiff's Exhibit P5.*
- B. *Bill of Sale over machines owned by the Company-Plaintiff's Exhibit P2.*

- C. *First Debenture over assets of the company including uncalled capital- Plaintiff's Exhibit P4.*
- D. *Adequate all risk & Insurance Cover over (A), (B) and (C) above respectively with the Bank's interest noted thereon.*
- E. *Joint and Several Guarantees by the directors of the company for total liability-Plaintiff's Exhibit P3.*

[14] *The witness testified that although \$143,000.00 had been approved, \$38,000 from the loan was not drawn by the Plaintiff. Although two cheques were made out for \$19,000.00 each totaling \$38,000.00 payable to one of his brothers and one of the sisters respectively, these cheques were not presented as these two siblings were overseas and since the monies payable to them could not be taken out of Fiji.*

[15] *The witness further testified that he could not recall being given any Brochures of fees and charges by the Defendant during the time the loan was taken. The main document that he could recall that he received from the Defendant was the Letter of Offer from FDB dated 22 October 2004.*

[16] *The witness said that in the years 2006 and 2007, the Plaintiff ran into a lot of financial difficulties. This was due to a downturn in business and also because it was found that the Manager of the Plaintiff Company had defrauded the Plaintiff of approximately \$200,000.00 over a period of two years.*

[17] *As a result, the plaintiff could not make payments to FDB. The FDB made demands for arrears to be cleared and threatened to close down the operations of the Plaintiff if the arrears were not settled.*

[18] *On 16 November 2009, a Bailiff from FDB had come to the business premises and locked the doors of the Plaintiff. The witness had then written a letter to FDB on 17 November 2009 (Plaintiff's Exhibit P17), appealing to them to reconsider their decision.*

[19] *Thereafter, the Plaintiff had engaged Kohli & Singh Lawyers to act for them and to obtain an injunction against the Defendant from the High Court of Labasa (Civil Action No. HBC 65 of 2009). This is confirmed by Plaintiff's Exhibit P18 to 21. Accordingly, on 18 December 2009, the High Court had granted the Plaintiff an injunction restraining the Defendant from interfering with the Plaintiff's peaceful possession of*

*its land and building and also restraining the Defendant from stopping the Plaintiff from operating its printing business from the said premises.*

- [20] *An Inter-Parte Notice of Motion was filed in Court on 11 February 2010 (Plaintiff's Exhibit P23), seeking a dissolution of the said Ex Parte injunction obtained by the Plaintiff.*
- [21] *Eventually, the Court proceedings were fully discontinued on 11 June 2010 and the injunction was dissolved (Plaintiff's Exhibit P32).*
- [22] *The witness testified that he had also written to the Prime Minister's Office seeking redress 'Based on the said communications, the Permanent Secretary to the Prime Minister had addressed a letter to the Chief Executive Officer of FDB, dated 14 January 2010 (Plaintiff's Exhibit P22).*
- [23] *The witness testified that since the Plaintiff was still in arrears to the FDB, he decided to refinance the loan obtained from FDB and transfer the property owned by the Plaintiff (Crown Lease No. 4077) to his son and daughter in law. For this purpose a loan from ANZ Bank was to be obtained. Letter of Offer from ANZ Bank dated 10 June 2010, was tendered to Court as Plaintiff's Exhibit P30.*
- [24] *It is an Agreed Fact that on or about 17 June 2010 the Plaintiff requested the Defendant for a settlement sum to discharge the Mortgage in order for the Plaintiff to complete a sale and give an unencumbered title to Shelesh Vishwamantar James Madhavan and Edith Arti Madhavan ["the Purchasers"]*
- [25] *It is also an Agreed Fact that by its letter dated 9 November 2010 the Defendant provided a settlement letter to the Plaintiff under which it advised the Plaintiff that the sum of \$157,572.93 was payable by the Plaintiff to the Defendant and upon payment of which the Defendant would discharge the Mortgage. The said amount was stated by the Defendant to be owing as at 30 November 2010 with further interest accruing on it at the rate of 11.84% per annum.*
- [26] *It has been agreed that by a letter dated 16 December 2010 from its Solicitors the Plaintiff objected to the said sum as being a correct settlement sum. Over the period 21 December 2010 and 13 January*

