IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 333** of **2009**

BETWEEN: **K NAIDU INVESTMENT PROPRIETORY LIMITED,** a limited liability Company having its registered office in Labasa, Fiji.

PLAINTIFF

AND: **MERCHANT FINANCE & INVESTMENT COMPANY LIMITED** a limited liability company having its registered office at level 1, R Marama, 91 Gordon Street, Suva, Fiji.

DEFENDANT

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Naidu R. for the Plaintiff

Mr. Nandan S. for the Defendant

DATE OF JUDGMENT: 02nd October, 2025

JUDGMENT

[Declaration, General, Specific and Exemplary Damages]

This proceedings was presided over and heard by the Presiding Chief Justice, the late Hon. Mr. Kamal Kumar and the Judgment was impending delivery, which will be delivered now.

Introduction

1. The Plaintiff filed a Writ and a **Statement of Claim** which was subsequently amended and sought for the following orders:

    (i) A Declaration that the seizure of the chattels was premature, unreasonable and unlawful.
    (ii) A Declaration that the Plaintiff was entitled to be given a reasonable time to pay the moneys due before the seizure.
    (iii) Special damages (to be particularized before trial)
    (iv) General damages for conversion, detention and trespass.
    (v) General damages under the Fair Trading Decree.
    (vi) General damages for breach of contract.
    (vii) Exemplary damages for wrongful seizure.
    (viii) Damages for humiliation, embarrassment, inconvenience and distress
    (ix) Damages for loss of future income/profits
    (x) Costs on an indemnity basis
    (xi) Interest on the award of damages
    (xii) Interest on the award of costs
    (xiii) Further and other reliefs.

2. The Defendant filed its **Amended Statement of Defence** together with a **Counter claim** and sought for the following orders:

    (i) Judgment in the sum of $1,321,252.00 against the Plaintiff.
    (ii) Interest at the rate of 14% per annum on the Judgment sum pursuant to the Bill of Sale.
    (iii) Charges pursuant to the Bill of Sale.
    (iv) Further interest at the rate of 13% per annum on the Judgment sum pursuant to Section 3 of the Law Reform (Miscellaneous) (Interest) Act, Cap 27.
    (v) Order that the Plaintiff's claim against the Defendant be dismissed with costs.
    (vi) Costs of this action on a full indemnity basis.
    (vii) Such further and other reliefs as this Honourable Court deems fit.

3. Both parties to the proceedings furnished Court with their written submissions.

Brief Background

4. The Plaintiff operated a substantial earth moving works, hire of heavy machinery, logging and trucking business in Fiji since 2004.

5. The Plaintiff was a customer of the Defendant since 2005 and had several accounts with the Defendant.

6. The Plaintiff was the owner and in possession of certain motor vehicles and machines.

7. The Defendant lent and advanced certain sums of money of $744,416.54 and secured the repayment inter alia by Bill of Sale over the chattels made on 30 May 2007.

8. The Plaintiff also executed a loan contract.

9. In or about March 2008, most of the Plaintiff's machines were damaged due to heavy flesh flooding in Labasa. This affected the Plaintiff's Business and the Plaintiff was unable to meet its loan obligations and defaulted on its payment obligations under the Bill of Sale and the Loan Contract.

10. On 28 March 2008, the Defendant restructured the Plaintiff's account and the Plaintiff signed a new loan contract on 28 March 2008 [Exhibit – 16]. The Plaintiff was required to make the first installment payment of $21,416.39 on 28 April 2008, which the Plaintiff defaulted.

11. Hence, the Plaintiff's Account was 2 days in arrears and the Defendant's Bailiff seized and took away the said machines and vehicles of the Plaintiff under security from Plaintiff's respective job sites.

12. The said Letter of authorization was only in respect of Five (5) vehicles/machines Registration Nos. CA 176, E 8915, ES 247, EY 518 and EY 523.

13. However, the Defendant's Bailiff seized a total of 13 items – E 8915, EY 518, FB 459, DM 311, Hitachi Excavator, DY 717, EM 430, EY 524, K-Naidu/EY 195, EY 523, EV 062, CA 176 and E 2047.

14. Hereafter, the Plaintiff and the Defendant had discussions and agreed to restructure the Plaintiff's loan account. The Letter of offer dated 11 September 2008 and 29 January 2009 were issued and the Plaintiff signed the letter and accepted the letter of offer after changes were made.

15. The Defendant, subsequently reneged, did not restructure the Plaintiff's loan account and demanded from the Plaintiff $1,036,365 which was not paid.

