IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 407 of 2000L

BETWEEN : **ROBERT YANG** and **ALRED YANG** both of Lautoka.

FIRST PLAINTIFFS

AND : **CROWN CORK (FIJI) LTD** a limited liability company incorporated in Fiji with its registered office at 7 Nagaga Street, Lautoka.

SECOND PLAINTIFF

AND : **FIJI DEVELOPMENT BANK** incorporated under the Fiji Development Bank Act with its Head Office at Suva, Fiji.

FIRST DEFENDANT

AND : **HASMUKH BHAI PATEL** f/n Punam Bhai Patel of Sigatoka, Director and **HD's GARMENT WORKSHOP LIMITED** a limited liability company having its registered office at Sigatoka.

SECOND DEFENDANTS

Appearances: R. Patel Lawyers for the Plaintiffs
Nacolawa & Company for the Defendants
Date of Hearing: Ruling on Paper
Date of Ruling: 10.12.2021

RULING

BACKGROUND

1. An excellent background to this case is set out in the Ruling of Mr. Justice Inoke in **Yang v Fiji Development Bank** [2010] FJHC 447; HBC407.2000L (30 September 2010) and also in the decision of Ms. Justice D. Wickramasinghe in **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011).

2. The Fiji Development Bank (**"FDB"**) gave a housing loan to Robert and Alfred Yang in 1983. As security, the Yangs gave a mortgage over the land and improvements. This was duly registered.

3. At all material times, the Yangs were the directors and shareholders of the Crown Cork (Fiji) Limited, (**"Crown Cork"**).

4. The FDB also gave an industrial loan to Crown Cork secured by a second mortgage over Yangs' land and a debenture over Crown Cork's assets and undertaking.

5. The Yangs leased their land and building to Hasmukh Bhai Patel. Rental income was assigned to FDB in repayment of the loans.

6. The Yangs allege that the two loans were merged by FDB at some point. The Yangs assert that this happened without their knowledge. As it happened, Crown Cork defaulted on the loans and FDB exercised its rights as debenture holder and appointed a receiver who sold the company's assets and undertaking including the Yangs' land to Hasmukh Bhai Patel.

7. The Plaintiffs alleged that such sale was negligent, fraudulent and at gross undervalue. They sue the Defendants for certain declarations, accounts and damages.

WHAT HAPPENED IN HBC 096 of 2001?

8. HBC 096 of 2001 was a related action. In that case, the FDB had sued Crown Cork on the same securities in this case, HBC 407 of 2000 - seeking *inter alia* judgment in the sum of $257,663.56. FDB was also seeking a judgment against the Yangs in the sum of $150,000.00 as outstanding payments on money lent to Crown Cork.

9. HBC 096 of 2001 had been set for trial before Wickramasinghe J in 2009. Notably, the Yangs and Crown Cork's solicitor was in court on the day when that trial date was fixed in Court. However, neither of them appeared in Court on the date of trial.

10. As Wickramasinghe J said in her judgment:

> [6] *When the matter was taken up for trial before me, the Plaintiff was represented by counsel; but, the Defendant was absent and unrepresented. When the case was mentioned on 7th December 2009 to fix date of trial, Mr. Nacolawa had obtained the date of trial on behalf of the Defendant. I therefore did not see any justification to postpone this action which had been initiated in 2001. Subsequent to recording the reasons in the case record, I ordered the Plaintiff to continue with the trial, in the absence of the defendants or their counsel. Needless to state that even in the absence of the Defendants or their counsel, the Plaintiff must prove its case on a balance of probability.*

11. Wickramasinghe J proceeded to trial, given that the matter was then already long pending.

FINDINGS OF WICKRAMASINGHE J

12. In her judgment, the Learned Wickramasinghe J recorded the following:

Date	Transaction	Comments
10/05/79	FDB loaned $150,000 to Crown Cork to purchase equipment for its business.	Term 10 years
	Securities: (i) a first debenture over all the company's assets;	

	(ii) personal Guarantees of the Defendants with a limit of $150,000; and (iii) Comprehensive insurance cover over the machinery and stock.	
10/02/94	Agreement.	Yangs' liability was agreed to be unlimited
23/08/94	Mortgage Bond No. 363955	Executed by Yangs. As collateral, the Yangs provided as collateral – secondary mortgagee rights over leased property No. 203460. Wickramasinghe J noted that the Yangs had earlier in 1983, pledged the same property to FDB to secure personal loan advances.