*2011, further communication ensued between the Plaintiff and the Defendant with respect to the settlement amount where the Defendant made some adjustments to the settlement amount.*

[27] *Accordingly, it has been agreed that on 13 January 2011, the settlement amount provided by the Defendant was \$162,085.00 and that the Plaintiff paid the settlement sum to the Defendant and the Defendant discharged the Mortgage. The loan to FDB was fully paid off on 18 January 2011.*

[9] The writ of summons was issued by the plaintiff on 10 April 2013, approximately two years two months twenty days after the payment by the plaintiff of its loans to the defendant. This raises other issues, for instance, could the plaintiff have raised any of the issues earlier such as the interest rates, and the various fees and charges, which are chargeable on a monthly basis, information on which could easily be obtained by requesting an updated statement of account, or from the half-yearly or yearly statements of account.

### **Grounds of Appeal**

[10] The appellant urged the following grounds of appeal:-

#### Ground 1

*The learned judge erred when finding in paragraph [56] of his judgment that the Respondent had not acted in breach of the loan contract and without pre-contract disclosure of the details of charges levied against the Appellant.*

#### Ground 2

*The learned judge erred in finding that the Respondent was entitled to levy the following charges against the Appellant;*

<i>Litigation Fees</i>	<i>\$10,777.68</i>
<i>Arrears Fees</i>	<i>\$31,177.23</i>
<i>Interest on undrawn amount of \$39,000.00</i>	<i>\$ 2,501.75</i>
<i>Commitment Fees</i>	<i>\$1,487.52</i>

Security/Demand/Other Fees	\$ 515.30
Service Fees	<u>\$ 247.21</u>
	<u>\$46,246.66</u>

Ground 3

*The learned judge erred by failing to consider and find that the respondent's actions as pleaded in the Statement of Claim in the High Court amounted to unconscionable conduct contrary to section 76 of the Commerce Commission Act 2010.*

**The Law**

[11] Appeals in civil cases are made under section 12 of the Court of Appeal Act. On this case the appeal is made under section 12 (1) (a) that is, from a decision of the High Court sitting in the first instance.

[12] Section 13 provides:

*“For all the purposes of an incidental to the hearing or determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court.”*

**Appellant's case**

[13] **Ground 1 (Breach of contract).** This is a challenge against the learned trial judge's findings in paragraph [56] of judgment:

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

[14] In the next paragraph, the learned trial judge concluded with:

*“[57] For all the aforesaid reasons, I am of the opinion that the plaintiff has failed on a balance of probabilities to establish the case against the*



Defendant. For the above reasons, I dismiss the Plaintiff's claims against the Defendant," (Underlining added)

[15] In support of **Ground 1**, the appellant submitted that:

- (a) The learned trial judge erred when finding that the respondent had not acted in breach of the loan contract and without pre-contract disclosures of the details of charges levied against the appellant.
- (b) Evidence was given on behalf of the respondent that it had brochures which outlined the details of the charges levied by it to its customers. Mr Mahavan (Director of the Appellant) gave evidence that he does not recall the type of brochures but that "*some documents were given*" to him. He gave further evidence that "*certain securities were given and just on those brochures but I would say that I confirm that these was the main document that we had to refer to all the terms and conditions as far as I remember and yes I will be a little recognize those*".
- (c) Mr Madhavan further gave evidence that at no point in time, during the currency of the loan, the respondent communicated with the appellant the types of charges that would be levied on the loan. He gave evidence that he was only explained the content of the offer letter.
- (d) Mrs. Tavanavesi, Manager Legal Services for the respondent, gave evidence: she did not know whether the brochures were even given to the appellant. She further gave evidence that brochures of the defendant's fees and charges were strategically placed at its premises and that further because these brochures were made available there was an expectation that the customers must know for themselves what the fees and charges were.

