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

CIVIL APPEAL NO. ABU 015 OF 2023
[Suva Civil Action No. HBC 93 of 2018]

BETWEEN	:	**ANAND ATILESH CHANDRA** ***1st Appellant***
		SUBHAS CHANDRA ***2nd Appellant***
AND	:	**FIJI DEVELOPMENT BANK** ***Respondent***
Coram	:	**Qetaki, RJA** **Morgan, JA** **Andrée Wiltens, JA**
Counsel	:	**Mr. Prakash, R.S. for the Appellants**
	:	**Ms. Choo, N. and Ms. Narayan, N. for the Respondent**
Date of Hearing	:	**07 May 2025**
Date of Judgment	:	**29 May 2025**

JUDGMENT

Qetaki, RJA

A. Background

[1] The Appellants are appealing against the judgment of the High Court at Suva in Civil Action No HBC 93 of 2018 where the Appellants were 'Defendants', and the Respondent 'Plaintiff'. The Plaintiff filed a writ of summons and the statement of claim, which was subsequently amended, seeking to recover the sum of

$8,238,241.66, and interest on Loan Account Numbers: 161186; 161215; 161272 and 161347, and other orders including for Costs and any other relief the Court deems just.

[2] The Plaintiff was a duly incorporated body corporate established under the provisions of the Fiji Development Bank Act and was engaged in the general business of lending. The 1st and 2nd Defendants at all material times were Directors of TOA Fiji Limited ("TOA") which took loans from the Plaintiff for the purpose of establishing and operating a poultry business. The 1st and 2nd Defendants had signed as Guarantors to loans made by the Plaintiff to TOA Fiji Limited. The Plaintiff took over TOA's farm as Mortgagee in possession on 11th August 2017. The Defendants were returning Fiji residents interested in establishing a poultry farm in Fiji. The Respondent agreed to assist the Defendants personally upon the Defendants entering inter alia into the personal guarantee sued upon and finance TOA as the vehicle for the investment. The Company gave other securities to secure the loans by the Plaintiff.

[3] In his judgement delivered on 9th March 2023, the learned Judge (Yohan Liyanage) concluded that, it was the responsibility of the Defendants as per the guarantee document to know the financial position of their company ('TOA') when providing the guarantees to the Plaintiff. The Defendants were involved in the daily operations of TOA when it started having losses. However, they continued to provide guarantees to the Plaintiff. The Defendants are bound by the guarantee and liable to pay any residual debt of TOA. They now cannot argue that the Plaintiff failed to provide sound financial advice, when in fact it was not the Plaintiff's responsibility. He saw no merit in the Defence and Counter-Claim and the Alternative Cause of Action

[4] The High Court made the following orders:

1. *Both Defendants to pay a sum of $7,427,652.93 to the Plaintiff within three months of this judgment.*

2. *The Defendants liable to pay an interest of 5% on the judgment sum [outstanding/reducing balance] from the date of this judgment until the judgment sum is fully paid.*

3. *Counter-claim and alternative cause of action of the Defendants dismissed and struck out.*

4. *Total cost of $5000 to be paid by the Defendants to the Plaintiff within 14 days.*

[5] The Defendants appealed and filed a Notice and Grounds of Appeal on 23 March 2023, with prayers that the judgment delivered on 09th day of March 2023 be set aside and judgment be entered for the Appellants against the Respondent as prayed in the Appellants Counter-Claim and Alternative Cause of Action. The Appellants urged 16 grounds of appeal in support of the Notice of Motion.

B. Grounds of Appeal

[6] The grounds of appeal are set out below.

1. *The learned Judge erred in law and/or in fact when he dismissed the Appellants Counter-Claim and Alternative Cause of Action against the Respondent without any reasonable explanation to such dismissal.*

2. *The learned Judge erred in law and/ or in fact when he failed to address the following issues in the Appellants Counter-Claim and Alternative Cause of Action.*

    (a) Breach of Banker Client confidentiality.

    (b) The failure of the Respondent to pay for the blast freezer.

    (c) The Respondent's failure to release money for the feed.

    (d) The Respondent's failure to allow TOA to purchase eggs locally and not to have Breeders.

    (e) The Respondent's disregard of the $10,000,000 offer.

    (f) The Respondent's failure to advise the Directors [Appellants herein] of TOA, in respect of the disposal of assets.

    (g) The loss suffered by the Appellants.

3. *The learned Judge erred in law and/ or in fact when he wrongly applied the case of Golby v Commonwealth Bank of Australia (1996) 72 FCR 134 and held that the Respondent did not owe a fiduciary duty to the Appellants.*

4. *The learned Judge erred in law and /or in fact when he disregarded the case of Shivas v Bank of New Zealand [1990] 2 NZLR and ordered the Defendants to pay the sum of $7,427,652.93 within 3 months from the date of Judgment.*

5. *The learned Judge erred in law and / or in fact when he failed d to address the issues that the Respondent failed and/or neglected to defend the second winding up proceedings against TOA after taking possession of the company and allowed the company to be wound up.*

6. *The learned Judge erred in law and/or in fact when he failed to apply section 82 of the Consumer Credit Act and held the Appellants liable to pay the sum of $7,427,652.93 within 3 months from the date of Judgment.*

7. *The learned Judge erred in law and /or in fact when he disregarded the case of Jones v Dunkel [1959] 101 CLR and gave credibility to the Respondent's only witness.*

8. *The learned Judge erred in law and/or in fact when he allowed the amendment of the sum claimed by the Respondent in its Amended Statement of Claim after trial and after a lapse of 4 years.*

9. *The learned Judge erred in law and/or in fact when he disregarded the case of New India Assurance Company Limited v G. P Reddy & Company Limited Court of Appeal Civil Appeal No. ABU 059 of 2011 and Manubhai Industries Limited & Another v Lautoka Land Development (Fiji) Limited Court of Appeal Civil Appeal No. ABU 0043 of 1998 and allowed the Respondent to amend the sum claimed in its Amended Statement of Claim after trial and after a lapse of more than 4 years.*

10. *The learned Judge erred in law and/or in fact in holding that the Appellants were not prejudiced with the amendment of the sum claimed in the Amended Statement of Claim after trial and after a lapse of over 4 years.*

11. *The learned Judge erred in law and /or in fact when he disregarded the fact that a 30-day Notice is to be given prior to advertisement of Mortgagee Sale and failed to apply section 77 of the Property Law Act prior the Mortgagee Sale being advertised.*

12. *The learned Judge erred in law and/or in fact in holding that there was no conflict of interest in respect of the Appellants second witness Wella Pillay.*

13. *The learned Judge erred in law and/or in fact in holding that the Appellants second witness Wella Pillay had not breached section 9 of the Fiji Development Bank Act.*

14. *The learned trial Judge erred in law and /or in fact when he failed to hold that the Appellants second witness Wella Pillay had no financial interest as the landlord.*

15. *The learned Judge erred in law and /or in fact when he failed to consider and analyse the Appellants submissions and arguments and dismissed the Appellants Counter-Claim and Alternative Cause of Action.*

16. *The learned Judge erred in law and/or in fact when he failed to consider the evidence adduced by the Appellants first and fourth witness.*

C. The High Court Judgment

[7] The learned trial Judge discussed the evidence of the only witness for the Plaintiff Ms Karolina Vosavalala, Team Leader of Asset Management Division, who had been with the Plaintiff for 18 years, at paragraphs [14] to [48] of judgment. For the Defendants, in Paragraphs [48] to [57] of the judgment the learned trial Judge discusses the evidence of Mr Anand Chandra, Managing Director of TOA and First Appellant. Mr Wella Pillay's evidence is discussed at paragraphs [58] to [60] of the

judgment. Mr Surendra Prasad's evidence was discussed in paragraphs [61] of the judgment. Ms Saren Patel's evidence was discussed in paragraph [62] to [63].

