

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

CIVIL APPEAL NO. ABU 076 of 2022
[High Court at Lautoka Case No. HBC 125 of 2015]

BETWEEN : **GYANESHWAR SANEHI RUP**

Appellant

AND : **CARPENTERS FIJI LIMITED**

Respondent

Coram : **Prematilaka, RJA**
Dobson, JA
Heath, JA

Counsel : **Mr. A. Dayal for Appellant**
: **Mr. M.F. Khalim for Respondent**

Date of Hearing : **07 July 2025**

Date of Judgment : **25 July 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons and orders proposed by Heath, JA.

Dobson, JA

[2] I concur with Heath, JA's judgment.

Heath, JA

Introduction

[3] In December 2009, Mr Gyaneshwar Rup purchased a new Hyundai Santa Fe Wagon (the vehicle) from “Carpenters Motors”. He borrowed money from “Carpenters Finance” to complete the acquisition. Mr Rup fell into arrears under the loan facility (the loan contract).¹ Despite demands, a balance of the loan remained unpaid.

[4] In 2015, Carpenters Fiji Ltd (Carpenters) issued proceedings in the High Court at Lautoka, by which it sought judgment against Mr Rup for the balance due under the loan contract. Mr Rup counterclaimed on the basis that the vehicle was not of merchantable quality. If Mr Rup had succeeded to the full extent of his counterclaim, the loan debt would have been extinguished.

[5] Carpenters claim was heard in the High Court on 19 and 20 September 2022. On 28 October 2022, Seneviratne J entered judgment in favour of Carpenters in the sum of \$71,731.95, together with interest and costs. Mr Rup’s counterclaim was dismissed.² Mr Rup appeals against both aspects of His Lordship’s judgment.

Background

[6] Carpenters has two relevant trading arms. One, “Carpenters’ Motors”, sold the vehicle to Mr Rup. The other, “Carpenters’ Finance”, advanced the money for Mr Rup to pay for it. Although different trading names were used, both the contract for the sale and purchase of the vehicle and the financing arrangement were entered into by the same legal entity, Carpenters Fiji Ltd.³ Unless the context otherwise requires, I shall refer to the company as Carpenters.

[7] In September 2009, Mr Rup applied for finance to acquire the vehicle. By an undated “Quotation”, Carpenters provided a breakdown of the financial part of the transaction

¹ The relationship between Carpenters Motors and Carpenters Finance is explained in para [6] below.

² *Carpenters Fiji Ltd v Rup* [2022] FJHC 789.

³ See also, para [36] below.

to Mr Rup. The price of the vehicle was shown as \$79,500. An allowance was made for the trade in of another vehicle (\$12,000), bringing the price payable down to \$67,500 “VIP ON ROAD”. There were two warranties in the “Quotation”. They were:

- a. *“Standard General Warranty” – 50,000 km or two years, whichever comes first;*
- b. *“Extended Drive Train Warranty” – for 36 months or 100,000 kms, whichever occurs first, from the date of delivery.*

[8] On 30 December 2009, Mr Rup entered into the loan contract to purchase the vehicle. The full particulars of the loan contract are set out in Seneviratne J’s judgment, and are not in dispute:⁴

*“Value of Vehicle: \$79500.00
Less Trade-in Isuzu Trooper Reg. DQ 171(Deposit): \$13,000.00
Loan sum: \$66,500.00
Add Account Est. Fee: \$ 1,565.86
Attestation Fee: \$ 20.00
LTA Charges: \$ 18.00
Interest (13% p.a.): \$44,267.51
Net Finance Sum: \$112,371.37
Repayments: \$1,864.37
Term of the Loan: 60 months.”*

[9] For the purposes of s 15 of the Consumer Credit Act 1999, the loan contract disclosed that:

- a. *The total amount of credit that Carpenters was providing was \$112,371.37.*
- b. *A rate of 13% per annum was to be levied on the net finance amount. Interest was to be calculated on that net amount and was to be charged “upfront for the entire term of the loan”. That meant that the total amount of interest charges payable under the loan contract was \$44,267.51.*

⁴ Ibid, at para 6.