[16] In support of **Ground 2 – (Litigation fees)** the appellant submitted that:

- (a) On 9 September 2010, respondent charged the appellant litigation fees of \$10,777.88.
- (b) This litigation fee was with respect to Civil Action No.65 of 2009, in High Court of Labasa. The action was for an Order for respondent to produce accounts with an interlocutory application for an injunction. The respondent had sought indemnity costs against the appellant. The action was subsequently withdrawn by the appellant and there were no orders as to costs. The Respondent did not take the issue of costs further.
- (c) The learned Judge in the High Court failed to consider that the respondent had failed to provide any particulars in relation to the litigation submitted by the Respondent. There were no bill of costs tendered by the respondent in Court as evidence of the litigation costs incurred. Despite these issues, respondent was allowed full litigation costs for the Labasa High Court proceedings.
- (d) Law in relation to costs see **2088300 Ontario Limited v 2184592 Ontario Limited** 2011 ONSC 2986, as follows:  
*“A mortgagee may be deprived of its costs, or even ordered to pay costs, if the mortgagee resists the right to redeem, make unfounded claims improperly refuses to account, causes vexatious delay and unnecessary costs, or is guilty of vexatious oppressive conduct.”* (Underlining added) .It is submitted that if the respondent claimed litigation fees (and that it was entitled to them), it must show on evidence an account for the sum claimed.
- (e) Further as costs were not awarded in Court, the respondent is not entitled to claim costs in that proceedings. The respondent did nevertheless charge legal costs (that

too, on an indemnity basis) on the appellant's mortgage and then collected it when the appellant sought to clear its debt to the respondent and redeem the mortgage.

- (f) The evidence of Ms. Tavanavesi, confirmed that there was no specific provision in the Mortgage document that entitled the respondent a right to reimbursement of its legal expenses from the appellant (page 357R). In the respondent's letter to the appellant, it had wrongly maintained that it was entitled to costs pursuant to the mortgage.

[17] In support of **Ground 2-Arrears fees** the appellant submitted:

- (a) The learned trial judge failed to consider that the arrears fee was charged by the respondent and became income to the respondent. It was not a genuine estimate of costs incurred by the respondent when an account went into arrears. This was confirmed by the respondent's witness (page 372 R). The law in relation to penalty income is discussed in **Paciocco v Australia and New Zealand Banking Group** [2014] FCA 35 (5 February 2014) (page 84 R) as:

*“If a stipulation is found to be a penalty, the court will relieve the burdened party of the penalty provided the prejudice or damage to the interests of the other party is susceptible of evaluation and assessment in money terms....”*

- (b) The respondent had charged the appellant an arrears of fee of 2.5% per month of the loan amount due. According to the respondent this was the standard practice of Banks to charge certain percentage of the outstanding loan amount when in arrears.
- (c) Ms Tavanavesi's evidence, confirmed that the Reserve Bank of Fiji together with the agreement of commercial banks, have labelled the practice of levying charges in percentage unfair and unjust (page 322 R). It encouraged banks to charge a standard fee of \$25.00 per month for arrears regardless of the loan amount.

- (d) The respondent's witness was not able to provide the calculation as to how 2.5% was worked out and charges levied to the appellant.

[18] In support of **Ground 2 – (Interest on undrawn amount)** the appellant submitted:

- (a) The parties agreed that the appellant had not drawn \$38,000.00 from the loan amount. The respondent claimed that it had not charged interest in the amount not drawn. This statement made by the respondent was incorrect and it led to the appellant believing that it was not charged interest on the undrawn sum.
- (b) The fact is that the appellant was charged interest on the undrawn amount (which was reflected by cheques that had been drawn but not presented) and which fact was brought to the attention of the respondent.

[19] In support of **Ground 2- (Commitment fees)** the appellant submitted that:

- (a) The appellant was charged a commitment fee for a period of 4 years while its account was in arrears.
- (b) The respondent was not entitled to any commitment fee because it was clear that a sum of \$38,000.00 was not drawn from the principal amount and was no longer required by the appellant.