[8] In his analysis of the evidence the learned Judge held :

> *(a) That the oral and documentary evidence provided by the Plaintiff establishes that the debtor company defaulted the loan instalment payments and on 14th June 2017, and the bank issued a demand notice against the two defendants as sureties to the loans obtained by the company. This is the final demand notice before Plaintiff took court action. (Paragraph [69]).*
>
> *(b) That Plaintiff found that TOA had been wound up by another creditor (paragraph [70]).*
>
> *(c) That Defendants viewed their personal guarantees to Plaintiff as a government institution with an expectation that Plaintiff will enhance and promote government policies as a development bank. The Defendants were dependant on Plaintiff to oversee the government's undertakings to erect chicken sheds and in the event of breach of the undertakings that the Plaintiff would properly provide advice including on the financial situation/problems of the Defendants. (Paragraph [71]).*
>
> *(d) The learned Judge asked whether there has been a fiduciary relationship between FDB and TOA, and proceeded to consider the legal principles, oral and documentary evidence before the court which would establish that there is a fiduciary relationship that exists between the Defendants and the Plaintiff. He considered the following cases in his analysis: **Hospital Products Limited v United States Surgical Corporation** [1984] HCA 64; (1984) 156 CLR 41, 96,103, **Timms v Commonwealth Bank of Australia** [2004] NSWSC 76 (24 February 2004), **Australian Competition and Consumer Commission v Ocean Commercial Pty Ltd** [2003] FCA 1516 (18 December 2003) and **Golby v Commonwealth Bank of Australia** (1996) 72 FCR 134 at 136. (See paragraphs [73] to [81]. He was satisfied that there was no fiduciary relationship that existed when TOA accepted the first loan offer. It was held that the Plaintiff did not play a role in obtaining government funding to set up 10 outside farms-such arrangements were between TOA and its counterparts. There was no need for a further endorsement or ratification for the personal guarantees given by the Defendants. (Paragraph [82])*
>
> *(e) That TOA approached the FDB again after it realized that the two special conditions in the first Offer Letter were not going to be fulfilled by TOA and counterparts in that agreement.*
>
> *(f) On the other two occasions, when TOA received funding from the Plaintiff, the learned Judge considered whether on those occasions, a fiduciary duty/relationship was established between TOA and plaintiff. He held that the FDB did not step out of its role as the lending bank to promote the interests of TOA, its client. The plaintiff when discussing with TOA the issue of refinancing, acted wholly with the intent to recover the debt owed to it. Clearly the FDB had given the opportunity to TOA for it to obtain legal advice and assistance. TOA ended up as defaulter mainly due to lack*

of proper management, according to Plaintiff. The debt owed cannot be resolved by exploring aspects of fiduciary relationship. (Paragraphs [86] to [89]).

(g) *The learned Judge observed that in exercising mortgagee's duties in power of sale a mortgagee has two main duties which it should observe in selling the mortgaged property, first to act in good faith in the conduct of the sale and secondly, the mortgagee owes a duty of care in the sale to obtain the true market value of the property mortgaged. However, the mortgagee does not become the trustee of the mortgagor of its own power of sale: see discussion in* ***McHugh v Union Bank of Canada*** *[1913] AC 229 and in* ***Cuckmere Brick Co Ltd v Mutual Finance Ltd*** *[1971] Ch. 949 (CA).*

(h) *On the two allegations against Mr Wella Pillay, it was held that although Mr Pillai had not disclosed his financial interest, that his Company only had a landlord-tenant relationship with a farmer, there was absence of any further evidence to show his involvement beyond the duties of a landlord. His mere presence in the FDB Board does not constitute an act of bad faith in the circumstances. The FDB's request to pay $300,000 by 31.03.2017 was not an act of bad faith as evidence showed that TOA had failed to keep up with instalment payments for at least 12 months and the arrears had accumulated in the four loan accounts to $1,314,211.49, $120,000, $238,611.39, $270,125 respectively as shown in exhibit (P21) –see paragraphs [89] to [93]. The mortgagee has a duty to exercise reasonable care in obtaining the best price available at the time of sale, and the mortgagee may decide the time of the sale:* ***Silven Properties Ltd v Royal Bank of Scotland PLC*** *[2003] EWCA 282. The mortgagee is not obliged to wait until the market picks up, and in the case of movable chattel the mortgagee has no duty to take care to sell at the place wherever best price is available, because to take chattel from one place to another will inevitably take time and mean sale is deferred:* ***Michael v Miller*** *[2004] EWCA 282*

(i) *It was the position of the Defendants that they had a potential buyer for $10 million. The plaintiff did not allow this to take place, and the evidence in that regard did not satisfy the required burden of proof. The trial Judge found that there was no progressive approach made to introduce the buyer to the plaintiff, at least to get into initial agreement. With the potential buyer from overseas for an amount of multiple times the price obtained by the plaintiff in 2020 which the defendant suggested to the plaintiff. The learned Judge found that the plaintiff had not acted in collusion with a particular purchaser or that there has been any corruption involved by the plaintiff in selling TOA's properties under mortgage. There was no element of bad faith or failure in duty of care by plaintiff.*

(j) *Defendant raised at the end of the trial that the debt amount reflected in the claim is not correct. The amount claimed in 2018 is $8,238,241.66 which by end of trial has reduced to $7,427,652.93. It could be due to the sale of assets held by TOA. He stated that the law on amendments to the pleadings is well settled and the Court can allow it at any stage of the trial, the main consideration would be whether it will cause any prejudice, and in this case, there is no prejudice.*

(k) *The learned trial Judge held that the Consumer Credit Act 1999 in particular section 80 (1) to (4) where a credit provider under the Act has*

to give notice to a debtor and not to begin enforcement without a prior notice has no application to this case. According to section 6 and 8 of the Act, it applies to credit contracts entered into by natural persons. Here the credit contract was between the plaintiff and a company.

D. Case For the Appellants

[9] **Ground 1:** The Appellants submit that the Judgment failed to address the difficulties faced by TOA. The evidence stated in the judgment in respect of the 1st Appellant and Ms Patel has critical parts of the evidence missing. It also fails to address key issues which are (a) to (g) under Ground 2. Had the issues been addressed, it would have been realised that it was the Respondent's breaches and failure had led to the default in the loan repayment. The learned Judge failed to discuss and give his opinion as to why the Appellant's Set-Off and Counter-Claim was dismissed.

[10] It is submitted that the judgment failed to discuss the gravity of the evidence adduced by the 1st Appellant and Ms Patel which showed how the Respondent failed to provide the funds for the chicken feed and the compressors that were needed for the blast freezer, and not allowing TOA to get its own breeders. Evidence was also adduced how there was a conflict of interest , and on the release of confidential information to third parties, prior to the Respondent taking possession of the property and assets.

Ground 2:

(a) Breach of banker's confidentiality:

[11] The Appellants rely on **Tournier v National Provident and Union Bank of England** ,1923 All ER Rep 550, **Saltman Engineering Co Ltd v Campbell Engineering Co Ltd** [1963] 3 All ER, page 413 at page 414.

[12] In **Royal Bank of Canada v IRC** [1972] 1 Ch. 665, the Court held that a duty was owed in respect of any banking transaction undertaken for the customer, both ordinary and extraordinary. It is submitted that evidence was given as to how a $10 million offer had come about for the purpose of TOA which was relayed to the Respondent by Ms Patel through her email (Volume 2, page 489, Exhibit DE 27 of Court Records). Evidence was also given as to how Ms Patel had asked the Respondent to advise on the debt owed as she was trying to get a buyer for TOA. The Respondent failed to provide her with the debt amount (Volume 3, page 877 of Court Records). The

Appellants (see DE27) communicated by email with Mr Nafitalai Cakacaka of the Respondent on the financial offer (volume 2, page 27 of Record,), who replied saying that the property is under Mortgagee Sale and the tenders closed, and Respondent will go back to the market if offers are unsuccessful.

(b) Failure of the Respondent to pay for the blast freezer:

[13] The Appellants referred to the First Appellant's evidence and the impact it had on TOA's business operations and revenue –See Volume 3, page 730 to 731 of Record. Ms Patel also gave evidence with respect to the blast freezer (Volume 3, page 882 to 883 of Record). The Appellants submit that the blast freezer is the main equipment for the business to be productive and make profits. Respondents provided 40% that was needed for deposit but failed to release the remaining 60% in time which would have allowed the compressors to be delivered and production to normalise. The Respondent was releasing the 60% at a time when it had been decided that they (Respondent) will be shutting down the business.

