

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 340 OF 2014

BETWEEN : **BHARAT JOGIA**
First Plaintiff

MARUTI JEWELLERY LIMITED
Second Plaintiff

AND : **PRAKASH KUMAR**
First Defendant

DUKSHA KALYAN trading as REEMA'S FASHION
GARMENT and NU TOUCH
Second Defendant

Counsel : **Ms N Singh & Mr N Nambiar for the Plaintiffs**
No Appearance for the Defendants

Hearing : **14 May 2024**

Judgment : **14 June 2024**

JUDGMENT

- [1] Between 2010 and 2014, the First and Second Plaintiff loaned the two defendants about \$239,000. It was not a commercial transaction. The defendants were friends of the First Plaintiff and it appears that the defendants had previously done a favour for the First Plaintiff. The money was loaned in order to assist the defendants to put their son through dental school. The defendants repaid approximately \$158,000 leaving a balance of, allegedly, \$81,025. The plaintiffs have brought these proceedings to recover the balance from the defendants.

- [2] The defendants did not attend the trial. Neither they nor their representatives have appeared since 21 July 2023.¹

Background

- [3] Bharat Jogia is the owner of Maruti Jewellery Ltd. The First and Second Defendants were at the material time shopkeepers in Labasa. The defendants were family friends of Mr Jogia. Sometime back, the First Defendant acted as guarantor for Mr Jogia and his siblings at a crucial time for their business. Thereafter, Mr Jogia's business prospered. In 2010, Mr Jogia agreed to loan monies to the defendants to assist with the educational costs of putting their son through dental school. From about 31 May 2010 through to 31 March 2014, Mr Jogia loaned various amounts of money personally or through his company to the defendants primarily by way of deposits or transfers into the bank account of Nu Touch.
- [4] The arrangement was that only the principal would be repaid. There was no arrangement for payment of interest.
- [5] The loans were mostly repaid. According to the plaintiff's pleadings the total amount repaid was \$157,957, the same being made between 31 October 2011 and 30 November 2015.
- [6] By or about 2014, the defendants were not making regular or timely repayments and, hence, the present proceedings were filed at that time to recover the remaining debt.

Proceedings

- [7] As stated, these proceedings were commenced in 2014. An amended Statement of Claim was filed by the plaintiffs on 7 June 2016. The plaintiff sought, by way of relief, recovery of the unpaid debt in the amount of \$122,750, interest at 13% and the costs of the proceeding.
- [8] A Statement of Defence to the amended pleadings was filed on 30 August 2016. The defendants' defence was that the debt had been repaid. They sought a proper account, an inquiry of the transactions and that the proceeding be transferred to Labasa. A reply

¹ The matter has since been called in court on 31/7/23, 3/10/23, 12/2/24, 27/2/24 & 4/3/24. The trial was conducted on 14/5/24.

was filed on 3 November 2016. The defendants then filed a summons for orders that the plaintiffs provide accounts for the loan. Following a hearing, the learned Master ordered the plaintiffs to file an affidavit verifying the accounts within 21 days.

[9] The plaintiffs duly executed an affidavit verifying their accounts in August 2019. On 19 November 2019, Mr Jogia executed an affidavit providing a detailed account of the advances made to the defendants and the repayments made. Mr Jogia deposed that he had loaned a total sum of \$239,000, and the repayments made were \$157,957. The outstanding amount, according to Mr Jogia, was \$81,025.

[10] A Summons for Directions, filed in February 2020, was followed with directions for the parties to file supplementary lists. The plaintiffs filed a supplementary list in August 2020. Thereafter, there was a noticeable absence of appearances for the defendant. The plaintiffs, therefore, filed a summons to strike out the defence for failure to comply with the Master's order to file a supplementary list. A hearing on 5 March 2021 led to a ruling on 4 August 2022 by the learned Master declining to strike out the defence.

[11] In early 2023, there were, again, a lack of appearances for the defendants and 'unless orders' were made by the Master. Copy Pleadings was filed on 6 April 2023 and efforts were then made to set the matter down for hearing thereafter.

[12] Trial dates were scheduled for 3 October 2023 and 1 December 2023. On 12 February 2024, the case was set down for trial for 7 May 2024 by Mansoor J. The Judge has since resigned and the matter has been transferred to me. The matter was set down for mention 4 March 2024. Notices were sent to counsel. There was only an appearance for the plaintiffs. The case was set down for trial on 14 May 2024.

Trial: 14 May 2024

[13] There was no appearance for the defendants. I enquired of counsel as to the court's power to proceed with the trial. My attention was brought to O.35, r.1(2) which provides that the court may proceed with the trial where a party does not appear. I am satisfied that the defendants have had proper notice. It was incumbent on the defendants, or their representatives, to attend each court date in order to be informed of ongoing court fixtures, including the trial date of 14 May 2024.