- c. *Repayment of the loan was to be made through monthly instalments of \$1,873 for a period of 59 months and a final payment of \$1,864.37. The first payment was due on 30 January 2010.*
- d. *Clause (J) of the loan contract provided for default notices and a default rate of interest. It stated:*

(J) Default Notice and Default Rate

- (a) If [Mr Rup] defaults in any one of the payments, then [Carpenters] shall issue a 30 day notice to [Mr Rup] to remedy the default.*
- (b) If the default has not been remedied within the notice period, then [Carpenters] may [issue] enforcement proceedings against [Mr Rup].*
- (c) If [Mr Rup] defaults in any one payment, then [he] shall be liable to pay a default rate of 1.75% per month on the outstanding amount. This default shall accrue from the date of default.*

[10] Clause (K) of the loan contract provided that Carpenters “may recover reasonable enforcement expenses (including all legal fees)” in the event of default. Enforcement covered not only legal proceedings to compel payment of the debt but also any steps required to realise the security over the vehicle that Carpenters was taking.

[11] Carpenters registered that security in terms of the loan contract. Security was given through a Bill of Sale which was registered with the Registrar of Deeds and Land Transport Authority.

[12] The relevant mutual promises set out in the Bill of Sale were:

- a. Mr Rup was to pay the “secured money and interest on the secured money” in the manner required, and to pay interest on any judgment that may be obtained against him;
- b. The Bill of Sale was to continue in full force and effect until Carpenters signed an unconditional discharge of both the property and Mr Rup’s personal obligation under the Bill of Sale;

- c. The relevant prerequisite to an unconditional discharge was payment of the secured moneys in full.

[13] Mr Rup took possession of the vehicle on 30 December 2009. Once he took possession, risk passed to him, so that he was responsible for insuring it. On his case, the vehicle began to exhibit problems with its ignition after it had been driven for about 2500 kilometres. In an email that he sent to Mr Chandra (of Carpenters Motors) on 17 March 2010, Mr Rup explained that he had purchased the vehicle for family use and had, since acquiring it, driven about 2500 kilometres before the ignition problem started. He advised that he had told people at the Carpenters' garage about the problem. Two mechanics came to view the car at his home. After some initial work was done, Mr Rup returned for the vehicle which, shortly after, again did not start. Later, work was done at Carpenters garage in Lautoka. Subsequently, Mr Rup moved the vehicle to Carpenters' premises in Suva.

[14] In his email, Mr Rup said that, notwithstanding the efforts of the mechanics, the ignition problem was continuing. Mr Rup expressed his concern that he was paying \$62.43 per day for the vehicle, and asked that it be replaced by a similar vehicle, but new. He based his request on the fact that the vehicle had been breaking down since it was only two months old.

[15] Mr Chandra replied to Mr Rup on the same day. He advised that the vehicle was covered under the manufacturer's warranty, plus the extended Hyundai "Drive Train Warranty". He also noted that Mr Rup had been provided with a replacement vehicle in the meantime. No offer of a new vehicle was made.

[16] Between 1 January 2010 and late 2011, Mr Rup faithfully made the payments due under the loan account. He stopped those payments around November in 2011, when the vehicle's engine was damaged through overheating, due to a radiator hose having burst. While the ignition problem had continued intermittently, on each occasion that occurred it was repaired under warranty at no cost to Mr Rup. After the overheating incident, Mr Rup effectively abandoned the vehicle at Carpenters' garage.