16. The Defendant sold 13 of the Plaintiff's machines/vehicles by auction at a total price of $268,570.

Analysis and Determination

17. At the trial, the Plaintiff called 03 witnesses whilst the Defendant called 02 witnesses.

18. The Agreed facts and the issues enumerated within the Pre-Trial Conference together with the *viva voce* evidence and Exhibits tendered into evidence were taken on Board and a determination was made accordingly.

19. The substantive questions that arose herein and needed determination are as follows-

    (i) Was the Defendant required to make a demand for the payment under the Bill of Sale/Loan Contract of the Moneys owing before it seized and took away the machines and vehicles of the Plaintiff?

    (ii) Was the Defendant required to give to the Plaintiff reasonable time to pay the moneys due before the seizure of the chattels?

    (iii) Was the Defendant required to give to the Plaintiff reasonable notice of its intention to enforce its rights under the Bill of Sale dated 30th May 2007?

(i) Was the Debt payable on Demand?

20. The Plaintiff signed a loan contract with Merchant Finance & Investment Company Limited in the sum of $744,416.64 on 28th March 2008.

21. He also gave security in terms of a **Bill of Sale** over his vehicles and machines totaling 18 items altogether to the Defendant.

22. The Plaintiff in the **Loan Contract** as the borrower authorizes and directs the Defendant, Merchant Finance & Investment Company Limited to pay the amount financed in the manner set out in 'Part B' of the schedule whereas the **Bill of Sale**, once a **contract** determines the right and obligations of the Guarantor (Plaintiff), and the Guarantee (Defendant), while also at the same being as an interim transfer of ownership of the chattels from the Plaintiff to the Defendant.

23. The **ownership** in accordance with the **Bill of Sale** would have revested in the Plaintiff had the Plaintiff not defaulted and had fully paid the monies lent to the Plaintiff in accordance with the **Bill of Sale**.

24. Clause 11 of the **Loan Contract** dated 28 March 2008 [Exhibit – P16] provides '**Default Events**':

> *"The balance of all moneys due to Merchant Finance shall at the option of Merchant Finance become immediately due and payable by the Borrower to Merchant Finance if :-*
> *(a)…….*
> *(b) The Borrower is in breach of any provision(s) of this Contract or any Mortgage or Bill of Sale of the Security property given by the borrower to Merchant Finance.*
> *(c) ……..*
> *(d) ………*
> *(e) ……..*
> *(f) ………*

25. According to the Plaintiff, pursuant to **Clause 11 of the Loan Contract** (as hereinabove), the balance of all moneys due became payable at the option of the Defendant. Therefore, it is for the **Defendant to demand from the Plaintiff moneys that become due and payable.**

26. However, the term **immediately due and payable** in the context of the Bill of Sale was considered by the Queens Bench in **Toms v Wilson 4 B & S 524.** In the **Toms v Wilson**, The English Court dealt with a case involving **a default in payment** under a Bill of Sale.

27. The Bill of Sale contained the term '**to pay money immediately upon demand'**. The Sheriff Officer delivered the demand for **immediate payment of the principal sum and interest** to the Plaintiff and on his **not immediately paying,** seized the goods.

28. The Queens Bench held "**that the seizure was premature**. The Court held "**the word immediately' must receive a reasonable construction so as to allow the debtor time to procure the money."**

29. Under **clause 2 (b)** of the **Bill of Sale** dated 30 May 2017 [Exhibit – P13], Payment is to be made on demand. If the Plaintiff makes a **default of any payment** when the same is due, **payment** is to be made on **demand**.

30. However, the Defendant's contention is that there is no obligation on the Defendant under the Bill of Sale to give notices or time to the Plaintiff to remedy its breaches. The Plaintiff cannot point to any clause in the Bill of Sale which requires the Defendant to give notice before the seizure or to demand payment before the seizure.

31. The Plaintiff called [PW2] – Mr. Parmesh Sharma, Chief Executive Officer of the Defendant who said, "**that there was no requirement in the Bill of Sale to give prior notice before the seizure**."