[20] In support of **Ground 3 (Unconscionable conduct)** the appellant submitted:

- (a) The learned judge had erred in failing to consider the aspect of unconscionable conduct pursuant to section 76 of what was then the Commerce Commission Decree 2010 in his judgment.

- (b) The respondent falls within the definition of a corporation under what was then the Commerce Commission Act. The respondent had to ensure that when doing trade, the appellant was aware of all fee and charges that accompanied the type of loan it was taking.
- (c) Simply an expectation and assumption that the appellant should know the fee and charges when taking a loan is not sufficient.

[21] In conclusion, the appellant submits that the judgment be set aside and the Court determine orders in terms of the Notice and Grounds of Appeal filed by the appellant.

### **Respondent's Case**

[22] The respondent had filed a written submissions on 7 August 2023, and made oral submissions at the hearing through its counsel. It opposes the three grounds of appeal.

[23] In respect of **Grounds 1 and 2** the respondent submitted the following:

- (a) The learned trial judge was correct in finding that the respondent had imposed fees and charges pursuant to the loan contract.
- (b) The Court had clear evidence of the manner in which the fees and charges were calculated for the period 2007 to 2010.
- (c) The appellant's witness Mr Madhavan agreed that his company had defaulted since 2007 and he also agreed that the respondent had been very lenient with his company.
- (d) Exhibit P7 showed the level of arrears.
- (e) On 3 November the respondent had written to the appellant stating that the arrears as at 31 October 2009 was \$35,868.00. On November 17 2009 the appellant had responded and asked for time to pay off all arrears. The appellant did not deny the debt.

- (f) The respondent's submissions in the High Court clearly set out how the debt of \$46,246.66 was made up.
- (g) The learned judge had carefully analysed each different component of the debt. There was nothing wrong or perverse about the learned trial judge's findings.

[24] On **Ground 3**, the respondent submitted that, the sum of \$46,246.66 was based on contract and was justified. Given this finding there could not be any finding that the respondent had acted unconscionably and contrary to the Commerce Commission Act 2010.

[25] That the appeal should be dismissed.

### **Discussion**

[26] From the outset, the submissions of the appellant and the respondent, both written and oral have been considered by the Court. It is not in dispute that:

- (i) There is a contractual relationship between the appellant and the respondent. The relationship is evidenced by the Letter of Offer which the appellant accepted, with the accompanying security documents that were executed emanating from the terms and conditions of the Letter of Offer which the appellant admitted, it accepted and sealed. The terms and conditions of the contract including the rights and obligations of the parties are set out in the documents aforementioned.

[27] On **Ground 1**, in the Court's view, the letter of Offer (Exhibit P1, at page 504 to 509 of Record) should be examined closely and carefully as, after its signing and sealing by the appellant, it became the framework under which the future relations of the appellant and the respondent are to be based and developed, as far as the loan contract is concerned. The following features are highlighted as critical to the resolution of Ground 1 and indeed this dispute:

(i) **Clause 1. General terms and conditions:**

- “(a) The conditions and arrangements set out herein and the obligations imposed on a borrower and the rights and powers held by the Bank in terms of the Fiji Development Bank Act Chapter; 214 as amended from time to time will become provisions and conditions of the bank’s securities and will form an integral part thereof.*
- “(b) The loan funds will be made available against such evidence of expenditure or reports as the Bank may require and the bank reserves the right to discontinue making disbursements or further disbursements of the loan funds at any time without giving a reason.*
- “(c) All out of pocket expenses incurred by the Bank together with the Bank’s usual fees in connection with any of its services will be debited to the applicant’s account and are payable by the applicant irrespective of whether or not the loan is disbursed.*
- “(d) If the loan is not disbursed within three months from today or such other days as may be extended by the Bank, the Bank will have the right to withdraw the approval.*
- “(e) The Bank’s written consent is to be obtained before entering into any arrangement which would involve additional borrowing from any other source or which create additional charges or liabilities on any of the properties secured to the Bank including the granting of specific charges over any chattels or items covered by the Mortgage Debenture to be obtained by the Bank.”*