[14] The Respondent's failure made a negative impact on TOA's business operations which crippled the business from sustaining its production. This caused TOA loss of profits and was one of the factors which resulted in payments being delayed to the Respondent. TOA's potential to increase its production was hindered, as the freezing containers used were taking longer than what a blast freezer would have taken to freeze the chickens. TOA was prepared to pay for the blast freezer compressor, and proposed to the Respondent that Appellants could pay for the deposit and the Respondent to pay for the balance, and also refund Appellants for the sum of the deposit paid by Appellant(See DE15 (Volume 2, page 464 of Record). On 9th July 2017, TOA requested in writing for the Respondent to release the 60% balance for the blast freezer. On 8th August 2017, TOA wrote to Nemani Cakacaka of Respondent informing him of payment status - only 40% has been paid for the blast freezer. (See Volume 2, page 432 Court Record) and also pointed out the impact of delayed payment of 60% on production. TOA was facing hardships (see Exhibit No. PE30). More expense were incurred on the feed due to slow processing of birds for slaughter.

[15] TOA complained to a consultant on 17th September 2017 of the delay in payment of 60% by the Respondent, which was replied to, "Sorry to hear that the Bank has not got in behind you".

[16] The Appellants referred also to other issues including at Paragraph 85 of Submission – on Failure of Respondent responsible for TOA's problems of production and repayment of loan; Paragraphs 87 to 100 operational issues and considerations, demonstrating the capacity of the existing plant and potential to increase production, with Respondent complying with payment at the appropriate time when Appellants required 60% balance to be paid.

(c) The Respondent's failure to release money on feed:

[17] Refer to evidence of First Appellant Volume 3, page 726 Court Record. From the evidence of First Appellant, it was obvious the Respondent had failed to provide funds for the feed in a timely manner, which led to a mortality rate which was damaging to TOA's business operations.

(d) The Respondent's failure to allow TOA to purchase eggs locally and not have its own breeders:

[18] The 1st Appellant also gave evidence as to the Respondent's refusal to allow TOA to have its own breeders for its business operations. It is submitted that the Respondent subjected TOA to getting eggs from abroad which made the business operations difficult, and the chicken sheds were never completely full. (See Volume 3, page 732 and 733 of Court Records). Ms Patel in her evidence stated how the Respondent didn't want TOA to have its own breeder flock. (See Volume 3, page 876 of Court Records), paragraph 104 of written submissions. See paragraphs 105 to 123 on supply of eggs and conduct of Respondent which Appellants say has caused problems to TOA in its operations and production due to Respondent's delays and decisions that are adversely affecting TOA. It is contended that there has been conflict in the recommendations in the consultant's report and the decision of the Respondent on operational matters like the supply of breeders (local v abroad) and costs implications and effects on local productions.

[19] TOA was facing issues with egg supply from 2015 and the Respondent disregarded the fact that there was shortage in eggs in Fiji and abroad. The Respondent knowing this issue did not allow TOA to have its own Breeder Flock, even though the Consultancy Report stated that TOA needed to have its own Breeders. TOA was making progress after it was able to have its own Breeders and had it not been for the unlawful advertisement for Mortgagee sale, it would have been in a better position to repay its loans. The Respondent's blatant disregard of the Consultancy Report and not allowing TOA to have its own Breeders cost TOA an estimated loss of $3,000,000. 00 over a period of 2 years (2015-2016). TOA had made $1,900,000.00 in 2017. These actions and breaches by the Respondent had crippled the business operations of TOA which resulted in the default of payments. If these breaches had not come about, TOA would have continued its business operations and made payments to the debt. The Respondent was well aware that unless the business is provided with the items needed, the business will not make a profit and be able to service the loan. TOA had secured a local distributor to help with the sale of their products. However, these were hindered by the Respondent's actions. The breaches by the Respondent which led to the default in payments were not analysed by the learned Judge at all.

e) The Respondent's disregard of the $10 Million Dollars offer:

[20] It is submitted that Ms Patel gave comprehensive evidence in respect of this offer – see Volume 3, page 894 to 895 Court Records - (See paragraphs 124 to 133 of written submissions. The crux of submission is in paragraphs 128 to133 as follows: The Respondent despite asking whether TOA had any buyers, disregarded the offer of $10 million that was submitted by TOA. In **Seager v Copydex Ltd (No.2)** [1969] 2 All ER, the Court of Appeal held that damages are to be assessed on the market value of the information between that of a willing buyer and willing seller. TOA had a willing buyer which was rejected by the Respondent. Appellants submit that damages under this heading be assessed in the sum of $10 million. The total debt of $6,939,501.65 (see paragraph 3.12 written submission) would have been settled and the balance monies from the sale could have been the profit the Appellants as Directors would have made.

(f) The Respondent's failure to advise the Directors [Appellants] of TOA, in respect of the disposal of assets:

[21] The Appellants submitted that the evidence given by Mr Chandra and Ms Patel were comprehensive and detailed but the learned trial Judge failed to take them into account. The Respondent at the time of disposal of the property failed to advise the Appellants of the same. Appellants were not made aware as to how much the property was sold for until the trial. Property was disposed in 2018. The Respondent owed a duty to TOA as the financiers which they failed to do (See paragraphs 136 to 137). The Appellants suffered great financial loss due to the multiple breaches by the Respondent who ought to have ensured that the loan approved was disbursed in a timely manner for the purchase of the compressor for the blast freezer and allowing TOA to have its own breeder flock. Despite this the Appellants continued with the operation of TOA and secured a distributor to help them. This did not last long as the Respondent decided to shut the business operations down and took possession of the property. This would not have occurred had the Respondent honoured its part. The evidence given by Mr Chandra and Ms Patel was disregarded by the learned trial Judge who failed to take into consideration the breaches of the Respondent.

Grounds 3 and 4:

[22] The Appellants submit that a bank will act in its own interest to ensure the security as a lender and create the expectation in the customer that it will advise in the best interest of the customer in respect of the investment it is making. The customer may take it that it is supportive to his/her interest and is consistent with the bank's financing. In this way a fiduciary duty is created by the bank with its customer and is known as an *investment adviser*. In **Commonwealth Bank of Australia v Smith** (1999) 102 ALR 453, it was stated that a fiduciary responsibility arises where the bank's role is seen to extend beyond that of finance provider into the area of advice. The Court stated that the primary Judge was correct when it held that the bank became the *investment adviser* of the respondents for the purchase of the hotel and in doing so a fiduciary relationship existed.

[23] In **Hayward v Bank of Nova Scotia** (1884) 45 OR (2d) 542, the Plaintiff who lived on a farm and for 40 (forty) years banked with the defendant. At page 543 Potts J.

said the bank manager in such a situation had a position of some status in the community. The Plaintiff was approached by a customer of the defendant and proposed to invest in the Plaintiff's farm by purchasing a new breed of cattle. The Plaintiff obtained a loan from the defendant; however, the investment did not venture as expected. Potts J held that there was a fiduciary duty between the Plaintiff and the bank and made reference to an earlier decision of **McBean v Bank of Nova Scotia** (1981) 15 BLR 296 where the same bank manager led another customer to obtain a loan on a similar investment. It was held that the Bank was in a position of conflict of interest as the customer incurred substantial debt to the bank.

[24] In **Lloyd's Bank v Bundy** (1975) 1 QB 326, Sir Eric Sachs stated, such (fiduciary) relationship arises when someone relies on the guidance and advice of another. In this present appeal, the Respondent gave advice to the Appellants and TOA as to what they are supposed to do in terms of purchasing eggs and breeders. Further TOA was in reliance of funds from the Government to build broiler sheds. When the Government pulled away from financing, TOA wanted to stop its operations. It was the Respondent that gave advice and stated that it will fund the sheds. TOA relied on the advice of the Respondent and went ahead and obtained a further loan to build the required sheds for its business operations. The Respondent advised TOA to purchase eggs from abroad and not locally and also not to have breeders. In doing so, the Respondent acted as an Investment Adviser to TOA and created a fiduciary relationship. The advice given to TOA by the Respondent was for its own benefit.