32. According to the Plaintiff, [PW2] **Mr. Parmesh Sharma** gave evidence that '**in general terms a 7 days grace period is given to a customer to bring his account up to date in the case of default. He said seizure depends on circumstances whether he is s good customer and security is not at risk, then security will not be seized.**

33. On 12 February, [PW 2] - Mr. Parmesh Sharma gave further statement clarifying the issue at hand [Exhibit – P45]-

> ***"…the bailiff authorization notice may be issued depending on the circumstance, it is issued almost after 30 days from the due date….. He stated that, bailiff authorization notice was issued by Lalin Chand on 23 April 2008 and 30 April 2008. There are no notices to indicate or confirm why the repossession notice was issued.***

34. According to [PW3[- Mr. Nouzab Fareed, Chief Executive Officer Fiji Holdings Group [Exhibit - P46] refers-

> ***"…..some of the actions in this case need further explanations as those actions are not in accordance to the policies and ethics of Merchant Finance'..…unusual, because the normal process is to issue arrears notice to the customer with time frames of 7, 14 and 21 days. That is the standard process."***

35. Further, [PW3] Mr. Nouzab Fareed told Court that 'based on the given information as per the loan account no: PA 11555965, 'I find it difficult to understand why a BAN [Bailiff Authorization Notice] was issued on 30 April 2008, whereas the account was restructured on 28 March 2008."

36. Above evidences of [PW2] Mr. Parmesh Sharma and [PW3] Mr. Nouzab Fareed upon analysis supports the preposition taken by the Plaintiff that the Defendant was required to make a demand for the payment first.

37. The Defendant did not present or call any evidence or witnesses, *viva voce* and/or documentary with regards to the issuing and serving a Demand Notice seeking for the payment on the Plaintiff under the Bill of Sale and loan contract and exhaust other avenues for recovery available as a customer of the defendant bank before proceeding to seize the machines and vehicle given under security.

38. According to [PW3] – Mr. Nouzab Fareed's statement dated 26 January 2013, he told Court:

> **"When a loan is restricted, the payment commences 30 days after the restructured loan documents are signed. In the current case, the loan was restructured on 28 March 2008. The First repayment was due on 28 April 2008. The Bailiff Notice was authorized according to the file notes on 30 April 2008. This procedure as quite unusual, because the normal process is to issue arrears notice to the customer with timeframes of 7, 14 and 21 days.**

39. [PW3] – Mr. Nouzab Fareed in his capacity as the Chief Executive Officer disagreed with the authorization of the Bailiff's notice on 30 April 2008 since the repayment commences 30 days after the restructured loan documents are signed and the first payment was due on 28 April 2008. Therefore, the procedure taken by the manager, Lalin Chand was quite unusual since the arrears notice was not issued to the Plaintiff with timeframes of 7, 14 or 21 days which would have been the standard procedure, instead.

40. It is obvious that Manager, Lalin Chand's actions in issuing the Bailiff authorization on 28 April 2008 for seizer of Plaintiff's vehicles and machines were in contumelious disregard of the Plaintiff's rights to the security under the Bill of Sale of machine and motor vehicles accordingly.

41. Reference is made to the case of **Paul Freeman v National Bank of Fiji**, Civil Appeal No. 25 of 1991 (25 November 1993):

    - ***One of the issue was whether demand upon the guarantor was necessary before he became liable to the bank for his company's debt? The deed of guarantee had the words – 'the debtor guarantees to pay the Bank on demand…."***

    The Court of Appeal held –

    - ***"Where the guarantee document specifies that such a demand shall be made, the law is clear that no liability arises until such a demand is made."***

42. Wordings in the current Bill of Sale before this Court, reads-

    "The mortgagor shall pay to the mortgagee on demand…."
    similar to the wording of the deed of guarantee in Paul Freeman case hereinabove.

43. Bearing all above in mind, the wordings of both the contract and the Bill of Sale is very specific and clear that a demand ought to be made. Therefore, the Defendant should have made a demand for the payment first before seizing the Plaintiff's machines and vehicles.

44. However, there is no evidence of any demand made by the Defendant to the Plaintiff, rather the Defendant categorically resorted to the abrupt, unprocedural, unethical and unusual procedure to straightaway issue a bailiff authorization for the Plaintiff's seizure of the security consisting of the machines and the motor vehicles.

(ii) Was the Defendant required to give the Plaintiff reasonable time to make payment before the seizure?

45. The Defendant was the financer holding a strong position compared to the Plaintiff who was at the mercy of the Defendant.

46. The Plaintiff's account fell into arrears because of two (2) floods in Labasa as a result of which some of the Plaintiff's machines were damaged and the logging operations were significantly affected [Exhibit P-15].

