IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 129 of 2010

BETWEEN : **MOHAMMED NASIR KHAN** father's name Mohammed Yakub Khan) and **NASRA KHAN** (father's name Singhi Ram Singh), husband and wife respectively, both of 16 Phullgers Avenue, Simla, Lautoka, Businessman and retired respectively.

PLAINTIFFS

AND : **MOHAMMED ALEEM KHAN**(father's name Mohammed Hakim Khan) of Kennedy Avenue, Nadi, Businessman.

DEFENDANT

Counsel : Ms Natasha Khan for the Plaintiffs
Ms Leena Goundar for the Defendants

RULING

INTRODUCTION

[1]. In this case, very little of the facts is in dispute. The plaintiffs are husband and wife. The defendant (**"Aleem"**), at all material times, was a family friend. In 2005, the 2nd plaintiff advanced to Aleem personally a loan of AUD$43,000 on the condition that Aleem would give the plaintiffs four undated cheques as security payable to the 1st plaintiff (**"Nasir"**) and that the loan be cleared off within a year. Aleem concedes that he did give four undated cheques to the plaintiffs pursuant to their arrangement. He also concedes that that their arrangement did leave him indebted to the plaintiffs in the sum of $43,000.

[2]. The cheques were tendered in evidence at the hearing of the application now before me. They are numbered sequentially from 100042 to 100045. Each cheque specifies the value given. Together, the values specified in the four cheques add up to $43,000 (see paragraph [9] below). I do note that the cheques say nothing about where they are drawn or where they are to be payable.

[3]. It is common ground that, at some point in time, after the plaintiffs had paid Aleem the money, the parties did vary their arrangement. However, they differ on how the arrangement was varied.

[4]. According to Nasir, the variation was only to give Aleem more time to settle the debt. Aleem however pleads that the variation was to offset the debt against part of a greater debt that Nasir's company (Khan Buses Limited – **"KBL"**) owes to the Aleem's company (Aleem Investments Limited- **"AIL"**).

5. As to paragraph 6 of the Statement of Claim the Defendant says that the Plaintiffs later agreed that the said sum of $43,000-00 was to be utilized by the Defendant in respect of over $400,000-00 owed as costs and disbursements payable by Khan Bus Limited, (a company of which the First Plaintiff was a Director and Shareholder) to Aleems Investment Limited a Company of which the Defendant was the Managing Director and majority shareholder and accordingly the Defendant denies any money to the Plaintiff's as claimed and except as is herein expressly admitted the Defendant denies each and every other allegations contained therein.

[5]. According to the plaintiffs, they went to the bank to deposit the four cheques into the Nazir's bank account on 17 September 2009 after Aleem failed to settle the debts on demand. The cheques however were dishonored by their bank.

APPLICATION FOR SUMMARY JUDGEMENT

[6]. On 03 September 2010, the plaintiffs filed an application for summary judgment under Order 14 of the High Court Rules 1988 and pursuant to the inherent jurisdiction of the Court.**Order 14 Rule 1(1)** states as follows:

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgement against that defendant.

[7]. Summary judgment is available to any plaintiff where there is no defence to a claim, or, if the defence raised is either not *bona fides* or discloses no triable issue. The court's task is to determine whether there ought to be a trial (see **Carpenters Fiji Ltd –v- Joes Farm Produce Ltd Civil Appeal Number ABU 0019/2006**)[1]. The plaintiff must prove each claim clearly and to satisfy the court that the defendant has no defence which has any realistic prospect of success.

[8]. Once a claim is established, the evidential and persuasive burden shifts to the defendant (see Thomas J in **Hibiscus Shopping Town Pty Ltd -v-**

[1]Where the Fiji Court of Appeal at pages 9 and 10 of the judgment stated the summary judgement principles as follows:-

"Here it is timely to state some of the well-established principles relating to the entry of summary judgment:

(a) The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiffs claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiffs claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.

(d) Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v. Green (1958) 2 QB 9 at page 29 per Sellers LJ.

(e) Likewise where a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action, and connect with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be fore unconditional leave to defend, even if the defendant admits whole or part of the claim; ***Morgan and Son Ltd v. S. Martin Johnson Co (1949) 1 KB 107(CA).***

Woolworths Ltd[1993] FLR 106 at 109) who must adduce affidavit evidence dealing specifically with the plaintiffs claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: **Magan Lal Brothers Ltd. –v- L. B. Masters & Company Civil Appeal No: 31/84.**

HAVE THE PLAINTIFFS ESTABLISHED THEIR CLAIM CLEARLY SO AS TO SHIFT THE EVIDENTIAL & PERSUASIVE BURDEN TO ALEEM?