[25] In **Golby's** (supra) case a fiduciary relationship did not exist as the bank did not act as an investment adviser unlike how the Respondent acted with TOA. The Appellant relied on **Shivas v Bank of New Zealand** [1990] 2 NZLR, page 368 which stated…. *"A guarantor who is concerned at the circumstances in which he has given a bank guarantee will be able to complain should any of the following circumstances be present- deceit by the bank, misrepresentation, negligence if advice or information is sought and given or volunteered by the bank in a careless manner, breach of fiduciary duty in terms of Hamilton v Watson (1845) 69 RR 85, unconscionable bargain, mistake and undue influence……"* (Underlining added)

[26] There was advice from the Respondent which resulted in TOA making substantial losses. TOA needed fertile eggs, and these were not available abroad but were

available in Fiji. It also needed breeder flock to sustain its business, but the Respondent said they did not need to. The Appellants were guarantors and filed a Set-Off and Counter-Claim against the Respondent based on the advice that the bank carelessly gave to TOA and the breach of its fiduciary duty, and **Shivas** (supra) applies here.

Grounds 5, 6 and 11

[27] It is submitted that the Respondent took possession of the property and the business operation of TOA on 31st of December 2017, and it took control of the business from that time/date. A second winding up action was filed at that time by another creditor, and the Respondent failed to defend the winding up of the business of TOA while it was in control.

[28] Before an action can be brought against a guarantor, the bank has to meet certain requirements under section 82 of the Consumer Credit Act 1999. Mortgage No's 764762 and 764763 are reliant upon the Consumer Credit Act 1999. Evidence was given by Ms Patel that no 30 days' notice was given to TOA by the Respondent prior to the advertisement for Mortgagee's sale. The default notices given previously were not in respect of mortgagee sale and these notices were resolved. [Paragraphs 165-168]. However, the Consumer Credit Act 1999 was amended in 2006 and applied to individuals and not a company. The material mortgages were executed in 2012, 2 years after the coming into force of the Consumer Credit Act 1999.

[29] In **Rakib v ANZ Banking Group Ltd** [2008] FJHC 184; HBC277.2008 (2 September 2008), the Plaintiffs applied for an injunction against the Defendant from exercising their power of Mortgagee sale. It was argued by the Plaintiffs that the Defendant had failed to comply with section 80 of the said Act, and the Court dismissed the application.

[30] The Appellants stated that the Mortgage documents, being reliant on Consumer Credit Act 1999 have become invalid. It submits therefore that the Court has the power to make a determination on the two Mortgages as to whether they were enforceable in the first place.

[31] The Appellants also submit that the Respondent failed to comply with the enforcement provisions of the Property Law Act 1971 - see section 77 of PLA. It failed to give Notice to TOA pursuant to section 77 and went ahead and advertised the property under Mortgagee Sale. TOA only became aware of the action when notified through the Respondent's email to TOA.

Ground 7:

[32] Appellants allege that the Respondent erred in law and/or in fact when he disregarded the case of **Jones v Dunkel** (supra), and gave credibility to the Respondent's only witness. The Appellants had filed a Set-Off and Counter-Claim against the Respondent, and the Respondent's sole witness was not in a position to effectively answer and address the Appellants issues and concerns relating thereto, at the trial. Why were no witnesses called by the Respondent? The rule operates where there is an unexplained failure by a party to give evidence, to call witnesses or tender documents or other evidence. In those circumstances it may lead to an inference that the uncalled evidence would not have assisted the party and where an inference is drawn, the rule cannot be used to fill the gaps in the evidence. In order to rebut what the Appellants had claimed in the Set-Off and Counter-Claim, PW1 was not in a position to give evidence in respect of the rehabilitation offer, project refinancing package, the failure to pay for the compressor for the blast freezer within time, the unlawful public advertisement, the conflict of interest, the unlawful access, the take over and the failure to challenge the winding up of the Company.

[33] The Appellants rely on the case **Land Transport Authority v Ravind Millan Lal & Others**, Fiji Court of Appeal No. ABU0053 of 2007S at page 7 the proposition that it can be presumed that the Plaintiff knowing that there was a Sett-Off and Counter-Claim, failed to call any witness that would have been in a position to rebut the Defendants Set-Off and Counter-Claim. The Plaintiff's own witness was not in a position to give evidence in cross-examination and further had no knowledge in respect of the provisions whereby a 30 days' Notice has been given prior to the advertisement for Mortgagee sale and therefore in their absence being left without explanation that a **Jones v Dunkel** (supra) presumption arises that their evidence would not have assisted the Plaintiff. The Appellants also relied on **FAI Insurance (Fiji) Limited v Prasad's Nationwide Transport Express Courier Limited,** Fiji

Court of Appeal, Civil Appeal No.ABU0090 of 2004 and **Premila Devi v Queensland Insurance(Fiji) Limited** HC Lautoka Civil Action No. HBC 233 of 2004.

Ground 8, 9 and 10:

[34] The Respondent in its Amended Statement of Claim claimed the sum of $ 8,238,241.66. The Total for all 4 Loan Accounts $7,427,652.93. It is submitted that costs ought to have been awarded against the Respondents for amending the claim to the lesser amount.

Grounds 12, 13 and 14:

[35] Combined, these allege that the Respondent breached its duty owed to TOA. Evidence given by Ms Patel (Volume 3, page 887 to 890 of Court Records) show the representatives of the Respondent, disclosed confidential TOA information to third parties and how there was conflict of interest with the Deputy Chairman of the Respondent. See section 9(5) of the Fiji Development Bank Act, which was breached by the Respondent.

Ground 15:

[36] The Appellants submit that the Appellants appeal must be granted and the judgment of the High Court be set-aside and Judgment entered for the Appellants as prayed in the Counter – Claim and Alternative Cause of Action (Set-Off), for the reasons stated below.

[37] The Learned Judge failed to consider the submissions filed as evident from the Judgment of the learned trial Judge. He also failed to take account of the evidence given by the witnesses at trial, the failure to pay for the blast freezer, the failure to release monies for the feed, the failure to allow TOA to purchase eggs locally and to have breeders and the disregard of the $10 million offer to purchase made to TOA. These were fundamental to the Appellants case and which were disregarded by the learned trial Judge. The Appellants provided a summary of damages and judgment sought.

E. Case For the Respondent

[38] The Respondent had tendered through its sole witness at the trial 35 Exhibits. It submits by way of introduction that, the securities given by the Appellants have never been in dispute. The total debt amount under the loan statement as at the date of the trial was not challenged and the admissibility of the loan statements was not challenged or opposed. The Respondent submits that at the trial, the Appellants had admitted in evidence that they had obtained legal advice from Mr. Faizal Koya of SFK Lawyers before executing the Offer Letters and Security documents.

[39] **Ground 1:** The Respondent submits that no explanation was required to be given by the Court as the trial Judge had found the Appellants 100% liable for the residual debt of TOA. Hence, the Counter-Claim was accordingly dismissed.

[40] **Ground 2 (a) to (g)** : The Respondent submits that grounds 2 (a) to (g) have no merits for the following reasons **:**

(a) No evidence was submitted by the Appellants that there was any release of confidential information by Surendra Prasad to a Third Party. The said Third Party was not called to give evidence, nor was any evidence of what information-alleged to have been released ever produced to court. No evidence was elicited by the counsel alluding to release of confidential information.

(b) There were no offer for $10 million brought to the Bank to redeem the mortgage. No attempts were made to secure any agreement with the alleged buyer for $10 million.

(c) Due to the unsustainable position of TOA Farms, the Report referred to as the "McLellan Consultancy Report", was commissioned by the Bank to assist the Farm.

(d) The report identified every aspect of the business, from eggs to livestock to broiler as problematic for TOA and the report made certain recommendations.

(e) Also most notably mentioned in the report was the market sustainability of TOA which was stated as having no real position relative to Crest and Rooster and other imported birds.

(f) Further the report set out a financial forecast requirement which the company had to fulfil.

(g) One of the other requirements was for TOA to stop buying eggs from Crest and look into importation of eggs from New Zealand.

(h) ***Mason J described the critical feature of a fiduciary relationship*** *in* ***Golby's*** *(supra) case, and in this case no such relationship existed or can be inferred.*

[41] From the Mc McClellan Consultancy Report, a strategic business plan was prepared and the plan forecast included; (a) the upgrade of TOA's Capex requirements to assist with its rehabilitation, and (b) the submission by TOA of its financial records for 2014 and 2015 to the Bank as Key requirements for the facilitation by the Bank of the rehabilitation package.

[42] The Appellants had a clear understanding that the financials were critical to the Bank's assistance of the rehabilitation. Evidence on this was unchallenged and the contents of the strategic plan not disputed as it was a document prepared by TOA through its accountants J Lal & Co.