(ii) **Item 3. Security.** *“Security is to be given to the bank in such form as the bank may require and is to comprise:*

- A. First Mortgage over CL4077 being Lot 2 on Plan M2275 Light Industrial Subdivision being 18.3 p with a commercial double storey-thereon.*
- B. Bill of Sale over machines owned by the company.*
- C. First debenture over assets of the company including uncalled capital.*
- D. Adequate All Risk & Insurance Cover over A, B & C above respectively with the Bank’s interests noted thereon.*
- E. Joint and Several Guarantee by the directors of the company for total liability.”*

(iii) **Clause 4(b) Commitment Fee.** *“The borrower shall pay to the Bank a commitment fee of 1% per annum on the principal amount of the loan not disbursed from time to time. Such commitment fee shall accrue three (3) months from the date the terms and conditions of the loan are accepted or such other*

*dates as shall be mutually agreed to by the parties to the respective dates on which monies shall be disbursed or withdrawn. Commitment fee is to be charged to the account monthly and payment thereof is to be made as set out in Clause 6(b) below.”*

**(vi) Clause 5 Interest.** *“Interest is to begin to accrue immediately the loan or part thereof is disbursed and is to be calculated on the daily balance outstanding at the rate normally charged by the Bank in respect of similar loans the rate at present being 9% per annum. Interest is to be charged to the account monthly and payment thereof is to be made as set out in Clause 6 below. Interest is to be charged to the account monthly and payment thereof is to be made as set out in Clause 6(b) below. The Bank reserves the right to amend the interest rate, without notice, at any time during the currency of the loan.”*

**(v) Clause 6 Repayments.**

*“(a) The commitment fees must be paid within thirty days after the same is charged to the account.*

*(b) The loan is repayable on demand and the arrangement set out below for payment is entirely without prejudice to the terms of the Bank’s securities and is not to be treated as a variation of such terms. Without impairing in any way the right of the Bank to call for the repayment of the indebtedness at any time on demand the borrower undertakes to meet the repayment as under:-.....*

*(c) (i) The borrower may make additional payments over and above the stipulated monthly repayments only upon giving the Bank at least 3 months prior notice, or alternatively, upon the borrower paying the equivalent of 3 months’ interest on the additional sum to be paid; and*

*(ii) If the loan is to be paid off earlier than the stipulated term, then the Bank shall be entitled to be paid, in addition to any other monies due and owing hereunder, interest on the balance sum then outstanding for the unexpired portion of the term hereby granted.”*

[28] In paragraph [56] of the judgment the learned trial judge stated that the fees and charges imposed on the plaintiff by the defendant amounting to \$46,246.66, were in terms of the loan contract and in accordance with the pre-contractual disclosures of the said charges to the plaintiff.



[29] As already stated, it is not disputed that the contract was concluded after the signing of the Letter of Offer and the attendant security documents. The alleged breach of contract stems from the claim, through the appellant's evidence that the disclosures related to fees and charges payable by the appellant to the respondent during the loan period were not disclosed to the appellant, from the commencement of the loan contract and perhaps after too. Specifically, that the Brochure on Fees and Charges were not shown and explained to the appellant. Mr Madhavan had testified that he could not recall being given any Brochures of fees and charges by the defendant during the time the loan was taken.

[30] The main document that Mr Madhavan recalled receiving from the defendant was the Letter of Offer dated 22 October 2004. The Letter of Offer has disclosed what the borrower needed to know on the terms and conditions of the loan with the respondent. The respondent's witness had testified to the availability of brochures and where they are located within the Bank's premises. In my view, the borrower, prior to signing the acceptance of the offer of a loan which contained the essential terms and conditions, must satisfy itself, prior to accepting the offer of the appropriateness and acceptability of the terms and condition, as far as the appellant's obligations are concerned. Any query, clarification or explanation that the borrower needed must be raised at that stage and not after signing of the formal acceptance of the Letter of Offer and prior to the execution of the Securities that are required to be executed and given, including the Guarantee, by the borrower. Any complications regarding those vital and essential loan conditions can be raised on on-going basis as they arise.