47. PW2 – Chief Executive Officer Mr. Parmesh Sharma told the Court that:

> ***"He can't recall if the Plaintiff was having consistent difficulties in meeting his installment payment." The Defendant failed to produce evidence of all the defaults in payment or the delinquency or the history of defaults or the continued defaults and/or any instances of defaults.***

48. However, where the terms of the instrument creating the debt does not specify that a demand was required, the rule has long been enunciated that the creditor must give reasonable notice to the debtor of **its intention to enforce** its rights under the **security**, in this case of the **Bill of Sale.**

Cases on requirement of reasonable notice

- **Ronald Elwyn Lister Ltd v Dunlop Canada Ltd** [1982] 1 S.C.R 726, the Supreme Court of Canada reiterated the rule enunciated in **Massey v Sladen** (1868) L. R. 4 Ex. 13:

  "that despite the wording of the security document, a debtor owing money payable on demand is entitled to a reasonable time to meet any demand for payment. Until a reasonable time has elapsed following the making of the demand, the creditor is precluded from enforcing its rights under any security which it holds for that indebtness. In Lister Estey J. described the rule which provides measured relief to a debtor faced with a demand for payment under an instrument of debt requiring immediate payment on demand. Estey J, speaking for the court, said (at p. 746):

  The Rule has long been enunciated in **Massey v Sladen** (1868), L. R. 4 Ex. 13 at p. 19, that the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but none the less real duress, often as real as physical duress to the person, and no doubt explains the eagerness of **the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.**

- In the British Columbia Court of Appeal decision in **Waldron v Royal Bank** at para [19], Lambert JA said of McKinlay JA's statement in Kavcar that it "represented

an important and considered conclusion of law". Lambert JA's explanation of the Lister principle at paras [20] to [25] is worth citing. His Honour said:

*[20] I should also add that in my opinion the cases applying the Lister principle illustrate, from the words in the security instruments, that the principle cannot be one of interpretation. Time and again the words used are words such as "immediately", "forthwith", or "instantly". In the leading case of **Massey v Sladen** (1868), L. R. 4 Exch. 13, the words in the instrument were: "instantly on demand, and without any delay on any pretence whatsoever." It cannot be consistent with words like that to decide that the Lister principle is only a guide to interpretation.*

[21] If the Lister principle is, as I think it is, an independent rule of law about seizures, then the principle must rest on one or both of two grounds. They are, from the common law side, the ground that a term of a security instrument that is contrary to the Lister principle is void as being contrary to public policy, and is severable; and, from the equity side, the ground that a term of a security instrument that is contrary to the Lister principle is unconscionable, and is severable. So those are the two grounds, public policy and unconscionability.

- The evolution of law in Canada was noted in Australia in the case of **Bunbury Foods Pty Ltd v National Bank of Australasia** [1984] 153 CLR 491. In **Bunbury Foods** the High Court of Australia (Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ) considered the situation where the contractual requirement between the parties required that there be an actual demand. Their Honours said (at pp 502 – 504):

"There remains for consideration the validity of the Bank's demand. The appellants rely on the statement of Cleasby B. in **Massey v. Sladen** (1968) LR 4 Ex13, at p 19 where the defendants seized goods the subject of a bill of sale which provided that in certain circumstances the sum due was to be payable instantly on demand and default the goods were liable to seizure. Cleasby B. said:

"The defendants are seeking to enforce the strict construction of a very stringent clause, by which the sum due is to be paid instantly on demand, without any delay, and on default the goods are to be seized. But if you are to enforce such a right, you must make a demand which is specific, you must let the debtor know what is the sum you insist on the payment of."

49. It can be ascertained and confirmed from the above case authorities that it supports the view that the interests of the parties will be more adequately protected by the principle that **the debtor must be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security then by the adoption of the suggested proposition that the notice of Demand must specify the amount of the debt.**

50. Therefore, the question that arises now is "whether the action(s) of the Defendant was against the well-established principles of law and contrary to the Explicit provisions of the **loan contract** and the **Bill of Sale**?"

51. The Defence submission(s) is that 'the issuing of demand letter is the Defendants' right as it also has its rights to withdraw it. The Defence further submitted that the seizure of the vehicles initially in 2008 was in accordance with the Bill of Sale and justified. The Defendant repossessed a few of the Plaintiffs vehicles. The loan contract was restructured since the Plaintiff was a regular defaulter according to [PW2] Chief Executive Officer Mr. Parmesh Sharma. He offered the Plaintiff a new restructure offer dated 11 September 2008 (Exhibit – P20). The Plaintiff did not accept the offer.

52. As a matter of Law-

- **Firstly – the Defendant, Merchant Finance was required to make a demand for payment, and**
- **Secondly – The Defendant, Merchant Finance should have then given the Plaintiffs a reasonable time to meet the demand for the payment and informed the Plaintiff that if the demand was not complied with, the Defendant will seize the Machines and vehicles.**

(iii) Was reasonable time/notice given?