[43] The Bank had communicated with the TOA (on 26th November 2015) regarding consolidation of all farm transactions to be part of the rehabilitation plan. The bank also expressed its concerns about TOA's inefficiency in running a sustainable business, highlighting the need to consult the Bank on every transaction that TOA undertook if the Bank were to assist in the rehabilitation of the project.

[44] The Bank was willing to assist TOA in reviving the farm operations in accordance with the McLellan Report's recommendations and communicated this to TOA on 30th November 2015. The Bank had set out (9) conditions that TOA had to fulfil, one of which was for TOA to provide to the Bank with its financials and cash flow and forecast.

[45] It is not disputed that the Bank released the 40% of the blaster freezer funds despite the Appellants not submitting to the Bank the financial information requested by the Bank in line with the recommendations of the two experts.

[46] The Bank communicated with TOA on 2nd February 2016 expressing its concern, among other things, over the increasing bank arrears on the 4 loan accounts and how the rehabilitation plan had not progressed with time taken by TOA in submitting information especially the financial information for the year 2014 and 2015 which was critical for the rehabilitation plan.

[47] The Bank also made it clear that the rehabilitation plan was getting difficult and the Bank would consider cutting its losses and moving to liquidation of the assets with TOA's assistance. On the same day the bank issued a Demand Notice to TOA for the sum of $7,570,917.35.

[48] The Bank and TOA representatives met on 8th February 2016 after which the Bank communicated with TOA on 10th February 2016 expressing appreciation for the joint meeting held, and for TOA being aware and mindful of the Bank's position in issuing the said Demand Notice of 2nd February 2016 and in its understanding of the action being taken by the Bank. The Bank also allowed TOA further time to provide the financials of 2014 and 2015 to be prepared by their accountants. Despite the meeting of 8th February, TOA never provided the financial information required by the Bank.

[49] Finally, the Bank communicated with TOA on 31st January 2017, stating that TOA's interest rate on all the 4 accounts was being reinstated and demanded $300,000.00 of the arrears.

[50] Since 2014 TOA had been asking for a deferment of loan payment and it was only in January 2017 that the Bank demanded money as no loan repayments had been made on the loan accounts despite several opportunities being given to them including rehabilitation of which the Bank was willing to assist but TOA had failed to comply with the requirements.

[51] TOA wrote to the Bank on 6th February 2017, and amongst other things, blamed the Bank for not being interested in the rehabilitation process , and informing the Bank it had engaged Asha Bhai Limited as its distributor and was expecting positive outcome.

[52] The Bank responded to TOA on 13 February 2017 and demanded the payment of the sum already in arrears ($300.00.00) to bring down arrears which at this point was concerningly high.

[53] The Bank wrote to TOA on 17th February 2017 cautioning that sufficient time had been allowed for TOA to comply with payments but that it had failed, hence the demand for the arrears to be paid.

[54] On 7th June 2017, the Bank wrote to TOA expressing concern that despite TOA engaging Asha Bhai Limited as its distributor the production level remained below sustainable level and recovery of their debt was at risk. The Bank allowed TOA 7 days to show they could bring the company up to a sustainable level.

[55] In its reply dated 12th June 2017, TOA admitted that: (a) their business was below sustainable level the main reason being the short supply of eggs and sought the Bank's consideration of a loan restructure, (b) the working capital brought into TOA was used to pay off creditors and were not in operations / productions for technical reasons, (c) TOA's biggest problem was due to not having working capital, (d) the Bank was not satisfied with TOA's creditworthiness, (e) in order to mitigate their financial position and low sustainability TOA was attempting to bring in an equity partner who seeing the substantial default on the loan account and high interest did not find the project feasible, and (f) TOA was looking for people with poultry skills to manage their operations.

[56] TOA did not complain that the Bank was responsible for their problems, or that the Bank withheld freezer blaster funds which caused the business production level to go beyond sustainable level, or that the poor financial conditions of TOA had been caused due to a third-party adverse intervention or conflict of interests of a member of the Bank's Board of Directors. TOA now wanted the Bank not only to defer the payments which were substantially overdue but also requested the Bank to restructure their loan accounts.

[57] On 18th June 2017, TOA wrote to the Bank admitting that : (a) their business has not grown to a substantial level due to a short supply of eggs both locally and overseas and their breeders were in lay which would procure egg supply security, (b) they had a significant lack of working capital and they were no longer able to shoulder these challenges, (c) the production cycle was affected due to biological transformation and other adverse conditions such as mortality rate of the birds that put a strain on their working capital, and (d) the restructure of the loan account was to make the package look attractive to their potential investors. TOA also stated that if the Bank did not want to consider their proposal and wished to exercise its power under the mortgage that TOA be permitted to identify potential buyers.

[58] TOA did not blame the Bank about the withdrawal of the Government facility or the freezer blaster which the Bank was to provide under the rehabilitation. TOA took full responsibility for the downfall of their business.

[59] On 7th August 2017 the Bank wrote to TOA and informed them of the Bank's actions to proceed with sale of property. At this time TOA's debt balance was $8,342,043.78 with arrears at $2,355.737.50. On 9th August 2017 TOA replied through Sam Chandra and also through Saren Patel (pages 430 to 434 of Records, Volume 2) forecasting what the business would look like (achieve) if the Bank did not proceed with mortgagee sale, blaming the Bank for birds not reaching the slaughter house due to withholding of the 60% blast freezer funds, stating that TOA had no working capital, and there was a shortfall of egg supply without which they could not put desired replacements in the shed.

[60] TOA wrote to the Bank on 24th August 2017, blaming the GM for not understanding TOA's business operations and not providing a true picture of TOA's position to the Board, that TOA had potential overseas investors which the bank was earlier informed about, and blamed the bank for not responding to communications/query on the investor, and advising that TOA would be making payments of $20 k per month from August, increasing to $40 k per month, based on TOA's forecast.

[61] TOA complained to Ministry of Industry, Trade and Tourism regarding the Bank's conduct and attitude towards its business. On 15th August the Bank's GM wrote to the Ministry addressing the issues and complaints raised by TOA.

[62] A meeting was held on 22nd August 2017 between the Bank and TOA where TOA had requested the release of the 60% balance of the blast freezer. The Bank on 23rd August 2017 wrote to TOA offering to provide the balance for the blast freezer and asking to be kept updated on when the freezer would arrive in Fiji. On 21st September 2017, TOA responded asking the Bank to withhold the payment of the 60% as the approval for its release had come too late and if accepted would incur unnecessary interest on the loan account, as they did not want to increase the debt level.

[63] TOA had declined the 60% contribution for the blast freezer from the Bank due to the late approval and other reasons including its confusion over the date of the mortgagee sale which was much later on 16th September 2017.

[64] The Bank sold the property to Rooster, at its land value by December 2020 and recovered $1,694,104.15 which was credited the TOA's loan account No.161186. This was the nearest offer to TOA's valuation.

[65] TOA's valuation was based on the income-based approach and forecast of the sustainability of the business founded on the 10 years agreement with Ashabhai Limited. The actual value of the land as at 2017 was $1.5 million and as at December 2020 at the peak of the pandemic, the farm was sold at $1,694,104.15. The Appellants' counsel did not refute nor challenge the Bank's evidence.

[66] It was submitted that the Court cannot give any weight to Westgate's market valuations which showed an inflated value of the property based on income projected over 10 years. The Appellants had several opportunities to sell their property and redeem their debt. The suggested buyer for $10 million, lacked concrete details, such as a binding Sales and Purchase Agreement.

Ground 3 & 4

[67] The Respondent cited **Lawlor v NBF Asset Management Bank (**supra)**,** (per Justice Scott.), and **Hospital Products Ltd v United States Surgical Corporation** (supra) (per Mason J) on whether there is a fiduciary relationship, and on the critical features of a fiduciary relationship.

[68] The Respondent submits that the cases cited and relied upon by the Appellants do not apply to the appeal now before the court. In Commonwealth **Bank of Australia v Smith** (supra) it was found that the vendor of the hotel and the prospective purchaser were customers of the bank. The bank was held to have a commercial self-interest in facilitating the transaction. When the bank adopted the role of "investment advisor", it created the fiduciary relationship and went beyond the scope of its banking obligations. The Bank failed to offer independent legal advice to one of the parties and gave its own legal advice on the purchasing of the hotel license.