[31] In addition:

- (a) Exhibit P6, a letter from the Relationship Manager of FDB, addressed to Managing Director Madhavan Printers Limited date 4 May 2006, did confirm the new fees and charges Brochure for the FDB which was effective from 1 June 2006. The said letter also confirmed that the bank had increased the variable interest rates for all customers by 1% with effect from 1 May 2006.

(b) Exhibit P8, which is another letter from the Relationship Manger Northern Division based at Labasa, addressed to Managing Director of Madhavan Printers Limited, dated 7 August 2006, and stated that the variable interests for all customers were being increased by a further 1% with effect from 1 August 2006.

[32] The onus is on the appellant to prove that the contract between the Bank and the appellant has been breached in the manner urged by the appellant. The appellant has not discharged the onus on the balance of probabilities. This ground fails for lack of merit and is dismissed.

[33] On **Ground 2**, the appellant's grounds of appeal and legal submissions, both written and oral, did not deny that Litigation Fees, Arrears Fees , Interests, Commitment Fees, Security/ Demand & Other Fees, and Service Fees, are payable under the loan contract. The fees are itemized in the contractual documents, especially in the Letter of Offer from the respondent to the appellant, which was accepted by the appellant and in the Mortgage document. In other words, these are legitimate aspects of the administration of the loan agreement, which a Bank or a financial institution in the normal course of its business would impose on its borrowers as their obligation, in consideration of the Bank providing the necessary financial resources for the borrower. As otherwise, the appellant is challenging the legitimacy of the defendant's rights as the financier or lender, to include those items as obligations of the borrower in the terms and conditions of the loan contract. What is being challenged, is the right of the defendant to enforce those conditions upon the borrower. Or to view the nature of those obligations in a different light, as a penalty which is not legally chargeable, or for being fraudulent and unconscionable to the borrower.

[34] The challenge against these obligation has come at the time when the respondent had taken steps to enforce its rights under the loan contract, and at a time when the appellant had successfully negotiated the refinancing of its loan by another lender, and coming after over two years of the settlement of the FDB loan and the discharge of the Mortgage security held by the Bank. I agree with the learned judge's finding that the respondent did not act in breach of the loan contract.

[35] Each item of claim will now be examined as to whether the claim can be sustained or otherwise:

- A. **Litigation Fees.** The defendant contends that the litigation fees were incurred in the action filed by the appellant against the respondent at the Labasa High Court being Civil Action No. HBC 65 of 2009. I have already alluded to the arguments for the appellant in paragraph above. Both the Letter of Offer and the Mortgage No. 601113, dated 3 June 2005 (Exhibit P5) confer a right to litigation fees, more so under the Mortgage in the part referring to “Enforcement Expenses”, meaning and includes any expenses reasonably incurred by FDB or their agents after a breach of any covenants, undertakings or promises of this mortgage which gives rise to;
- (a) FDB taking possession of the property or taking any other action to enforce this mortgage; and/or
  - (b) Preserving or maintaining the property (including insurance, rates and taxes) payable for the property; and/ or
  - (c) FDB taking any legal proceedings for the recovery of the secured money.

The authority for the respondent to claim litigation fees is founded on the Mortgage Contract, as the contract confers rights and obligations to the respective parties to it. Ms Tavanavesi’s evidence at pages 356, at bottom of page to 357, when read carefully, did not confirm that the Bank cannot recover litigation fees. She stated answering Mr Singh’s questions:

*“Ms .Tavanavesi: The fact that there is a breach of covenant that the cutomer hold with the bank that had hindered the enforcement of the bank’s right. From that perspective he would say this is where the notion of enforcement expenses would come in.*

*Mr Singh: No madam we can argue on this but I put it to you there is no such provision. There is no specific provision which allows FDB to debit an account based on legal expenses it has incurred in defending itself. I put it to you madam.*

*Ms Tavanavesi: May not be in mortgage specifically, however, it specifically covered in the statute ,the FDB Act as I've got earlier section 18 a. its brought provision but because the bank has to.*

*Mr Singh: Right. Thank you madam. Just recapping what you've said, it may not be in mortgage specifically but it's covered under the statute and the act."*

The case **2088300 Ontario Limited** (supra), has no relevance and is not applicable in this case, as I hold that the Loan Contract (Letter of Offer and Mortgage), authorised the defendant/ respondent to levy litigation fees, as explained earlier.