[9]. I am of the view that the plaintiffs have established their claim clearly. An affidavit of Nasir sworn on 02 September 2010 resonates the basic facts set out above. Sometime in 2005, Aleem approached Nasir to seek a personal loan of AUD$43,000.00. At the time, Aleem was Nasir's financial and business advisor (a fact which Aleem does not deny). Nasir says he then discussed the matter with his wife, who lent money to Aleem from her personal bank account on the conditions stated above. Aleem accepted the conditions and the money. As part of the plaintiffs' conditions, Aleem signed 4(four) undated Westpac Banking Corporation cheques, each specifying a particular value, and each bearing Aleem's name and account number as drawer. The name "Nasir Khan" is also stated in each cheque as the payee. The cheques were numbered sequentially as follows

CHEQUE No.	AMOUNT
100042	AUD $10,000.00
100043	AUD $10,000.00
100044	AUD $10,000.00
100045	AUD $13,000.00

[10]. Nasir says the agreement was later varied upon Aleem's request to extend repayment time to Aleem and on the condition that the loan would become payable upon demand. In due course, the plaintiffs would demand payment from Aleem who kept asking for more time. When it became clear to the plaintiffs that Aleem was neglecting to repay the loan, the plaintiffs' relationship with Aleem started to sour from 2007. On **17 September 2009**, the plaintiffs decided to pull the plug so to speak and went to their bank to present the undated cheques. The bank however dishonored the cheques because Aleem had closed his account. The plaintiffs then made further requests for payment to Aleem but to no avail.

[11]. In my view, considering that the plaintiffs are suing on the dishonored cheques, and that Aleem has not at all refuted that he was given the money alleged or that

he did give the undated cheques in question as security for the advance, or that the cheques were dishonored by the bank, the evidential and persuasive burden shifts at this point to Aleem.

ALEEM'S CASE

[12]. Aleem pleads that he only borrowed $40,000 from Nasir with interest at $3,000. He says nothing about whether the money was in Australian or Fijian dollars. However, at paragraph 1, he pleads **"the money was borrowed in Australia"**. Aleem seems to assert that the plaintiffs ought not to have tried to deposit the cheques without his prior notice of approval. He pleads thus at paragraph 8:

> 8. As to paragraph 9 and 10 of the Statement of claim the Defendant says as follows:
>
> (i) the Defendant was not aware that the Plaintiffs had deposited the Cheques and the same was done without informing the Defendant.
>
> (ii) on the contrary the Plaintiffs had informed the Defendant that the Cheques were misplaced.
>
> (iii) that the Defendant had closed the relevant account and he would have never agreed for the Plaintiffs to deposit the said Cheques in the account that no longer existed.

[13]. At paragraph 12 of the statement of defence, Aleem asserts that what the plaintiffs did was illegal under the Money Lenders Act:

> 12. As a further and alternative defence, the defendant says that the Plaintiffs were money lenders and accordingly in any event the Claims of the Plaintiffs are unenforceable:-
>
> (i) under the Money Lenders Act particularly sections 3, 16 and 18 thereof.
>
> (ii) under the Exchange Control Act particularly sections 7,8,9 and 10 thereof.

[14]. Aleem opposes summary judgment. By his affidavit sworn on 27September 2010, he deposes that he did borrow the monies in the 1990's and not in the year 2005. In addition, he says that he borrowed $40,000.00 only and not $43,000 as the plaintiffs claim. He says however that the additional $3000.00 was interest making a total of $43,000.00.

[15]. Aleem deposes that the plaintiffs later agreed that the sum of $43,000.00 was **"to be utilized by me in respect of over $400,000.00 owed as costs and disbursements payable by Khan Bus Limited, (a company of which the First Plaintiff was a Director and Shareholder) to Aleems Investments Limited a Company of which I was the Managing Director and majority shareholder....."**.

[16]. Aleem deposes that the plaintiffs were not supposed to bank the cheques as the cheques were issued as security. He says that, had he intended the cheques to be banked, he would have dated them. He says the plaintiffs had no right to deposit the cheques. He says that if the plaintiffs had notified him that they would be depositing the cheques, he would most certainly let them know that the account in question had been closed for sometime[2].

[17]. Aleem further re-asserts that KBL owes money to AIL and that the agreed variation was for his (Aleem's) debt to the plaintiffs to be offset against part of KBL's debt to AIL. He also reasserts that the monies he borrowed were made in Australia and repayments were to have been made in Australia[3].