[14] The plaintiffs produced a bundle and supplementary bundle. Mr Jogia provided viva voce evidence. His testimony was as follows:

- i. Mr Jogia stated that the defendants were family friends and that they had a shop in Labasa. He also stated that he had agreed to provide a loan in order to assist them with the cost of educating their son to become a dentist. The loans were paid to the defendants between 2010 and 2014.
- ii. Mr Jogia produced a number of documents to support the fact of the loan payments. The documents are found in the plaintiff's bundle and supplementary bundle. The documents include check butts and confirmation of transfers by the bank of the following eleven transactions:
 - 31 May 2010 - \$10,000.
 - 16 December 2010 - \$30,000.
 - 5 April 2011 - \$9,000.
 - 28 June 2011 - \$20,000.
 - 30 September 2011 - \$15,000.
 - 5 June 2012 - \$15,000.
 - 10 January 2013 - \$30,000.
 - 10 June 2013 - \$20,000.
 - 10 June 2013 - \$30,000.
 - 2 July 2013 - \$20,000.
 - 31 March 2014 - \$20,000.
- iii. Each of these transactions were contemporaneously recorded as temporary loans or loans to Nu Touch and the bank account to which the monies were deposited were the same.
- iv. Mr Jogia identified, at Tab A of the plaintiffs' Bundle of Documents an Acknowledgement of Debt dated 10 September 2014. The document was completed by the First Defendant and signed by Mr Jogia as a witness. He stated that he had recorded therein a loan of \$20,000 to be repaid to Mr Jogia at \$350 per month. Mr Jogia also produced an undated handwritten statement from the defendants.² The defendants confirmed therein that they had taken a loan of

² Contained at Tab B of the Plaintiff's Bundle of Documents.

\$70,000 and were seeking a further \$70,000 from 'Bharat Jogia of Maruti Jewellery Ltd'. Mr Jogia stated at the hearing that he did not provide the additional loan of \$70,000.

- v. Mr Jogia referred to Tab 'UV', being a two line letter from March 2014 prepared by the defendants' son, Sunil Kalyan, and addressed to Mr Jogia. The letter reads:

Thank you for all your financial support to my family. I give you my personal guarantee that if my father, Prakash Kumar Kalyan, is unable to pay his loans of any amount, I would pay the loans on his behalf.

- vi. Mr Jogia stated that the actual amount of the debt owed by the defendants was as per his affidavit of 19 November 2019. He introduced this affidavit in his evidence, confirming that the contents were true and correct.
- vii. Mr Jogia produced an Application for Registration for Nu Touch dated 11 April 2005 which showed that the owner was the Second Defendant, Duksha Kalyan.³
- viii. Mr Jogia stated that he had made many efforts to recover the debt from the defendants but they proved fruitless. The defendants did provide a number of cheques which Mr Jogia presented to the bank but each of them bounced. When he made a complaint to the police, Mr Jogia was advised the police could not advance the investigation until they interviewed the defendants in Labasa. They did not have the financial resources to travel to Labasa and, therefore, Mr Jogia offered to pay for the investigating officer's return flights. Mr Jogia stated that he was subsequently charged by FICAC, along with two police officers, for bribery in respect to the payment.⁴
- ix. Mr Jogia was asked by his counsel what he was seeking from the proceeding. Mr Jogia became overwhelmed with emotion. He stated that he had provided considerable financial assistance to the defendants to help their son with his education in order to qualify as a dentist. The defendants have now sold up and left Fiji in order to move to Australia to live. Mr Jogia wanted the defendants brought back to Fiji to face the consequences of not paying their debt to him.

³ Plaintiff Exhibit 1.

⁴ The prosecution appears to have been conducted recently and Mr Jogia is awaiting the decision of the Magistrate.

- x. In addition to the outstanding sum of about \$81,025, Mr Jogia also stated that he has incurred legal costs for the proceeding of about \$20,000. He was unable to be precise.

Decision

- [15] The plaintiffs' claim is for recovery of the balance of a loan made to the defendants between 2010 and 2014. The plaintiffs' state that it made multiple loan payments in the sum of \$239,000. The arrangement was that the defendants would repay the loan in monthly instalments. The defendants were only required to repay the principal. No interest was payable. The defendants made payments up to about 2015 in the total amount of \$157,957 and then payments stopped. The plaintiffs seek recovery of the outstanding balance of \$81,025, plus interest at 13% plus costs on an indemnity basis.
- [16] I am satisfied that an arrangement existed between the plaintiffs and the defendants that the former would loan monies to the defendants to be used for the education of the defendants' son. Further, that the agreement was that the defendants would repay the principal but without interest. The evidence for this was provided by sworn evidence of Mr Jogia. His testimony was corroborated by the First Defendant's Acknowledgment of Debt dated 10 September 2014 (Tab A) and the undated written statement by the defendants at Tab B. The multiple loan payments made by the plaintiffs to Nu Touch over the 4 year period are consistent with this evidence as are the repayments from October 2011 to November 2015.
- [17] I am also satisfied that the amount of \$219,000 was paid to the defendants as itemized in paragraph [14] ii. above. The evidence for this is in the form of cheque stubs and bank deposit receipts that record the payment made, the date, the fact of the payment to Nu Touch and the account of 9802065004 to which the amounts were deposited. I have carefully gone through this evidence to confirm these details are correct. The Application for Registration of Nu Touch dated 11 April 2005 (Plaintiff Exhibit 1) shows that Nu Touch is owned by the Second Defendant.
- [18] The amount of \$219,000 is \$20,000 less than the amount claimed by the plaintiffs of \$239,000. It appears that the plaintiffs are relying on the Acknowledgment of Debt (Tab A) of 10 September 2014 to verify a further loan payment of \$20,000. I have difficulty accepting this for two reasons. Firstly, the Acknowledgment of Debt does not itself state that a further payment of \$20,000 was being made, only that \$20,000