[36] **B. Arrears Fees.** Arrears fees is said to be a fee (a flat rate) which is charged on all accounts if the repayment due is not paid within 30 days of the due date. Exhibit D5 indicates the arrears fees is \$30.00 or 2.5% of the arrears whichever is higher. The respondent argues it is justified in charging arrears fee at the rate of 2.5% from the appellant in line with the information in the Brochure. Exhibit P6, a letter from the Relationship Manger Northern FDB, addressed to Managing Director of Madhavan Printers Limited, dated 4 May 2006, where the new fees and charges Brochure for FDB, which was to be effective from 1 June 2006, was being endorsed with the said letter.

The case **Paciocco** (supra), relied on by the appellant would appear to have no relevance in this case, as I hold, as did the learned trial judge, that the defendant now respondent had acted within FDB's powers under the loan contract.

[37] **C. Interest on undrawn amount.** There was no evidence led at trial that the defendant charged the sum of \$2,501.75 on the plaintiff in respect of the undrawn amount of \$38,000.00.Exhibit P42, a letter from FDB to Parshotam & Company, dated 9 November 2019 sated as follows:

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

The said letter from FDB, also stated that the defendant had agreed to waive the exit penalty fee of \$4,604.00

[38] **D. Commitment Fees.** The Letter of Offer from FDB, Exhibit P1, at Clause 4(b) makes reference to the Commitment fees-see paragraph [27] above. The Brochure, Exhibit D5, states that a commitment fees of 1% per annum on principal amount not disbursed from time to time would be levied from the borrower.

[39] **E. Service Fees, Security/Demand/Other Fees.** The Brochure on Fees and Charges allowed for the levying of such fees and charges. As a condition of the Letter of Offer, see paragraph [26](i)(c) above, all out of pocket expenses incurred by the Bank together with the Bank's usual fees in connection with any of its services will be debited to the applicant's account and are payable by the applicant irrespective of whether or not the loan is disbursed.

Ground 3 is dismissed, being without merit.

### **Conclusion**

[40] From the above discussions, it is evident that the amount of \$46,246.66, for fees and charges imposed by the defendant on the plaintiff was in accordance with the terms and condition of the loan contract and in accordance with pre-contract disclosures, between the parties.

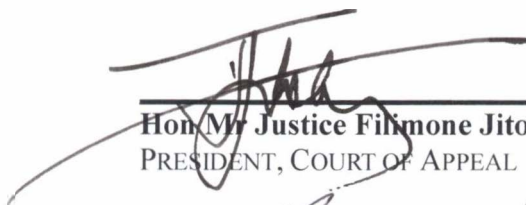
[41] The appellant's appeal is dismissed.

### **Andrews, JA**

[42] I agree with the judgment of his Honour Justice Qetaki, JA and the proposed orders.

**Orders of the Court:**

1. *The appeal is dismissed.*
2. *The High Court decision is affirmed.*
3. *I order the appellant to pay summarily assessed costs in the sum of \$2,500.00 to the respondent within 1 month of the judgment.*



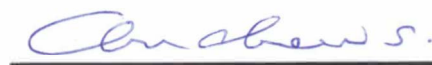
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**Hon Mr Justice Filimone Jitoko**  
PRESIDENT, COURT OF APPEAL



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**Hon Mr Justice Alipate Qetaki**  
JUSTICE OF APPEAL



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**Hon Madam Justice Pamela Andrews**  
JUSTICE OF APPEAL