13. Wickramasinghe J noted that the Yangs had tried earlier to have HBC 096 of 2001 adjourned indefinitely until HBC 407 of 2000 (which is this matter now before me) was determined. However, their application had been dismissed by another Judge.

14. At the trial of HBC 96 of 2001, Mustahib Hafiz Ali, the Senior Business Manager of FDB produced two bundles of Documents as Volumes 1 and 2 and tendered documentary evidence which were marked as exhibits 1 to 7.

15. After considering the evidence, Wickramasinghe J found as follows:

    (i) Crown Cork had defaulted in its loan account for some time
    (ii) because of that, FDB appointed a Gardiner Whiteside on 08 September 1997 as Receiver to manage Crown Cork.
    (iii) by letter of 17 March 1997, Crown Cork advised FDB that the plant and machinery of its company was badly damaged due to cyclone, wind and water and that as a result, heavy corrosion had set in.
    (iv) subsequently, the Receivers advertised and then sold the plant and machinery for $18,000.
    (v) the sale proceeds were then credited to Crown Cork's loan account.
    (vi) after obtaining a valuation report and several attempts to advertise for sale, the leased property that was mortgaged to FDB was also sold for $332,500.

16. Wickramasinghe J also noted as follows:

    [11] From the sale proceeds of $332,500 of the leased land, the Plaintiff had settled in full the First Mortgage (the personal loan of second Defendant) which on 2nd October 2000 stood at $132,650.35 **[Exhibit 7]**. The balance sum of $199,977.86 of the sale proceeds have been credited to the First Defendant's loan account. Accordingly, as at 30th November 2000, the Defendants owed the Plaintiff a sum of $257,530.56 **[Exhibit 4]** as claimed in this case.

    [12] At the trial, counsel for the Plaintiff informed court that he would limit its claim to $257,530.56 although the Writ of Summons specifies a figure of $257,663.56.

    [13] I have considered the evidence before this court and am satisfied that the Plaintiff had loaned a sum of $150,000 on 10th May 1979, to the First Defendant's Company on the securities of the Second and Third Defendants as stated above. The Plaintiff has also served demands on the Defendants as required by the guarantees. The Demand Notices were produced before this court marked as **(ABOD) Documents 184,185,237, 238, 239 & 240 of Volume 2**.

> [14] I am also satisfied that the account balance of the First Defendant as at 31/03/1999 stood at $448,235.24 and after apportioning the sale proceeds of Plant & Machinery, leased land and the insurance recoveries, the debt as at 31st December 2000 stood at $257,663.56.

17. After considering the above, Wickramasinghe J then turned to consider the defence which the Yangs had raised, even though they had chosen not to attend Court:

> [15] Let me now consider the defences raised by the Defendants in the Statement of Defence. The main defenses are that:
>
> - (i) the guarantees have not been signed by the Defendants;
> - (ii) the demand notices were not served on the Defendants; and
> - (iii) the property, plant and machinery were sold at undervalued prices;
>
> [16] A consideration of the pre-trial minutes reveals that the Second and Third Defendants had admitted at the pre-trial conference that they had signed the Guarantees. Copies of the Guarantees were produced in evidence. The defence that no demand notices had been served was also refuted by the Plaintiff in its evidence. Documents **(ABOD) Documents 184,185,237, 238, 239 & 240 of Volume 2** were produced by the Plaintiff to prove demand was made. Letter of 9th December 1992 sent by the 1st Defendant clearly admitted the debt. [**ABOD, Document 89 Volume 1**]. The Submissions that the properties, plant and machinery were sold at undervalued prices was also refuted by evidence, in that the Defendants had themselves admitted that the plant and machinery had been rusted and damaged due to floods. The plant and machinery had been duly advertised and then sold for $18,000.00. I am also unable to accept that the property that was sold for $332,500 is grossly undervalued. Mr. Ali in his evidence said that a Valuation of the property was obtained from Rolle [**ABOD, Document 197 Volume 2**] who valued the property at $365,000. However, the Plaintiff then accepted an offer to sell the mortgaged property for $332,500.00 [**ABOD, Documents 209 & 210 Volume 2**]. Mr. Ali in his evidence informed court that the sale was carried out with much difficulty after advertising on several occasions at great expense to the Plaintiff, and the property needed substantial repairs and had many problems. He also informed that the Defendants did not take any action to prevent the sale of the land although it was advertised several times.
>
> [17] I accept Mr. Ali's evidence that the Defendants could have sought legal remedy before the sale, had they in fact, truly believed that the properties were sold far below the market value. I therefore hold that the defences stated in the statement of Defence have no basis.

ISSUE ESTOPPEL

18. After Wickramasinghe J's judgment in HBC 096 of 2001, FDB would file the following Notice of Motion on 11 April 2011 in HBC 407 of 2000 (this case) seeking the following orders:

    (i) an Order that the plaintiffs' statement of claim be struck out for being an abuse of the process of the Court which is likely to cause embarrassment to the parties and by virtue of issue estoppels

    (ii) an order that Judgment be entered for the 1st defendant pursuant to its statement of defence and for damages to be assessed

    (iii) such further or other orders as this Court in the circumstances considers appropriate.

19. The Learned Master Udit in **Ledua v Colonial Life Fiji Ltd** [2008] FJHC 363; HBC288.2004 (18 August 2008) defined issue estoppel as follows:

[9] Issue estoppel differs from other forms of estoppel in that it is limited to one or more particular issue(s) in an action. Lord Denning MR, in **Fidelitas Shipping Co Ltd -v- V/O Exportchleb** [1965] 2 ALLER 4 at 8 summed up this principle as follows: -

> *"...within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctively determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again".*

20. Issue estoppel occurs when a particular matter is taken to have been decided in earlier proceedings. In deciding what issues were decided, the court may consider any material. Pleadings are relevant in the inquiry, but not decisive. Any material that identifies the issues is admissible (see Scutt J in **Naigulevu v National Bank of Fiji (No 2)** [2009] FJHC 65; Civil Action 598.2007 (10 March 2009).

21. In **Johnson v. Gore Wood & Co**.[2000] UKHL 65 (2001) 1 All ER 481, Lord Bingham in the House of Lords reviewed the authorities as follows:

> *It may very well be .... that what is now taken to be the rule in* ***Henderson v. Henderson*** *has diverged from .... res judicata. But* ***Henderson v Henderson*** *abuse of process... although separate and distinct from cause of action estoppel and issue estoppel , has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding, involves what the court regards as unjust harassment of a party.* ***It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*** *As one cannot comprehensively list all possible forms of abuse so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.*

(my emphasis)

22. In **Reserve Bank of Fiji v Gallagher** [2006] FJCA 37; ABU0030, ABU0031, ABU0032U.2005S (14 July 2006), the Fiji Court of Appeal expressed favour over the above approach:

> [70] Counsel referred us to many manifestations of applications of the ***Henderson*** rule. We find it unhelpful to review them all since we are attracted by the non-dogmatic approach in ***Johnson v. Gore Woods*** and the reasonableness approach in ***Anshun***.