[69] The Respondent submits that the two cases **Hayward and MacBeans v Bank of Nova Scotia** (supra) do not apply in this case nor support the argument of the Appellant. In the two judgments dated 1984 and 1981 respectively it was found that the Bank Manager, Dunnel provide investment advice and prepared financial projections for

profit estimate, encouraging MacBeans and Hayward to take further loans in the interest of purchasing the cows. There was a failure by Dunnel to discuss material information that the vendor of the cows, Poland was in fact heavily indebted to the Bank in 1975 and the Bank's regional office was not confident about the prospect of the exotic cow business nor of Poland's venture .The regional office had in fact issued urgent caution not to extend investment loans in that field. Dunnel was heard to have assured both MacBeans and Hayward that the investment was a "good deal" and a "good investment". In the present case, contrary to the allegation that the Bank had been giving investment advice by encouraging the Appellants to take loans when Government pulled out and that the Bank was involved in deciding where to purchase the eggs, the evidence suggested otherwise.

Grounds 5, 6 & 11

[70] The Respondent submits that these grounds have no merit. The bank exercised its rights to conduct mortgagee sale and act on the securities TOA had given under the mortgage. The securities involved the land under the mortgage and debenture over the assets of TOA. There were no obligations on the part of the Bank to step in and defend any winding up action against the Company. This was the sole responsibility of the Directors of TOA. The Bank did not take over the property of TOA- it took possession of the securities under the mortgage. The Directors were asked to vacate as they were living on the property. Notwithstanding the Appellant's are now misleading the court that there was a 2nd Winding Up Action. The testimony of Saren Patel (Page 920 of Volume 3, was never challenged, that there was no 2nd Winding Up Action. The allegation that no demand notices were served on the guarantor is also misleading-see the unchallenged evidence of Mr Chandra. The Consumer Credit Act does not apply to business loans of this magnitude so this ground is of no merits.

Ground 7

[71] The Respondent submits that **Jones & Dunkel** (supra) does not apply. There was no missing information or gaps in evidence that the Court was required to draw an inference which would have assisted the Appellants case. The learned trial Judge did not rely on the only witness for the Bank's testimony in arriving at his decision but relied on various documents tendered into Court together with the evidence of the

Appellants. See **State v Minister for Information, Broadcasting, Television & Telecommunications** Ltd (Application 1) (supra).

[72] The respondent submits that, it is simple common sense that when a documentary paper trail clearly sets out the evidence of the Bank and the one witness who was authorised and in a position to authenticate and shed insight into the veracity of the documents of the Appellants' financial and debt issues there was no reasons to then subpoena every personnel of the Bank to be involved in the proceedings. The Bank had nothing to hide and did not attempt to conceal information from the Court that would require invoking **Jones v Dunkel** (supra) in favour of the Appellants.

[73] The respondent submits with respect to **Land Transport Authority v Rvind Millan** (supra) relied on by the Appellants, in contrast to the present case, the presumption of Jones & Dunkel only arose because there was no evidence submitted by LTA and the only other evidence that was submitted was incorrect.

[74] In **FAI Insurance v Prasad's Nationwide** (supra), the findings of the court were that the only witness for the appellant was not employed at the material time and the only witness Mr Jit who had assessed the vehicle could not be found. Even if he could the court was free to infer that his evidence could not have assisted the insurance company as it did not say the insurance monies was akin to the company having the vehicle as the Respondent had neither received the monies nor the vehicle. The findings in **Pramila Devi v Queensland Insurance** (supra) do not apply to this case, the two named defendants against whom the claim was filed were never called to give evidence.

Ground 8, 9 & 10

[75] The Respondent submits that the amendment of the claim was made to reflect the correct figure taking into account the time the action was filed until the point when the trial was heard. The Appellants submissions on these grounds are misleading.

Grounds 12, 13 & 14

[76] See pages 813 to 814 Volume 3-evidence of Mr Chandra. It is submitted that Appellants were present at the meeting and had prior knowledge of Mr Pillay's

involvement with Future Farms .They did not raise an objection nor ask for Mr Pillay's removal at the time. There was no correspondence concerning the alleged conflict from the Appellants, however, the issue was only conveniently raised after Bank had taken possession. Mr Pillay gave evidence he was not associated with Future Farms, but he was landlord of Future Farms (Page 825 Volume 3). Mr Pillay had no vested interest financially in Future Farm's business. He was not a shareholder or director.

Ground 15

[77] The Respondent submits that the issues relevant to this ground have already been raised in the other grounds.

F. Analysis

[78] This analysis takes into consideration the judgment of the learned trial Judge, the grounds of appeal, the submissions, both written and oral of the appellants and the respondents, and the facts and the circumstances of the case. The Appellants and the Respondent have through their counsels submitted written submissions which are of great assistance to the court. There are 16 grounds of appeal urged by the Appellants. At the hearing counsel for the Appellant had substantially focused his submissions on whether the Respondent owed a fiduciary duty or relationship with TOA and the Appellants, and secondly, on the mortgages and the circumstances surrounding the mortgagee sale. The analysis commences by addressing these two issues.

Grounds 3 & 4

[79] Whether the learned trial Judge was mistaken in holding that the Respondent did not owe a fiduciary duty to the appellants and in doing so had wrongly applied the case of **Golby v Commonwealth Bank of Australia** (supra)**.** The argument is that the Respondent's failure to assist TOA in financing its operational needs, when requested by the Appellants, led to TOA suffering losses in its business operations and was the reason why TOA was not able to make repayments to the Respondent in line with its Loan Agreement. The second issue, is in relation to the Mortgagee Sale: whether the learned trial Judge was mistaken in disregarding the case of **Shivas v Bank of New Zealand** (supra) when he ordered the Defendant to pay the sum of $7,427,652.93 within 3 months from the date of judgment. This is in the context of claims that a late

notice was served on TOA on the eve of the Mortgagee sale advertisement, and the Respondent's lack of consultation with TOA on the withdrawal of the proposed rehabilitation package.

[80] The Appellants contend that a bank will act in its own interest to ensure the security as a lender, and create the expectation in the customer that it will advise in the best interest of the customer in respect of the investment the customer is making. The customer may take it that it's significant to her/his interest and is consistent with the Bank's financing. In that way a fiduciary duty is created by the bank with its customer. In his judgment the learned Judge held that no fiduciary relationship existed between the Respondent and the Appellant when TOA accepted the first loan offer. Further that the Respondent did not play a role in the obtaining of government funding's to set up 10 outside farms - such arrangements were between TOA and government. There was no need for further endorsement or ratification of personal guarantees given by the Appellants (para 82).

[81] It was also held that no fiduciary duty/relationship was created between TOA and the Bank when the subsequent loans were given. The Respondent did not step out of its role as the lending Bank to promote the interests of TOA, its client. The bank, in its financial dealings with the Appellant, including discussions on refinancing of TOA, acted wholly with the intention of recovering the debt owed to it. Further, he found that the Respondent had given TOA every opportunity to obtain legal assistance.

[82] The claims giving rise to the creation of a fiduciary relationship of the Bank towards the Appellants and TOA, as I understand it, arose from one of the special conditions of the first loan where Government is to facilitate and fund the participation of several Mataqali, which did not get off the ground as the government did not provide the funds as anticipated. It is alleged that the Respondent, despite the above, allowed the Appellant to draw down from the approved loans, being satisfied with communications received by if from the Divisional Commissioner Western based in Lautoka.

[83] The Appellants had sought further loans from the Respondent, and it is contended that the Respondent failed to advise the Appellants of the consequences or implications of it providing further loans to the Appellants, as the Government had pulled out. TOA

was wound up on 8th December 2015. The first-named Appellant made representations to the Respondent for a rehabilitation package to be provided by the Respondent, for possible restoration of TOA. On 30th November 2015, the Respondent wrote to TOA and offered a project financing package to assist to rehabilitate TOA. The winding-up order was stayed on the 31st March 2016.

[84] It is claimed that after assurance given to TOA by the Respondent that a rehabilitation package will be provided, the Appellants injected the sum of $432,000.00 into TOA. The said rehabilitation package is claimed to also contain funds to be given to TOA for the purchase of a blast freezer compressor in the sum of US$63,497.00, to which the Respondent only gave the sum of US$54,000.00 and did not release the balance to TOA to purchase the blast freezer compressors.