- [17] On 29 June 2012, Carpenters sent an email to Mr Rup in which the vehicle was valued on a “buy out basis”, allowing for the cost of repairs. The value attributed to the vehicle at that time was \$30,000.
- [18] On 21 October 2014, Carpenters issued a Default Notice, by which a total amount payable of \$64,154.08 was claimed. This was inclusive of “default interest” within 30 days from the date of service of the notice, plus costs associated with its issue. The “default interest” was shown, in the Default Notice as being “2.2% per month”. Mr Rup did not comply with the terms of the Default Notice. The vehicle continued to be housed at Carpenter’s garage. Carpenters did not formally repossess the vehicle until 10 January 2015, following the service of the Notice After Repossession.
- [19] The Notice After Repossession informed Mr Rup that the vehicle had been repossessed on 10 January 2015, for breach of the Bill of Sale. Subject to Mr Rup’s right, within 21 days, to redeem, the Notice After Repossession stated that Carpenters would sell the vehicle and credit the proceeds to the outstanding amount. The Notice After Repossession estimated the value of the vehicle at \$4,000, “as is where is”.
- [20] The value attributed to the vehicle in the Notice After Repossession, must be considered in the context of the fact that Carpenters had *de facto* possession of the vehicle since around December 2011. On that point, Mr Rup had joined issue on the date on which repossession occurred. This is relevant to the time at which Carpenters could have sold the vehicle in partial satisfaction of its debt. While Mr Rup contended the vehicle was available for sale from late November/early December 2011 when he decided not to remove it from Carpenters’ garage, as a matter of law Carpenters had no right to sell the vehicle until after repossession had been effected, on 10 January 2015.
- [21] By letter dated 26 May 2015, Carpenters issued a further demand against Mr Rup in the sum of \$71,731.95. It was made clear that legal action would follow if payment were not made. This proceeding was issued in the High Court on 4 August 2015, to recover the amount due to Carpenters. The prayer for relief sought judgment in the sum of \$71,731.95, together with interest on the judgment “at the rate of 18% per

annum until full payment but limited to the jurisdiction of the Court”. As a matter of law, the maximum post-judgment interest rate payable is 4% per annum.⁵ In that regard, the judgment under appeal ordered that Mr Rup pay to Carpenters the sum of “\$71,731.95 with interest pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) Act”.

[22] At the time of the High Court hearing (September 2022), the vehicle remained in the possession of Carpenters, unsold. In evidence before the trial judge, it was asserted that the vehicle had not been sold because of its “condition”. I take that to mean that Carpenters considered that the vehicle, at the time of trial, had no intrinsic value.

Mr Rup’s position on appeal

[23] Counsel for Mr Rup advanced two submissions in support of the appeal:

- a) The first goes to the counterclaim, and is based on the continuing assertion that the vehicle was not roadworthy when purchased in December 2009 (the merchantable quality issue);
- b) The second deals with a discrete point in relation to the calculation of interest (the interest issue).

[24] A further point emerged in oral argument. That involves the question whether Carpenters has adequately mitigated its loss (the mitigation issue).

The merchantable quality issue

[25] Mr Rup had been complaining continuously about the ignition difficulties from March 2010.⁶ In November 2011, the “overheating” incident occurred. By this time, Mr Rup had used the vehicle for some two years, and had driven the vehicle

⁵ Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, s 4(1), as amended the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act 2011.

⁶ See para [13] above.

approximately 97,000kms: some 94,500kms since the first ignition problem, to which Mr Rup referred in his email to Mr Chandra of 17 March 2010.⁷

[26] In summary, between 30 December 2009 and November 2011, Mr Rup had driven the vehicle for 97,000kms – almost 10,000kms per month. This was after the first ignition problem in March 2010 when the car had been driven about 2500km. Mr Rup acknowledged that he had arranged for the vehicle to be serviced at all times until the 80,000km service was required, with the last service being undertaken on 6 September 2011. At that time, the vehicle was showing 80,872kms on the odometer, less than the distance that had actually been driven by that time. Yet, Mr Rup continued to assert that the vehicle was not roadworthy when purchased on 30 December 2009.

[27] In relation to the merchantable quality issue, reliance was placed on the warranties provided on the sale of the vehicle.⁸ Carpenters called a witness, Mr Narendra Lal, a Warranty Manager, employed by Carpenters with more than 30 years experience. While not independent in the sense that term would be used to describe an expert witness, Mr Lal's evidence is relevant to the state of the vehicle and the condition it was in when it was placed in Carpenters' custody.

[28] Mr Lal described the issue raised in November/December 2011 (when the vehicle was left at Carpenters garage) as follows:⁹

“Q: Could you tell this Court about that issue?”