23. The reference to **Anshun** above was a reference to the Australian High Court case of **Port of Melbourne Authority v. Anshun Pty Ltd**. [1981] HCA 45; (1981). 147 CLR 589, 602-3 where Gibbs, CJ, Mason and Aickin JJ expressed the principle thus:

> "In this situation we would prefer to say that there will be no estoppel **unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable to rely on it.** Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations, given in Cromwell v County of Sac. (1876), 94 US (24 Law Ed at p 199).
>
> "It has generally been accepted that a party will be estoppel from bringing an action which, if it succeeds will result in a judgment which conflicts with an earlier judgment."

COMMENTS

24. In essence, the striking out application under Order 18 Rule 18 of the High Court Rules 1988 is premised on the argument that Wickramasinghe J's decision in HBC 096 of 2001 "has effectively dealt with the issues raised in the current action in HBC 407 of 2000".

25. I am of the view that Wickramasinghe J's findings have dealt with most of the issues which the Yangs rely on in their case against the FDB, but not all. In saying this, I am mindful not only of Wickramasinghe J's findings, but also of the fact that the Yangs had also tried unsuccessfully to have the two cases consolidated.

26. The Yangs basic allegations are:

    (i) Crown Cork borrowed $150,000 from the FDB.
    (ii) this loan was approved on the principle that Government provide licence to safeguard their venture.
    (iii) after 3 years, the Government decided to "uplift the protection rendered".
    (iv) FDB as lender was operating on Government funding
    (v) FDB failed and/or neglected and/or recklessly conducted its lending without protecting its loans and misdirected Crown Cork to fail in venture when it ought to have known that if the license would be revoked, Crown Cork would fail in the venture when it ought to have known that the license would be revoked and there was no likelihood of recovery of the loan principal.

(vi) furthermore, **<u>in terms of FDB's corporate mandate and objective</u>**, FDB had a duty as mortgagee to protect itself and its customer which it failed.

(vii) FDB in effect failed and/or neglected and/or acted recklessly in failing to insure against consequential loss should the occasion so arise.

(viii) FDB had lent on a first mortgage on lease no: 203460 for the construction of a factory building and all the rental were assigned to the FDB.

(ix) as time went, Crown Cork ran into difficulties with servicing its account.

(x) when it became imminent that the Crown Cork venture was a failure, FDB then took charge of lease 203460.

(xi) having taken all the securities, FDB was unwilling to advance any funds for operation or allow any operating capital.

(xii) **the Yangs then approached the National Bank of Fiji to bail them out.**

(xiii) **NBF was willing to guarantee the regular $3000.00 per month in loan repayment**.

(xiv) however, NBF would require a first mortgage over Lease No. 203460.

(xv) **FDB however refused to give a first mortgage in favour of NBF**

(xvi) NBF therefore withdrew its offer

(xvii) later however, FDB agreed. By that time, it was too late as NBF had already withdrawn its offer.

(xviii) FDB sold the computerized bottle top manufacturing machine for $18,000.00.

(xix) that machine was bought for $150,000.00 to $200,000.00.

(xx) the Yangs say that they later discovered after the sale of the second hand machine offshore were sold for $750,000.00.

(xxi) the Yangs say that FDB failed to advertise the sale offshore or failed to procure an appropriate or a reasonable price.

(xxii) Eventually, FDB sold lease 203460 for the debt due and owing in respect of Crown Cork debt at a gross under value to my sitting tenant.

(xxiii) The principal amount borrowed to construct on lease 203460 was totally paid. The yangs say that they had progressively built over a period of time and only required $104,000 in two lots of $24,000 and $84,000 and repaid $222,000.00.

(xxiv) the FDB sold a sophisticated machinery for $18,000. It had lent $150,000 to purchase the same machine. This is sufficient evidence that the FDB acted with gross negligence, carelessly and recklessly.