[17]. Aleem also argues that the plaintiffs' action is time barred under the Limitation Act. On 25 October 2010, he filed a summons under Order 20 of the High Court Rules 1988 seeking to amend the statement of defence by adding the following as paragraph 14:

> **14. THAT** in any event the plaintiffs cannot claim the said sum of $43,000-00 Australia as the purported debt is statute barred and unenforceable under section 4 of the Limitation Act.

[18]. Order in Terms was granted on 31 January 2011.

[19]. An affidavit of a Prem Chand, a clerk of Sahu Khan & Sahu Khan sworn and filed on 22 November 2010 for and on behalf of Aleem exhibits an authority of Aleem[4] but it adds nothing further from that mentioned above.

---

[2]The defendant deposes as follows:

As to paragraph 10 of the Said Affidavit I say as follows:-

(i) The Plaintiffs were not supposed to bank the cheques as the cheques were issued as security as evidence of the monies owed and that is why the undated cheques were issued and if the intention was that the cheques be banked at the appropriate time then needless to say the cheques would have been dated and this is particularly when the First plaintiff has sworn in paragraph 3 of the Said Affidavit that the loan was to be cleared within 1 year of the loan.

(ii) Accordingly the Plaintiffs had no rights to deposit the cheques.

..... if I was informed by the plaintiffs that they intended to deposit the cheques then I would have certainly informed them that the Account had been closed sometimes ago.

..... I admit giving the undated cheques and I repeat the contents of paragraph 10 herein.

[3]The defendant deposes:

As to paragraph 20 of the Said Affidavit using the same subheading numbers as therein I say as follows:-

(i) (a) I repeat the contents of paragraph 7 herein and also confirm the contents of paragraph 5 of my Statement of Defence to be correct.

(b) I admit that the Judgment of Mr. Justice Inoke being annexure MNK 3 in the Said Affidavit and I deny each and every allegation contained therein.

(ii) I deny each and every allegation contained therein and say that Khan Buses Limited does owe Aleem Investment Limited the monies referred to paragraph 7 herein and paragraph 5 of my Statement of Defence.

(iii) The monies borrowed by me were in Australia and the repayments were to be made in Australia and both the Plaintiffs are residents of Fiji and been residents of Fiji at all material time in relation to the monies borrowed by me and which are subject to this action.

(iv) I repeat the contents of paragraph 2 of my Statement of Defence and say that the monies borrowed were $40,000.00 and $3000.00 interest and that made total sum of $43,000.00.

..... there are substantial triable issues and I have been advised by my Solicitors and verily believe that judgment cannot be entered as claimed by the Plaintiffs in their Summons for Summary Judgment filed herein.

[4]He deposes as follows:

As to paragraph 7 of the Said Affidavit the Defendant says as follows following the same sub-paragraph numbers as used by the Deponent of the Said Affidavit:-

(a) The Defendant repeats paragraph 7 and says that the amount referred to therein are owing.

(b), (c) and (d) The Said Winding Up Proceedings was commenced in Winding Up Action Number HBF 15 of 2009 and the Judgment therein is subject to an Appeal to the Court of Appeal of Fiji under Appeal No ABU 0036 of 009 and which appeal was heard by the Honourable Fiji Court of Appeal on 2nd day of

PLAINTIFFS' DENIAL

[20]. By an affidavit in reply he swore on 08 November 2010[5], Nasir again denies that either he or his wife or his company, KBL, ever owed money to Aleem and/or to AIL. Nasir's depositions in his first affidavit are reproduced below:

> Neither we or nor Khan Buses owes Aleem and/or his Company Aleem's Investments Limited any monies as alleged. Aleem through his Company has attempted to extort monies from Khan Buses previously.....
> We did not at any time tell Aleem to use the funds as payment of debt on behalf of Khan Buses Limited. We had no reason to as Khan Buses Limited did not owe Aleem and/or Aleem Investments Limited any monies at all and we rely on the Judgment marked as MNK 3 above;
> My wife is an Australian Citizen and I hold Permanent Resident to Australia. My wife, who is currently retired, was a registered nurse in Australia for a number of years. She last worked for Aloha Age Care Centre, Sydney. She lived and paid her taxes in Australia at the said time. The monies in the fixed deposit were from her savings. Therefore, I am informed and verily believed that there have not been any breaches of the Exchange Control Act as pleaded. Furthermore, as our financial and business advisor Aleem is well aware of the same....
> The amount advanced by us to Aleem was in the full sum of $43,000.00 not just $40,000.00. We were at no stage charging any interest on the amount as claimed by

---

November, 2010 and Judgment has been reserved to be given on Notice and I annex herein and marked as Annexure **"B"** is a copy of the Notice and Grounds of Appeal in the above matter and annex herein and marked as Annexure **"C"** is a copy of the Submissions on behalf of the Defendant's Company Aleems Investment Limited made in the Fiji Court of Appeal.