A: This issue the vehicle had a hose bust from radar hose and because of that the coolant leaked out of radiator. The vehicle on highway had a radiator leak due to which the coolant leaked out and this went unnoticed by the customer where there is a gauge on the vehicle which says temperature gauge; low and high. So if the temperature gauge is rising that means the engine is overheating; and its like a precaution to the customer. You have to stop the vehicle to see what is wrong and because of that loss of coolant, the engine overheated, buckled and ceased.”

⁷ See para [13] above.

⁸ See para [7] above.

⁹ Page 33 of the transcript.

[29] On being questioned about the relevance of that to the warranties, Mr Lal stated that the hose must have perished over a period of time because 95,000 to 96,000kms was too much for it to bear. This evidence was supported by a contemporary email sent by Mr Faiyaz Rahiman of 12 January 2012 to Mr Rup, into which Mr Lal was copied. Mr Rahiman was described (in the email) as Carpenters' "Western & Northern Fixed Operations Manager" and "Acting Service Manager Central Workshops". He said that the issue of overheating of engine definitely could not be taken under warranty because:

- (a) It was not related to the initial issue of vehicle not starting.
- (b) The engine had excessively overheated due to the worn out of radiator hose causing a water leak further; and
- (c) Mr Rup had missed 3 consecutive servicing that were required to be done at 85,000, 90,000 and 95,000kms.

[30] Although not strictly in issue on this appeal, I am satisfied that the warranties do not apply. Nevertheless, Mr Lal's evidence remains relevant to the merchantable quality issue, to the extent that he deposed that the "overheating" problem was in "no way related to the initial issue of the vehicle not starting".¹⁰ Based on Mr Lal's evidence, it is clear that the engine failure was caused by overheating due to a worn-out radiator hose.

[31] The question is whether any of the loss suffered by Mr Rup in being required to repay the loan that Carpenters provided to him can be offset by a claim that the vehicle was not of merchantable quality (in the sense of not being roadworthy) at the time of its acquisition.

[32] Mr Rup's argument lacks any factual foundation. It is fanciful to suggest that a vehicle could be regarded as unroadworthy when purchased on 30 December 2009 yet driven safely for some 97,000kms (almost 10,000kms per month) from that time, notwithstanding the continuing problems with the ignition system. In my view, there

¹⁰ See para [29] above.

is no evidential basis on which a claim for breach of the implied term as to merchantable quality can be sustained. That ground of appeal fails.

The mitigation issue

[33] The mitigation issue arose during the course of argument in this Court. Although not addressed in the High Court, I am satisfied that the evidence from which proper inferences can be drawn was available at trial. No prejudice is caused to Carpenters by consideration of the point on appeal.

[34] The relevant evidence is as follows:

- a. The vehicle was purchased on 30 December 2009 for \$79,500.¹¹
- b. In an email from Carpenters to Mr Rup dated 29 June 2012, the vehicle was valued by Carpenters at \$30,000, on a buy-out basis, allowing for repair costs.¹²
- c. The Notice After Repossession of 10 January 2015 provided an “estimated value of ... \$4,000 ‘as is where is’.”¹³
- d. The evidence at trial (in September 2022) was that the vehicle had no value and had not been sold by Carpenters.¹⁴

[35] There are two periods of time during which the question of mitigation of loss must be assessed. The first is the period from 29 June 2012 to 10 January 2015.¹⁵ During this period, the vehicle seems to have depreciated in value by some \$26,000, even though Carpenters retained possession of it in its own garage. The second is the period between repossession, on 10 January 2015, and trial, in September 2022.¹⁶ During that period, any remaining value in the vehicle had seemingly been extinguished.

¹¹ See para [8] above.

¹² See para [17] above.

¹³ See para [18] above.

¹⁴ See para [22] above.

¹⁵ See para [33](b) and (c) above.

¹⁶ See para [33](c) and (d) above.