(xxv) To further secure the debt of the Crown Cork it took charge over lease 203460.That I have arranged with the NBF to guarantee $3000 monthly to pay the FDB which it refused and rejected. It was apparent that the FDB failed to recognize its interest in such refusal or rejection as the FDB as the prudent banker would be well secured by a guarantee from the NBF than I.

(xxvi) the mortgagee sale has been effected in somewhat unusual circumstances. FDB acted in negligence when securities were offered by NBF which it refused to accept.

(xxvii) the replacement value of lease 203460 is approximately $1,200,000.00 or thereabout and the FDB sold by mortgagee sale for about $300,000 which is a gross under value to a sitting tenant who was paying the rental to the bank directly.

(xxviii) the building needed some maintenance for the roof worth $5000 and the FDB refused to provide the sum.

(xxix) the tenant withheld the rent and the FDB carried out a mortgagee sale and the sitting tenant succeeded in purchasing the property.

(xxx) the Yangs say that FDB failed and/or neglected to protect its own interest and it was aware that the Yangs had nothing left.

(xxxi) they say that through the unconscionable conduct of FDB, and through its failure and negligence, they have been unable to pay off the loans.

27. The case about the machinery being sold at an undervalue has already been dealt with by Wickramasinghe J. She has made final conclusions on the point which have remained unchallenged and which is *res judicata.*

28. Similarly, the allegation by the Yangs that the FDB had merged their two loans without their knowledge or consent is also *res judicata.*

29. However, there are other aspects of the Yangs' case in HBC 407 of 2000 (this case) which were not raised in HBC 96 of 2001. These are:

    (i) whether FDB owed a duty of care of good faith to the Yangs in the circumstances of this case to ensure that their venture, and the related securities, were not unduly exposed.
    (ii) does FDB owe a duty of good faith in exercising its powers as mortgagee/debenture-holder to preserve, exploit and realize the assets comprised in the mortgages and/or debentures in question and to obtain repayment of the sum secured?

    (iii) does FDB's corporate mandate, and the fact that this is tied to government policies and priorities, mean that its duty of care to a mortgagor like the Yangs, is different (higher?) than that of any other ordinary commercial bank such as the ANZ, BSP etc?

SOME CASE LAW

30. In **Finch & Anr v Lloyds TSB Bank plc & Ors** [2016] EWHC 1236 QB, one of the issues raised was whether a Banker, as lender, owed a duty in contract or in tort to advise a borrower about a potentially onerous clause in the loan agreement.

31. The breach of contract argument relied on some concept of "duty" which section 13 of the English Supply of Goods and Services Act 1982 allegedly implies into every English contract.

32. In terms of the duty in tort, Judge Pelling QC said that the basic common law position is that a bank is under no legal obligation to provide advice. However, if a Bank does provide advice to a borrower in any particular case, then the bank must do so with reasonable care and skill.

> 52. *The Tortious Duty Case*
>
> *I start with a summary of the applicable legal principles. In summary:*
> *(i) In general a bank is not under a legal obligation to provide advice but if it gives advice then it must do so using reasonable care and skill – see* ***Woods v. Martins Bank Limited*** *[1958] 1 QB 55 per Salmon J at 71: "I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred.";* ***Bankers Trust International Plc v. PT Dharmala Sakti Sejahtera (No.2)*** *[1996] CLC 518 per Mance J as he then was at 533: "... a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly.";* ***National***

Commercial Bank (Jamaica) Limited v. Hew *[2003] UKPC 51 per Lord Millett at [22]; and Paget, Law of Banking, 14th Ed., Para 29.7*

33. In any given case, whether or not a bank, as lender, owes a duty of care to a borrower in tort, the first question to ask is whether or not the bank has assumed a responsibility to advice. If the answer is *"yes"*, the next question to consider is whether or not that advice was actually relied upon by the borrower.