(e) The Defendant says that what the basis of taking the loan of $40,000.00 and $3,000.00 interest issuing the Cheque for $43,000.00 were as stated by the Defendant in his First Affidavit.

(f) The Defendant does not accept the contents of the purported Annexure MNK1 and the contents thereof were taken by deceit and misrepresentation by Mohammed Navid Khan and the whole conversation has to be seen later in evidence in their proper context and except as is herein expressly admitted the Defendant denies each and every other allegation contained therein.

..... the Defendant ..... denies as alleged that it was agreed that there was variation to the arrangement of payment.

[5]Nasir deposes as follows:

..... the sum of $43,000.00 was advanced and the same is evidenced by the three cheques.
In response to paragraph 7 of the said Affidavit I say as follows:-

(a) Both me and my wife deny owing any money to the Mohammed Aleem Khan and or his Company Aleem Investment Limited as alleged in paragraph 7 of the said Affidavit.

(b) The Defendant's Company namely Aleem Investment Limited filed a Winding up Petition against Khan Buses Limited to recover the debt as alleged in Paragraph 7 of the said Affidavit. I crave leave to refer to my earlier Affidavit sworn on 2nd September, 2010 (hereinafter referred to as "my earlier affidavit") and in particular annexure MNK 3. The Court when ruling on the winding up petition made the following findings of fact from paragraph 8 onwards:

(i) In March 2000 Aleem approached me for a loan;
(ii) I agreed to give him a loan in the sum of $200.000.00 from my companies' overdraft facility on the condition that the facility be restored in 90 days and that Aleem be responsible for the repayment, interest and/or charges;
(iii) The facility was not paid by Aleem despite the agreement reached between us; and
(iv) Aleems Investment paid back the facility on 28/01/05.
(v) The debt being claimed by Aleems Investment against Khan Buses was in fact debt owed by Aleems.

(c) At paragraph 11 the Honourable Court goes to hold:-

> *.....on this principle alone, the Petition as well as any court action against Khan Buses based on this fact, whether by writ or otherwise, should be permanently stayed. If the money has been used by Ashleem Investment Limited or some other person then those are the proper parties to pursue. Not Khan Buses. If the issue of these proceedings or subsequent proceedings is to facilitate joinder of some other parties, when Aleem knows full well the circumstances behind the dealings with bank, no clearer case of abuse of process or of a frivolous and vexatious action can be found. He can sue those persons independently of Khan Buses".*

(d) The Honourable Court further finds at paragraph 17

> *".....the further prosecution of the petition or any proceeding based on these facts will constitute an abuse of process".* (Emphasis provided).

(e) I am astounded that the Defendant is even claiming that monies were to be used up for repayment of monies owed by us to him in light of the Honourable Court's ruling on this.

(f) I now annex my son Mohammed Navid Khan's Affidavit sworn on the 17th day of July, 2009 and the mark the same as annexure **"MNK 1"**, with the deponent of the said Affidavit's own admission that our Company owes his Company no monies.
..... I admit that the cheques were given as security as this was one of the conditions on which my wife had agreed to lend the money to the Defendant. Furthermore, it was also agreed the cheques would be banked into my account after one year, which was later varied.

> Aleem. The monies were loaned interest free. We now claim interest by way of right for loss of use of our monies. I am advised and verily believe that the provisions of Moneylenders Act do not apply. In any event we never were nor are moneylenders.

THE LAW & ANALYSIS

[21]. As I have stated above, the plaintiffs are suing on some dishonoured cheques. Aleem does not refute any allegation concerning the cheques or the circumstances in which he gave the, (cheques) to the plaintiffs. The evidential and persuasive burden would therefore fall heavily on Aleem to convince this court not to grant a summary injunction. I am of the view that Aleem has failed to discharge that burden. I discuss my reasons below based on the point of argument raised by Aleem.

Starting Point

[22]. As a starting point, it is not in dispute that the cheques in question were intended to be evidence of Aleem's indebtedness to the plaintiffs. Aleem himself concedes to this fact when he deposes as follows:

> The Plaintiffs were not supposed to bank the cheques as the cheques were issued as security as evidence of the monies owed and that is why the undated cheques were issued and if the intention was that the cheques be banked at the appropriate time then needless to say the cheques would have been dated and this is particularly when the First plaintiff has sworn in paragraph 3 of the Said Affidavit that the loan was to be cleared within 1 year of the loan.(my emphasis)

Bills of Exchange

[23]. Ms Khan submits that, as security, the cheques must be analysed in terms of the Bills of Exchange Act (Cap 227). I must agree. I find Aleem's submissions confusing and ill advised. Section 73 of the Act provides that a cheque is a bill of exchange drawn on a banker on demand and therefore, the provisions of the Act would generally apply.