[36] The question is whether the failure of Carpenters to sell the vehicle between repossession and the date of hearing compromised its ability to claim that the vehicle had no intrinsic value to be set-off against the amount payable under the loan. Set-off was clearly available because Carpenters was a single legal entity, notwithstanding that the sale of the vehicle and the financing arrangement were undertaken through different trading arms.¹⁷

[37] In my view, the vehicle must have had some intrinsic value throughout the period that it was held in Carpenter's garage, even if only as scrap. It is highly unlikely that Carpenters would have allowed the vehicle to remain on its premises unless there was some potential for it to be sold at a price higher than would be obtained on the scrap market. Even though Carpenters did not have a right to sell until after repossession had been actioned, I would assess a deduction of \$10,000 to reflect a failure to mitigate by selling the vehicle. In my view, that is a conservative assessment, based on the declining value of the vehicle, as evidenced in Carpenters' own documents and testimony at trial.¹⁸

Interest issue

[38] During the course of evidence given by Carpenters' witness, Mr Arunesh Kumar, an issue arose in relation to the charging of interest. At the time of the trial, Mr Kumar worked for the "Carpenters Finance" trading arm of Carpenters and was able to give evidence about the amount of the debt due by Mr Rup to Carpenters.

[39] Counsel for Mr Rup cross-examined Mr Kumar on the interest charged. It transpired that the reference in the original loan offer to 13% had already been brought to account in the principal amount payable.¹⁹

[40] The contractual default rate was put at 1.75% per month.²⁰ In the subsequent Default Notice that had somehow increased to a rate of 2.2%.²¹ When pressed, Mr Kumar

¹⁷ See para [6] above.

¹⁸ See para [25] above.

¹⁹ See para [9]b above.

²⁰ See para [9] d above.

²¹ See para [18] above.

stated that the 2.2% was a “typing error” and that the overall calculation of the debt, \$71,731 had incorrectly recorded that. I take that as an admission that the contract rate was not applied. There was no contractual basis to charge more than 1.75%. The judgment obtained by Carpenters must be adjusted to take account of that discrepancy.

[41] Given the amounts at stake, and the time it has taken to reach final resolution of a proceeding issued in 2015, I consider this Court should make a broad assessment of the amount by which the interest component in the judgment should be reduced. This does not amount to a re-opening the loan contract. Rather, it corrects a wrong calculation of interest by Carpenters. On a broad-brush basis, it appears that the difference between the figure of 1.75% (in the loan contract) and 2.2% (in the Default Notice) represents about 25% of the interest charges. I would make a deduction from the interest component of the judgment to reflect that. Based on the difference between the principal and interest components of the debt (as set out in the loan contract), the allowance is calculated as 25% of \$44,267.51,²² which I would round down to \$10,000.

Result

[42] For those reasons, I would allow Mr Rup’s appeal. I would reduce the judgment entered against him in the sum of \$71,731.95 to \$51,731.95. The deduction of \$20,000 represents my assessment of the adjustments required for the mitigation issue (\$10,000) and the interest issue (\$10,000).

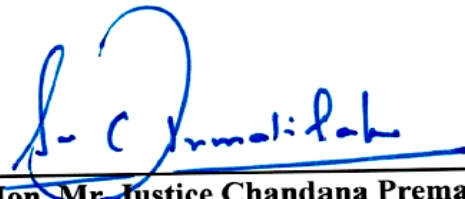
[43] I would add interest on that sum from the date of judgment in the High Court (28 October 2022) to the date of payment, at the rate of 4% per annum, in accordance with s 4(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

[44] While Mr Rup has succeeded to a limited extent, I consider that this is a case in which it would be just to require each party to bear their own costs. I would make no order for costs.

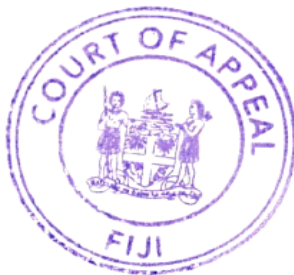
²² See para [8] above.

Orders of the Court:


1. The appeal is allowed.
2. The judgment entered in the High Court against Mr Rup is set aside.
3. In substitution, judgment is entered in favour of Carpenters against Mr Rup in the sum of \$51,731.95.
4. Interest shall accrue on the substituted judgment from the date on which judgment was given in the High Court (28 October 2022) to the date of payment at the rate of 4% per annum, in accordance with s4 (1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.
5. No order as to costs.



The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



The Hon. Mr. Justice Robert Dobson
JUSTICE OF APPEAL



The Hon. Mr. Justice Paul Heath
JUSTICE OF APPEAL

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