34. The answer to the above questions, in turn, depends on the reasonable foreseeability of the loss, whether there is sufficient proximity between the parties, and whether it is fair and just in all the circumstances to impose a duty.

    ii. *Whether a duty of care in tort is owed in any particular case will depend upon the application of one or more of the usual three tests – that is the assumption of responsibility coupled with reliance test, the three-fold-test (reasonable foreseeability of loss, sufficient proximity between the parties and whether it is in all the circumstances fair just and reasonable to impose a duty) and the incremental test – having regard to the exchanges which cross the line between, and the dealings of, the parties considered in their context – see* **JP Morgan Chase Bank v. Springwell Navigation Corp** [2008] EWHC 1186 (Comm) *per Gloster J as she then was at [48]-[52] and* **Standard Chartered Bank v. Ceylon Petroleum Corporation** [2011] EWHC 1785 (Comm)*; and*

35. Whether or not a Bank/lender has assumed the responsibility to give advice, the Courts must keep in mind that assuming such a responsibility is not the same as advice given in the context of a commercial relationship (as per Pelling J QC citing **JP Morgan Chase Bank**).

    iii. *In approaching the question using the methodology referred to in (ii) above, there is a distinction to be drawn between the provision of advice in the context of a commercial relationship and assuming responsibility for that advice – see* **JP Morgan Chase Bank v. Springwell Navigation Corp** *(ante) at [374].*

36. At paragraph 57, Pelling J QC then went on to say, to clarify the above, that, in general, the relationship between a banker and a customer is not an advisor and client relationship:

    In my judgment another relevant contextual factor is that identified in the case law summarized above – in general the bank is <u>not</u> under a duty to give advice. The relationship is generally a banker and customer relationship not an advisor and client relationship. The other contextual consideration is that the alleged duty arose not after the relationship of banker and customer had come into existence but before it came into existence, and in the context of negotiations concerning the terms on which it might come into existence.
    (my emphasis)

37. As to when a bank crosses the line to assume an advisory role, Lord Finlay LC in **Banbury v Bank of Montreal** [1918] AC 626 said at p 654:

    "While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business ... If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advice, but if he takes upon himself to do so, he will incur liability if he does so negligently."

38. The learned authors **Warne & Elliott** in *Banking Litigation* (1999) opine that a bank will cross that line in circumstances where there has been a request from the customer, which request is accepted by the bank, and advice is given pursuant to the request:

> *"A banker cannot be liable for failing to advise a customer if he owes the customer no duty to do so. Generally speaking, banks do not owe their customers a duty to advise them on the wisdom of commercial projects for the purpose of which the bank is asked to lend them money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, under which the advice is to be given."*

39. The Yangs have not pleaded that FDB had ever crossed that line that divides the province of bank/customer relationship on the one hand and advisor/client on the other or that FDB had assumed a responsibility to advice.

40. Rather, their entire course of action appears to be premised on an allegation that FDB had failed to give proper financial or investment advice and direction in ensuring that the Yangs venture is a commercial success.

41. The relationship between FDB and the Yangs was primarily a contractual one. It arose out of their mortgage/loan agreement.

42. The Yangs however are not asserting liability against FDB based on any aspect of their loan agreement. Rather, they are asserting a tortious liability based on the common law of negligence. No argument is raised about any implied duty imposed under any Fiji statute.

IS THERE AN ARGUABLE CASE THAT FDB WAS NEGLIGENT IN NOT ADVISING THE YANGS AS ALLEGED ABOVE?

43. Generally, a cause of action in negligence requires an injured party to establish the existence of a duty of care and that the said duty was in fact breached, which breach was the proximate cause of the damages suffered. The first question is whether or not a lender such as FDB owes a borrower a duty of care and if so, what is the nature of that duty. Secondly, the Yangs appear to say that their venture began to plummet so to speak as a result of certain policy change by the Government. Does that somehow impose on FDB a duty to safeguard the serviceability of the loan?