> 73. A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

[24]. Section 3 of the Act defines a bill of exchange as follows:

> 3.-(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.
(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with:
(a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount; or
(b) a statement of the transaction which gives rise to the bill,
is unconditional.

Effect of Not Dating the Cheques

[25]. The suggestion by Aleem that the cheques were not dated because they were not intended to be banked, is rather misguided and ludicrous. The cheques would have no value as security if they were not intended to be banked. They must be "realisable" in order to have any security value. In any event, the fact that the cheques are undated does not invalidate them according to section 4(4) of the Act.It must mean that they can still be presented, hence, their security value.

(4) A bill is not invalid by reason:
(a) that it is not dated;
(b) that it does not specify the value given or that any value has been given therefor;
(c) that is does not specify the place where it is drawn or the place where it is payable.

Cheques – To Be Presented Within Reasonable Time

[26]. Arguably, in the circumstances of this case, the effect of section 4(4), when read together with other provisions of the Act[6], is to give *prima facie* authority to the holder of a cheque (plaintiffs) to date the undated cheque at presentation, provided, as read together with section 74 (see below) that the cheque is presented (and at which point it must then be dated) within a reasonable time.

Presentment of cheque for payment

74. Subject to the provisions of:
(a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of

[6] The following sections may or may not be relevant but this point is really not at issue in this case:
12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly:
Provided that-
(a) where the holder in good faith and by mistake inserts a wrong date; and
(b) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Ante-dating and post-dating

13.-(1) Where a bill or acceptance or any endorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be.
(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday

such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid;

(b) in determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case;

(c) the holder of such cheque as to which such drawer or person is discharged shall be a creditor in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

[27]. I am of the view that the plaintiffs did present the cheques within a reasonable time, and in doing so, I am accepting their account of facts that the money was actually lent to Aleem in 2005 and not in the *"1990s"* as Aleem would have me believe. I also accept that the reason why the plaintiffs did not immediately present the cheques for payment was because of their arrangement with Aleem, from time to time, on Aleem's request, to extend the time for payment.

Payable on Demand

[28]. In addition, the fact that the cheques are undated would appear to support the plaintiffs' case that the cheques were meant to be payable on demand (of course subject still to the *"reasonableness"* provisions of section 74). In this regard, section 10 of the Act is supportive:

Bill payable on demand

10.-(1) A bill is payable on demand-

(a) which is expressed to be payable on demand, or at sight, or on presentation; or

(b) **in which no time for payment is expressed**. (my emphasis)

(2) Where a bill is accepted or endorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any endorser who so endorses it, be deemed a bill payable on demand.

Cheques Drawn in Australia – Money Paid in Australia

[29]. Although Aleem does not argue the point, and no issue of conflict of laws is raised by counsel, Aleem seems to hint at an argument that the correct forum to enforce any right pursuant to the cheques is Australia. He deposes:

(iii) The monies borrowed by me were in Australia and the repayments were to be made in Australia and both the Plaintiffs are residents of Fiji and been residents of Fiji at all material time in relation to the monies borrowed by me and which are subject to this action.

[30]. The fact that the cheques might have been drawn and payable in Australia seems irrelevant because section 4 of the Act would still deem the cheques in question as *"inland bills"*. This provision must be read together with section 72 of the Act.

Inland and foreign bills

4.-(1) An inland bill is a bill which is or on the face of it purports to be-
(a) both drawn and payable within Fiji or within the Commonwealth of Australia, New Zealand or Papua; or
(b) drawn within Fiji or within the Commonwealth of Australia, New Zealand or Papua upon some person resident therein.
Any other bill is a foreign bill.
(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

And section 72:

Conflict of Laws
Rules where laws conflict

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance supra protest, is determined by the law of the place where such contract was made:

Provided that-

(i)where a bill is issued out of Fiji it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
(ii)where a bill, issued out of Fiji, conforms, as regards requisites in form, to the law of Fiji, it may, for the purposes of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in Fiji;

(b) subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made:

Provided that where an inland bill is endorsed[7] in a foreign country the endorsement shall as regards the payer be interpreted according to the law of Fiji; (my emphasis)

(c) the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured;
(d) where a bill is drawn out of but payable in Fiji and the sum payable is not expressed in the currency of Fiji, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable;
(e) where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

[31]. From the parts of section 72 highlighted above, it would appear that the law of Fiji (i.e. Bills of Exchange Act and other relevant case law) must be applied in this case, considering also that the plaintiffs, as Aleem admits above, **"are residents**

[7]Section 2 of the Act defines ***"endorsement"*** and ***"delivery"*** as follows:
"delivery" means transfer of possession, actual or constructive, from one person to another;
"endorsement" means an endorsement completed by delivery;

of Fiji and been residents of Fiji at all material time in relation to the monies borrowed by me and which are subject to this action".