[85] In this, it is alleged, the Respondent had breached the rehabilitation program and caused TOA to suffer losses. There was, in the Appellant's contention a specific agreement between the Respondent and the Appellant to finance the blast freezer compressor. On 15th day of September 2017, the Respondent gave TOA a notice on the eve of the publication of a Mortgagee Sale advertisement, which was published. The notice was published without TOA being informed by the respondent that the undertaking for rehabilitation had been withdrawn.

[86] In **Golby v Commonwealth Bank of Australia** (supra) , it is alleged that the bank owed a fiduciary duty to the applicants which it breached in the following respects: (a) failing to tell the Applicants what Barry's indebtedness to the Bank was; the value of Barry's security, whether it was more advantageous to the Bank that Barry's indebtedness be discharged before that of the Applicants, whether Barry was paying the Bank a lower rate of interest on borrowing, that the Applicants should have taken independent advice as to whether or not to bank at the same Bank as Barry; and (b) acting in such a way as to favour or which might tend to favour one of its customers and/or itself as against the interests of the Applicants.

[87] It is accepted that there are cases where a Bank would owe a fiduciary duty to a customer, for example in **Commonwealth Bank v Smith** (supra), however, one cannot deduce from the case that, in every transaction which a Bank enters into with a customer the Bank will be a fiduciary. In **Hospital Products Limited v United**

States Surgical Corporation (supra), which was discussed in **Golby** (supra) , Mason J at page 96 , suggested:

> *"……. the categories of fiduciary relationship are not closed, the relationship of banker and customer is not one of the accepted fiduciary relationships. It is not a critical feature of a banker/customer relationship that the banker undertakes or agrees to act for or on behalf of or in the interests of its customer in the exercise of some power or discretion affecting the interests of the customer in a legal and practical sense. When a customer defaults in the repayment of a mortgage, a banker is entitled to exercise the powers in the mortgage for the banker's own interest, as long as the banker acts in good faith in exercising the power of sale. Absent therefore some special feature, such as the giving of advice in Smith, there is no reason to erect a fiduciary relationship between banker and customer when the relationship is essentially one founded on contract."*

[88] In my view **Shivas's** (supra) case does not apply to this case given its facts and circumstances compared to the facts and circumstances of the present case. That case revolves around the duty of a bank to disclose information which affects the credit of its customer to an intending surety, in circumstances where the Bank had taken preparatory steps to appoint receivers of the company. One of the Plaintiffs (Mr Fallon) was not only the intending surety but also the accountant for the company whose bank account was to be guaranteed. The bank would be entitled to expect that Mr Fallon in his capacity as accountant of the company was familiar with the company's financial position or could make himself familiar if he wished. The same can be said of the Appellants who are directors of TOA. They are shareholders and directors of TOA and guarantors of TOA's loans from the Respondent. They are in control of the administration and management of TOA. They are the brains that drive and apply the strategic plan of TOA and the overall operations of TOA. They have their own legal advisers and have always been reminded by the Respondent to seek independent legal and other advice.

[89] Next, the Appellants argue that the Respondent was required to give adequate notice to the Appellants and TOA prior to its advertising, and that this was not done. The advertisement has caused substantial harm to TOA's reputation and implied that TOA was insolvent. Two mortgages are involved: Mortgage No's 764762 and 764763 which were both executed on 16th October 2012, and they are subject to consumer credit law, which includes the Consumer Credit Act 1999 or the Consumer Credit Regulations 1999 (see Volume 2, pages 237 and 259 Court Record).

[90] Two issues arise from the Appellants argument, firstly on the duties of the Respondent with respect to its exercise of the power of sale, secondly, whether the Respondent had not adequately notified TOA and the Appellants of its intention to exercise its power of sale as mortgagee. It is well-established that there are two main duties that a mortgagee should observe in selling the mortgaged property, firstly it is to act in good faith in the conduct of the sale, and secondly, the mortgagee owes a duty to obtain the true market value of the mortgaged property. However, the mortgagee does not become the trustee of the mortgagor due to the power of sale. See **McHugh v Union Bank of Canada** (supra), and **Cuckmere Brick Co Ltd v Mutual Finance Ltd** (supra). There is no obligation for the mortgagee to inform the mortgagor, who is also a guarantor, of the preparatory work being done towards the exercise of the power of sale under a mortgage.

[91] The property was sold after the properties were advertised in the open market. The value that was realised represented the market value at the time. It was well within the Respondents power as mortgagee to accept the offer. The Appellants valuation appears to be inflated and based on unrealistic financial forecast adopted from the 10 years agreement between the Appellants and Ashabhai Limited, and the learned trial Judge was not mistaken in disregarding Shiva's case.

[92] The grounds have no prospect of success.

Ground 1, 2 and 16

[93] The learned Judge found that the Appellants are 100% liable for the residual debt of TOA. The counter-claim was dismissed. No further explanation was required.

[94] There is no evidence adduced that confidential information was released by the respondent to a third party. No third party was called to give evidence, and no evidence was elicited by counsel for appellants alluding to the release of confidential information.

[95] The Appellants understood and were aware of the commissioning of the McLellan Consultancy and its purpose and objective, and the primary objective behind the report which was to assist TOA. The Appellants were aware of the Strategic Plan formulated by its accountants which contained forecasts (see paragraph [40] above). One of the

key recommendations in the report was for TOA to submit its financial records for 2014 and 2015 to the Bank. TOA did not comply with the key requirement despite numerous reminders by the Respondent's officers. It is evident that the Respondent was careful to ensure that the financial position of the Appellants was accurately updated beginning with the 2014 and 2015 financials, to enable the Respondent to consider and make determination on the requests from TOA for the release of finances for its various operational requirements.

[96] In assessing and evaluating the submissions from the parties, it would appear that the Appellants various requests for the release of funds by the Respondent with regard to the 60% balance of the purchase price for the blast freezer, the money for the feed, and for the purchase of eggs, were made by the Appellants in the face of the key requirements of the Mc Lellan Report. The Report required the submission of TOA's 2014 and 2015 financials to the Respondent. The Appellants and TOA did not comply. There was no documentary or other evidence that the Respondent and the Appellants' had agreed that the bank will continue to release funds to the Appellants. It would seem unreasonable for the Appellants to expect approval of its various requests, given the Respondent is a development Bank which must also prioritise its interest, in securing the timely repayment of its loan in line with the loan agreements.

[97] TOA alleges that an offer of $10 million from a third party was rejected by the Respondent, and if accepted the amount would have been sufficient to pay off the total debt of $6,939,501.65. The balance monies from the sale could have been profit for the Appellants as Directors. TOA had a willing buyer which was rejected by the seller, and therefore the Respondent was liable for damages, to be assessed on the market value of the property between that of a willing buyer and a willing seller- see **Seager v Copydex Ltd (No.2)** (supra).

[98] However, no evidence was given that the third party had indeed made an offer as relayed by the Appellant/TOA's employees. There was no serious follow up attempted by the Appellants with the third party. There was no progressive approach made to introduce the potential buyer to the Respondent, at least to get an initial agreement. There was no evidence that the ultimate sale was a result of collusion between the Respondent and the buyer, or that that there has been any corruption

involved by the Respondent in selling TOA's properties under mortgage. There was no evidence of bad faith.

[99] The evidence of the DW1 and DW4 was discussed by the learned trial judge at paragraphs [48] to [57] and [62] to [63] respectively in the judgment. The evidence was analysed with the final decision and orders in favour of the Respondent taking into account the totality of the evidence at the hearing.

[100] Grounds 1, 2(a) and (g) and 16 have no prospect of success. They have no merits.

Grounds 5, 6 & 11

[101] It is argued by the Appellants that the learned Judge failed to deal with the allegations regarding the Respondent's failure or neglect to defend the second winding-up proceeding against TOA The Respondent took over after taking possession of TOA on 31st December 2017, and allowed TOA to be wound up. The Respondent as mortgagee is entitled under law to conduct a mortgagee sale and act on the securities TOA gave under the mortgages, and the debentures over the assets of TOA.As lender the Respondent is entitled to enforce the secuties in its own interest. The Respondent has no duty or obligation to step in and defend a winding-up proceeding against TOA. That is the sole duty and responsibility of TOA's Directors. The Respondent took possession of its securities, and not the operations of TOA. Directors of TOA were asked to vacate because they were living on the property. There is on this aspect evidence, which was not challenged, given by Ms. Patel at page 920, Volume 3 of record that TOA was not sought to be wound up a second time.