was then owed – this debt may relate to previous loans that were then still outstanding. Secondly, each of the previous eleven loan payments were recorded on a cheque stub and bank deposit record. No such evidence has been produced for the payment in September 2014. As such, I am not prepared to accept that the plaintiffs made a further loan payment of \$20,000 in September 2014 to the defendants. The result is that I find that the evidence supports the fact that the plaintiffs loaned the amount of **\$219,000.00** to the defendants over the period from 31 May 2010 to 31 March 2014.

[19] Mr Jogia relied on his affidavit of 19 November 2019, containing the itemization of the payments from the defendants, as evidence of the same. Mr Jogia annexed bank statements to his 2019 affidavit to verify these payments. I have carefully gone through the bank statements and I am satisfied that the figures itemized by Mr Jogia at paragraphs 9 and 15 of his affidavit are corroborated by the figures recorded in the bank statements for his company and Mr Jogia personally. I also confirm, from my own calculation, that these figures amount in total to \$157,957. However, I note that on 11 April 2011 Mr Jogia received a cash deposit payment of \$3,250 which is the same amount as the payments being made by the defendants over that period. It seems highly likely, in my view, that this payment was also a loan repayment by the defendants given the amount, the mode of payment (cash deposit) and period during which it was paid. This payment is not included in the itemization contained in Mr Jogia’s affidavit. I, therefore, add this figure to the amount repaid by the defendants such that I find that the total amount repaid by the defendants is **\$161,207.00**.

[20] With the above figures in mind, the result is that the amount of **\$57,793.00** remains unpaid by the defendants.

Interest

[21] The plaintiffs seek interest on the outstanding balance at 13%. The plaintiffs rely on *Aleems Investment Ltd v Khan Buses Ltd* [2017] FJHC 97. The High Court held:

[39]...I hold that the defendant is wholly liable to pay the sum of \$408,862.63 to the plaintiff with interest need to be worked out in accordance with the commercial value of the transaction that should be computed from 28th January 2005 to the date of the judgment and the post judgment interest in terms of section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest)

Act [Cap 27] for the total sum stated in paragraph 38 from the date of the judgment until the total sum is paid in full.

[41] The plaintiff claims interest at the rate of 10% for the sum claimed against the defendant and yet, there was no evidence to establish that there had been an agreement to pay the interest at the rate of 10% by the defendant when the plaintiff paid the money to the Habib Bank Ltd. In the absence of evidence to prove the former, the Court has to look at the case law authorities on this issue.

...

[45]. The subject in the case in hand is with regard to an outstanding monetary transaction between two companies. Obviously this falls within the realm of a commercial transaction. Then the judgment creditor should be entitled to claim the interest rate at its commercial value.

[46]. Having given the due regard to the guidelines laid down by the forgoing case law authorities in calculating the average interest rate in cases of this kind, I am persuaded to award the plaintiff with interest at the rate of 10% per annum on the sum claimed against the defendant.

[22] The plaintiffs are not entitled to interest at 13%. They had no arrangement in place with the defendants for payment of any interest and the loan could hardly be described as being a commercial transaction. The plaintiffs are, however, entitled to interest at the rate of 4% per annum under s 4 for the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, payable from the date of judgment until satisfaction of the judgment debt.

Costs

[23] There remains the issue of costs. The plaintiffs are entitled to costs having succeeded with their claim. They seek costs on an indemnity basis. Mr Jogia's evidence is that his costs for this proceeding have been about \$20,000. The case is some 10 years old and there have been multiple applications and appearances by counsel on the claim. The figure of \$20,000 in this context is not unreasonable. However, I do not accept

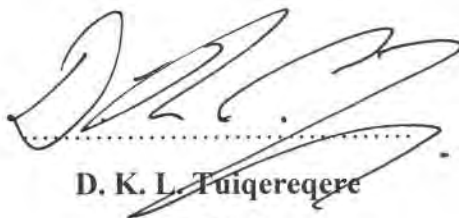
that the plaintiffs are entitled to full costs. In my view, 60% of the actual costs is a reasonable award, being the amount of \$12,000.

Orders

[24] For the reasons stated above, the following orders are made:

- i. Judgment is entered in favour of the First and Second Plaintiffs in the amount of \$57,793.00.
- ii. The First and Second Plaintiffs are entitled to interest on the amount of \$57,793.00 at 4% from the date of judgment to the date the amount is paid.
- iii. The First and Second Plaintiffs are entitled to costs in the amount of \$12,000 to be paid by the First and Second Defendants within one (1) calendar month.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Nambiar Lawyers for the First and Second Plaintiffs.

Sen Lawyers for the First and Second Defendants