[32]. Aleem does not refute that the money borrowed was in Australian dollars. I find that it is established without dispute that the plaintiffs did lend Aleem AUD$43,000.

Variation of Agreement

[33]. The loan from the plaintiffs to Aleem was a personal one to Aleem. The funds involved belonged to the 2nd plaintiff personally. Neither KBL nor AIL were involved in any way. Essentially, Aleem argues that his personal obligation to repay the loan was, by agreement, *"offset"* against a loan which KBL owes to AIL.

[34]. The plaintiffs of course deny that they ever agreed to that arrangement.

[35]. The debt purportedly owing by KBL to AIL is summarised in the Fiji Court of Appeal ruling in **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJCA 4; ABU0036.2009 (24 January 2011), in Mr. Justice Inoke's ruling in **Aleems Investments Ltd v Khan Buses Ltd** [2011] FJHC 473; HAC102.2011L (26 August 2011) and in Master Ajmeer's ruling in **Aleems Investments Ltd v Khan Buses Ltd**[2014] FJHC 452; HBC102.2011 (20 June 2014).

[36]. The following observations of Master Ajmeer is insightful:

> [21] Major change in the claim has been brought in the amended statement of claim. The date the plaintiff (i.e. AIL) allegedly lent money to the defendant (i.e. KBL) has been changed as **28 January 2005**. In the original statement of claim it was **28 January 2008.** There has been three year different between the initial date and the amended date. This clearly indicates that the plaintiff is not consistent even on the date when it lent money to the defendant.
>
> [22] The plaintiff says that they lent money to the defendant in the sum of $408,862.63. Why the plaintiff lent such a huge amount of money to the defendant without security? Was there any agreement between the parties? What was the repayment arrangement? If so, what was interest rate agreed upon? The pleading of the plaintiff does not provide any of these particulars.
>
> [23] In contrast, the defendant denies that the plaintiff lent moneys to the defendant. The defendant in the amended statement of defence says that the sum of $408,862.63 that the plaintiff paid Habib Bank Limited was to satisfy the claim for monies advanced by the defendant to the plaintiff, together with bank overdraft interest. The defendant also does not provide any particulars of the advanced money to the plaintiff. The defendant has also taken up limitation defence. Pursuant to section 4 of the Limitation Act, actions founded on simple contract, etc. shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[37]. Having read these rulings and the issues involved, it is hard for me to believe Aleem's assertion regarding the plaintiffs' purported agreement to vary their arrangement on terms which Aleem alleges. The debt alleged by AIL is very much denied by KBL. I do not believe Aleem's account on this aspect of the case. The fact that AIL is, as clear from Master Ajmeer's observations, claiming the full amount purportedly owing to it by KBL (with no deduction of the AU$43,000 which is the subject of the case) means to me that neither Aleem nor AIL will suffer any injustice at all if summary judgement is entered in this case.

[38]. Different if, for example, AIL was claiming in the other action now before Master Ajmeer, a sum which is already reduced on account of the amount purportedly offset in this case. **In fact, the fact that AIL is pursuing the entire sum in the action before Master Ajmeer without allowing for any discount for the set off purportedly agreed in this case before me, tells me that AIL is pursuing that debt separately.** The policy of the law is that a defendant cannot claim a set-off or a counter-claim to avoid settling a bill of exchange. If she has a counter-claim (or set off) that must be pursued in a separate claim (see case law discussion below).

[39]. And in this case before me, I am not inclined to accept the allegation by Aleem that the plaintiffs did agree to a setoff for two principal reasons: firstly, because policy dictates against it as case law will show below and secondly, in any event, because KBL and AIL are two totally different juridical persons who are not even parties to this action before me (not that it would make much difference if they were).