44. I accept that a prudent lender, guided by their operations manuals, will take appropriate steps to assess a borrower's capacity to service a loan before approving and granting a loan. A lender would argue that its primary concern is on security rather than loan serviceability.

45. The evidence before Wickramasinghe J is that, this assessment is undertaken as part of the lender's due diligence process to minimize its own risk. This assessment is not undertaken for the borrower's benefit, or out of any sense of duty to the borrower. However, Wickramasinghe J did not have to deal with the legal issues which the Yangs raise in the current case.

46. **Valcorp Australia Pty Ltd v Angas Securities Limited** [2012] FCAFC 22 (8 March 2012) gives us a subtle perspective on the point. I say "subtle" because the Court in that case was not considering the liability of a lender to a borrower. Rather, it concerned a tussle between a lender and a valuer.

47. In **Valcorp**, a lender lent AUS$2.8 million to some borrowers. That loan was secured by a mortgage over an apartment owned by the borrowers. Before making the advance, the lender retained, and obtained from a valuer a valuation of the apartment. The valuer did value the apartment at AUS$3.6 million. Relying on the valuation, the lender advanced AUS$2.88 million to the borrower. In due course, the borrowers defaulted and the lender sold the apartment. However, the lender was only able to realize AUS$1.75 million out of the sale. The lenders sued the valuer for misleading and deceptive conduct in contravention of section 52 of the Australian Trade Practices Act 1974 (Cth).

48. The courts found that the valuation was indeed negligent and that the valuer did mislead and deceive the lender. However, the lender also negligently contributed to its own loss in not having properly assessed the borrower's ability to service the loan before granting the loan.

49. In other words, in **Valcorp**, the lender negligently contributed to its own loss in failing to realize its full security in a charged property because it had failed to undertake certain serviceability enquiries of the borrowers, prior to granting the loan.

50. In **China and South Seas Bank Ltd v Tan** [1990] 1 AC 536 (PC) at 545, Lord Templeman of the Privy Council opined that a mortgagee's decision on sale is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor. He can sit back and do nothing. He is not obliged to take steps to realise his security. In other words, a creditor is not obliged to exercise its powers in relation to its security in a certain way.

51. However, part of the Yang's case theory appears to be founded on the same principle in **Downsview Nominees Ltd v First City Corp Ltd** [1993] AC 295 (PC) at 317. In this case, a debenture holder breached its duty when it refused to assign the debenture to the junior debenture holder when the latter offered to redeem it. The duty in question is the duty of the mortgagee to act in good faith in exercising its powers for the purpose of preserving, exploiting and realising the assets comprised in the security and obtaining repayment of the sum secured. Interestingly, the Privy Council held that the duty was founded in equity, on a mortgagee and the receiver appointed by them, to the borrower, to exercise their powers in good faith for the purpose of obtaining repayment of the charge.

52. If the Yangs could establish as a matter of fact that FDB acted in bad faith by refusing the refinancing arrangement that the Yangs had entered into with NBF, and to allow NBF first mortgagee rights over the land in question, the Yangs may have an arguable case on the same principle. However, considering that the NBF had long ceased to exist well before this case was initiated by the Yangs, this will be a hard fact to establish.

CONCLUSION

53. The above issues raised by the Yangs which I discuss above in paragraphs 30 to 64 are not caught under any principle of res judicata or issue estoppel.

54. I have also tried briefly to discuss whether the Yangs case theory discloses a reasonable cause of action. While I have some misgivings about the strength of their case, I am mindful of Mr. Justice Kirby's caution in **Len Lindon v The Commonwealth of Australia** (No 2) s 96/005:

> An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not, alone, sufficient to warrant summary termination......Even a weak case is entitled to the time of a court.

Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

55. In the result, I am not inclined to grant the Orders which the defendant seeks. The parties are to bear their own costs. This case is adjourned to Friday 28 January 2022 for further directions to take the matter trial.

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Anare Tuilevuka
JUDGE
10 December 2021