[102] The argument that no demand notice was ever served on the guarantor appears similarly misleading in light of the unchallenged evidence of Mr Chandra.

[103] Ground 5, 6 and 11 have no prospects of success. They have no merit.

Ground 7

[104] It is clear from the transcripts and Record that the learned trial Judge did not rely on the evidence of the sole witness for the Respondent alone. The Record show that the Respondent had tendered a total of 35 Exhibits. Apart from relying on the Respondent's witness, the learned trial Judge also relied on the documents tendered

in Court. The securities have not been disputed, and the total debt amount under the loan statement as at the date of the trial was not challenged. The admissibility of the loan statements was not opposed. **Jones & Dunkel** (supra) does not apply because, the totality of the respondent's evidence has addressed the issues before the Court. There was no missing information or gaps that the Court was required to draw inferences upon that would have assisted the Appellant - See **State v Minister for Information, Broadcasting, Television & Telecommunications, Ex-parte Fiji Television Ltd (Application 1)** (supra).

[105] In this case, the documentary paper trail sets out the evidence of the Bank and the one witness who is authorised and in a position to authenticate and shed insight into the veracity of the documents and the Appellants' financial position and debt issues, which was accepted by the learned trial Judge. The presumption in **Jones & Dunkel** (supra) does not arise. Similarly, **Land Transport Authority v Ravind Millan** (supra) does not apply and may be distinguished as there, there was no evidence submitted by LTA and the only evidence submitted was incorrect. The other two cases relied upon by the Appellant also do not apply, as in **FAI Insurance v Prasad's Nationwide** (supra) the only witness for the Appellant was not employed at the material time and the only individual witness, who had assessed the vehicle could not be found. In **Premila Devi v Queensland Insurance** (supra) the two named defendants against whom the claim was filed were not called to give evidence.

[106] Ground 7 has no merit.

Grounds 8, 9 & 10

[107] The Appellants contend that the learned trial Judge was mistaken in allowing the amendment of the sum claimed by the Respondent after a lapse of over 4 years; and in holding that the Appellants were not prejudiced with the reduction of the sum claimed. The purpose of the amendment sought by the Respondents is to ensure the amount claimed accurately reflects the figure owed by the Appellants having regard to the time of filing of the action until the trial date. The Court Rules allows for amendments to be made in pleadings at any time of trial and even at the conclusion of trial, subject however, that no prejudice or injustice is caused to the other party: **Fiji Electricity Authority v Balram** (supra).

[108] The Appellants rely on the principles in **New India Assurance Limited v GP Reddy and Company Ltd** (supra), where, the statement of defence was filed on 23rd April 2008 and it took 5 years for the appellant to seek leave to amend the statement of defence. This Court held that allowing the amendment would be unjust and refused leave to amend. The case had adopted the principle in **Manubhai Industries Limited and Another v Lautoka Land Development (Fiji) Limited** (supra). In the latter case, it was the second respondent who applied for amendment during the course of the hearing to amend its pleading so that he could plead contributory negligence. However, the Court was of the firm view that the application be refused for the reason that the appellants had pleaded precise particulars of negligence against the second respondent in its statement of defence to the appellant's claim.

[109] The Court was of the view that had an application to raise contributory negligence by way of amendment been made earlier (in the course of trial at the High Court), it may well have been allowed. But at this later stage, over 5 years after the second respondent's amended statement of defence was filed, to grant the request would be unjust to the appellants.

[110] These cases are distinguishable from the present case as, firstly, the claims are not monetary claims of specific amounts as here. Secondly, the court had determined that the amendments if made at the late stages in the course of trial, would be unjust to the other party. Here no prejudice to the Appellants was raised, except for costs, which was not awarded to the Appellants.

[111] In **Burnham v The City of Mordialloc** [1956] VLR 239, Counsel for the defendant sought to amend the defence and introduce further issues after conclusion of the arguments, which was opposed by the Plaintiff's counsel on the grounds that he has conducted the case based on the issues raised in the pleadings, and he would have conducted the hearing differently if the defendant's counsel had raised the issues previously. That is not the position of the Appellants in this case. It is significant also that the total debt owed was never challenged at the trial, and the amendment sought has the effect of reducing the debt owed by the Appellants. There is no prospect for the grounds to succeed.

Grounds 12, 13 & 14

[112] These grounds are focused on Mr Wella Pillay's conduct as a Director of the Respondent. It is argued that the learned Judge was mistaken in holding that Mr Wella Pillay had no conflict of interest given his position with the Respondent and as landlord to Future Farms an established poultry Company, when he did not declare his interest at the Respondent's Board meetings, which he attended in which TOA's financial position was discussed. The evidence of Mr Pillay show that he had stated that he did not think he had a financial interest in Future Farms to compel him declare his interest as he was a landlord of Future Farms not a shareholder or Director. He had adequately explained his position. There were no objections raised by TOA's representatives at the Board meetings they attended. The decisions that the Board made with respect to the payment of the arrears of debt owed by TOA to the Respondents were in the interests of the Respondent. Whether Mr Wella Pillay breached section 9 of the Fiji Development Bank Act depends on whether he held a financial interest in Future Farms or any other company which may compromise his decision making.

[113] That depends on the facts and circumstances. Mr Pillay as landlord is entitled to receive rental income from his tenant in accordance with the terms and conditions of the Tenancy Agreement or Lease. Under such agreement or lease it would be normal to have a right to receive rent at intervals and also a right to enforce the terms of the rent payment and other conditions if not followed by the tenant. In that sense, I do not agree that Wella Pillay has a financial interest in future farms, except of course if he has another stream of income flowing to him, other than rent or any payment made in consideration of a breach of the Agreement or lease conditions. There is no evidence adduced to support such a suggestion or arrangement existing. This ground fails.

Ground 15

[114] The contentions in this ground has been addressed in my analysis above. In the Appellants evidence tendered and accepted by the Court it is clear that all the submissions relevant to the statement of claim has been addressed. The Respondent is a development Bank which lends money upon conditions and is empowered to

demand security for the lending it provides. Its first interest is to protect its security at all stages of the Appellant's Project. There are policies and rules governing the administration of a loan portfolio and strict monitoring of repayment is conducted, especially if the loan account is in substantial arrears. The Bank is also not a financial adviser to TOA or the Appellants, and had continuously asked the Appellants to seek independent legal and other advice. No unreasonable reliance should be placed on the Bank to compromise its right under its security.

[115] The Appellants are investors and experts in the poultry industry and should have made decisions conducive to TOA's growth and success. For example, it could have closed down earlier when the government did not provide funding for the special term involving Mataqali's was withdrawn. The Bank is a statutory body with powers and functions and is not a government institution. It operates in a commercial environment to assist and support farmers, businesses and investors financially to boost productivity and succeed with their ventures.

[116] The Bank had made several requests to TOA to release its audited financial statements of 2014 and 2015 so the Bank can evaluate and assist in the release of the 60% blast freezer monies, but no financials were submitted by TOA. The company did not provide any evidence that its financial information had been forwarded or given to the Respondent. The Appellant was able to provide 62 documents in its defence, however, it did not supply the only pertinent documents that the Bank required. TOA's financial reports never existed. This ground fails.

G. Conclusion

[117] In light of the analysis, the circumstances of this case and the totality of the evidence, the appeal is dismissed. Costs as summarily assed to be paid by the Appellants to the Respondent.

Morgan, JA

[118] I have read and concur with the reasoning, conclusion and orders in the judgment of Qetaki, RJA.

Andrée Wiltens, JA

[119] I agree with the reasons and orders of Qetaki, RJA.

Orders of the Court

1. *Appeal is dismissed.*
2. *Orders of the High Court are affirmed.*
3. *The Appellant to pay costs to the Respondent in the sum of $5,000.00 within 21 days from the date of this order.*

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

Hon. Mr. Justice Andrée Wiltens
JUSTICE OF APPEAL

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