Case Law

[40]. Generally, as stated, case law shows that there are limited defences to a dishonoured bill of exchange including a cheque. The rule is that the defendant must pay the plaintiff on the bill of exchange first and pursue claims later. In **Cebora SNC v SIP (Industrial Products)Ltd** [1976] 1 Lloyd's Re 271, at pages 278 -279, Sir Eric Sachs said as follows:

> Any erosion of the certainties of the application by our Courts of the law merchant relating to bills of exchange is likely to work to the detriment of this country, which depends on international trade to a degree that needs no emphasis. For some generations one of those certainties has been that the bona fide holder for value of a bill of exchange is entitled, save in truly exceptional circumstances, on its maturity to have it treated as cash, so that in an action upon it the Court will refuse to regard either as a

defence or as grounds for a stay of execution any set off, legal or equitable, or any counterclaim, whether arising on the particular transaction upon which the bill of exchange came into existence, or, a fortiori, arising in any other way. This rule of practice is thus, in effect, pay up on the bill of exchange first and pursue claims later.

[41]. Stephenson LJ in the above case said as follows at 278:

Bills of Exchange are treated as cash, and unless there are exceptional circumstances where there is an action between the immediate parties to a bill of exchange judgement will not be held up by virtue of a counter claim by the defendant, and the execution will not be stayed.

[42]. In **Nova (Jersey) Knit Ltd v KammgarnSpinnerei GmbH** [1977] 1 WLR713; [1977] 2 All ER 463, the House of Lords (as per Lord Russell) said at 732;479:

"...It is in my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser: nor is it available as a set-off or counterclaim. This is a deep rooted concept of English commercial law."

[43]. **Inre Ramans Emporium Ltd** [1997] FJHC 6; Hbe0042j.96s (15 January 1997), Pathik J cites the Fiji Court of Appeal decision in **Coir Industries Limited v Louvre Windows Limited** 1984 30 FLR 45:

.... the Fiji Court of Appeal in COIR INDUSTRIES LIMITED v LOUVRE WINDOWS LIMITED1984 30 FLR 45 when SPEIGHT V.P delivering the judgment of the Court said:

"The law on Bills of Exchange, unfortunately for the appellant, is quite clear. Once a Bill has been unconditionally accepted, it is the equivalent of cash, and the only excuse available in support of subsequent dishonour is failure of consideration or that its acceptance has been procured by fraud".

"There is nothing to suggest that fraud could be construed from the increased price which it is acknowledged would be disclosed on the shipping documents available to the appellant before the Bills were accepted. Nor can a suggestion of fraud arise from the allegation that a comparatively small quantity of the goods were defective, or from the claim that there was short supply or that some were damaged or that insurance cover had not been perfected. These are common incidents in trading relationships. The acceptor of a Bill of Exchange undertakes payment as if by cash, and any dissatisfaction, short of total failure of consideration, must be a matter for subsequent counterclaim."

Also in **ATKIN'S COURT FORMS** 2nd Ed. Vol. 6 (1985) p.318 at para. 28 it is stated:

"It is universally accepted that a bill of exchange can be treated by the drawee or holder as the equivalent of cash. In consequence, an action founded upon a dishonoured bill is in a different category from other actions. It is no defence for the drawer or acceptor to say that he has counterclaims against the drawee or holder arising out of the same transaction, which he can plead as a defence by way of set-off. The only defences to an action on a bill which is accepted as genuine are that it has been obtained by fraud or illegality or where there has been a total failure of consideration. Summary judgment may usually be obtained by the drawee of a dishonoured bill and if the plaintiff's claim to be a

bona fide holder for value is not in issue or if it can be supported by the evidence of contemporary documents the plaintiff will have discharged the onus of proof upon him and he will be entitled to judgment."

[44]. In light of the policy of the law as stated above, and considering that the plaintiffs do vehemently deny having agreed to any variation to offset Aleem's loan against a greater debt allegedly owing by KBL to AIL - it would be pointless to make this issue a triable one. Aleem would face an insurmountable burden of convincing any court that his arrangement with the plaintiffs on terms he alleges, which, prima facie go against the grain of legal policy, was in fact varied by agreement.

Money - Lenders?

[45]. As stated above (paragraph [13], Aleem also argues that what the plaintiffs did contravened the Money Lenders Act. Essentially, what Aleem is saying is that in lending him the money and in demanding interest thereon, the plaintiffs were engaging in the business of money lending which – without any licence to do so as required under the Money Lenders Act – would be an illegal activity.

[46]. I do not accept Aleem's argument. In not accepting that argument, I am accepting the plaintiff's account that Aleem was a personal friend of the family and their business and financial advisor and that they had lent him money only on that basis. Mr. Justice Kermode in **Rokoluve v Dayal** [1978] FJSC 14; Civil Action 170 of 1973 (26 September 1978) faced a similar issue. His comments, below, I endorse and apply in this case before me now:

The defendant as an alternative defence claims the plaintiff is an unlicensed moneylender and the loan transaction is unenforceable.
While the plaintiff spoke freely about the defendant's seeking a loan of $1,500 in my view on the facts the transaction was not a loan at all but the purchase of a post-dated cheque - a bill of exchange - for $1,550 at the discount price of $1,500. (my emphasis)It follows that the provisions of the Moneylenders Act has no application. **Meston** in **The Law Relating to Moneylenders 4th Edition** at page 19 discusses the discounting of notes. He refers to an unnamed case apparently reported in (1932) 96 J.P. 62 as to whether a man in the habit of cashing seamen's advance notes and deducting a small amount was a moneylender within the statute. The opinion was expressed and adopted by the learned author that such a man does not lend money but discounts the notes. In the instant case the plaintiff on the facts gave $1,500 in exchange for a post-dated cheque for $1,550.
If I am wrong in my view on the evidence before me, that the transaction was not a loan, I would still hold that the plaintiff was not a moneylender within the meaning of that term in the Moneylenders Act.
The plaintiff was at the time engaged in domestic duties. She was at one time a market vendor and made and sold mats. She denied she carried on the business of moneylending

or held out she was lending money. Her savings amounted to a sum of about $2,000. From time to time infrequently and sometimes at long intervals she would lend small sums to relatives and friends. She did not ask for interest but sometimes borrowers would give her extra money when repaying loans.

At the time she gave the money to the defendant she had previously given Ratu David Tonganivalu $2,000 in exchange for his cheque which cheque when cleared provided the funds for the transaction with the defendant.

She also made what she said was a loan to a Rotuman who gave her a cheque in exchange for her cheque. There was as stated small loans to friends and relatives in her village and to one Charlie.

It is clear from her evidence which I accept that her friends and relatives called on her for small loans from time to time and from her savings she accommodated them leaving it to them either to repay the loans or the loans with an additional amount. She did not seek interest and did not hold herself out as a moneylender.

Mr. Maharaj quoted **Same v. Sheriff Mohammed & Ors**.5 F.L.R. 13 in support of his argument that the plaintiff was a moneylender but that case is clearly distinguishable. There the plaintiff failed to satisfy the Court that the presumption raised by section 3 of the Moneylenders Act did not apply. He failed to satisfy the Court that he was not a moneylender at the time of the loan.

In the instant case I am satisfied by the plaintiff's evidence that her business was not that of moneylending and that she did not carry on or advertise or hold herself out as carrying on that business.

Meston in The Law Relating to Moneylenders also refers to one of the cases quoted by Mr. Ramrittu.

In **Litchfield v. Dreyfus** (1906) 1 K.B. 584, the plaintiff in that case assisted friends and persons whom he had had business with loans and by discounting bills for them. He was held not to be a moneylender, Farwell J. said:

> "The act was intended to apply only to persons who are really carrying on the business of moneylending as a business not to persons who lend money as an incident of another business or to a few old friends by way of friendship."

The learned Judge also said in that case:

> "But not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided they are from his point of view eligible .... It is a question of fact in each case."

In **Edgelow v. MacElwee** (1918) 1 K.B. 205 McCardie J. in referring to the definition of a moneylender under the Moneylenders Act (1910) (Imp.) said:

> "A man does not become a moneylender by reason of occasional loans to relatives, friends or acquaintances whether interest be charged or not. Charity and kindliness are not the bases of usury ... There must be a business of moneylending, and the word "business" imports the notion of system, repetition, and continuity.
>
> Each case must depend on its own peculiar features. It is ever a question of degree."

The plaintiff did make a number of loans to relatives, friends and acquaintances. Some were with interest and others were not. She has satisfied me that she was not in business as a moneylender and I hold as a fact that she was not at the time she paid the defendant $1,500 a moneylender within the meaning of that term in the Act. There will be judgment for the plaintiff for $1,550 with costs to be taxed on the higher scale.

[50]. In any event, I have already made my conclusions above that the transaction happened in 2005 and that the plaintiffs, in the circumstances, did present the cheques within a reasonable time.

CONCLUSION

[51]. For all the above reasons, I grant an Order for summary judgement in favour of the plaintiffs against Aleem in the sum of AUD$43,000 plus costs which I summarily assess at FJD$2,500 (two thousand five hundred dollars only).

HIGH COURT OF FIJI
LAUTOKA

.....

Anare Tuilevuka
JUDGE
28 August 2014.