53. According to the Defendant, the Plaintiff had it in writing that recovery would be proceeded with if the conditions of insurance were not met by 20 February 2009. This was in black and white so the eventual selling of the chattels should not have been a surprise to the Plaintiff.

54. The Plaintiff did not meet the conditions within the availability period.

55. Issuing of Demand Letter is the Defendant's right as it is also its right to withdraw it.

What constitutes reasonable notice?

56. This is a question to be determined according to the circumstances of each case.
In **Lista Supra:** a Reasonable time must always be allowed but, in assessing what length of time is reasonable in a particular situation, various factors must be analysed. Regardless of the nature of the breach, a demand for payment must always be made giving the borrower reasonable time to meet the demand. However, in the current case, no notice was given by the Defendant, let alone reasonable notice.

57. The Supreme Court of Canada in Lister (supra) "preclude a creditor from enforcing its security which secures any debt payable on demand, regardless of the wording of the security document without:

- First – making a demand;
- Secondly – unless a period of time which is reasonable in the circumstances has been given to the debtor within which to satisfy the demand.

58. The Principle that underlines this rule is-

> **"that debtor must be given a reasonable time within which to respond to the demand for payment."**

59. The power to seize the Plaintiff's machines and vehicle did not arise until the Defendant made and/or served a demand on the Plaintiff.

60. Therefore, the Question of giving the Plaintiff reasonable time to pay the debt to the Defendant after service of the demand does not arise herein.

Trespass and Conversion

61. The Defendant acted in a haste, without applying the standard procedures, rather applied an unusual procedure to seize the Plaintiff's machines and vehicles under security, and subsequently, sold the Plaintiff's machines and vehicles for a sum of $268,570.

62. There was a wrongful disturbance of the possession of the goods by seizure, removal and direct act of the Defendant.

63. In absence of any prior notice, let alone reasonable Notice is given as in the current case situation, the seizure and sale of the Plaintiff's machine and vehicles constituted **trespass** and **conversion.**

Exemplary Damages for wrongful seizure

64. Exemplary Damages, better known as punitive damages, refer to extra damages awarded beyond that actually incurred by the Plaintiff.

65. The Defendants wrongful seizure of the security (machines & vehicles) was in contumelious disregard of the Plaintiff's rights and entitles the Plaintiff to Exemplary Damages.

66. The conduct of the Defendant was high handed and reprehensible the way the Defendant seized the Plaintiff's security without serving any notice of demand and later sold 13 of the machines and vehicles.

67. The Plaintiff was deprived of any reasonable time for compliance. The First payment was defaulted by only 2 days' timeframe.

Was there any false and misleading representation under section 54 of the Fair Trading Decree?

68. The Defendant after 17 weeks, by letter of offer dated 29 January 2009 made representations to the Defendant **that it had approved the restructure of the Plaintiffs loan account and that it would** make a loan to the Plaintiff up to a sum of $984,477 [exhibit – P24]

69. In reliance upon the Defendant's representations, the Plaintiff did not seek any refinance elsewhere and on 4 February 2009, the Plaintiff signed the new contract and the Bill of Sale [Exhibit – P.25].

70. The Defendant had acknowledged that the Plaintiff was having difficulties due to two (2) floods and had agreed to restructure the Plaintiff's account.

71. The Defendant subsequently reneged and did not refinance the Plaintiff.

72. *Section 54 of the Fair Trading Decree* reads:

> ***"(1) A person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive."***

73. I find on the balance of probabilities evidence that the Plaintiff was induced by the Defendants and mislead when it made representations to the Defendant that it had approved the restructure of the Plaintiff's loan account and make a loan to the Plaintiff upto a sum of $984,477. (see paragraph 69). Therefore, the conduct of the Defendant's representations tentamounted to **Deceptive conduct**.

Section 55 of the Fair Trading Decree

74. The Plaintiff submitted that the Defendant engaged itself in conduct that was in all the circumstances, unconscionable.

75. The Question of whether or not the conduct is misleading or deceptive depends on the context in which it occurs: case of **Anand & Thompson Pty Ltd v Trade Practices Commission** (1979) 25 ALR 91, (at p.92) Federal Court of Australia refers.

76. The Plaintiff was the borrower and the Defendant the creditor. The Defendant made representation to the Plaintiff that it had approved the restructure of the Plaintiff's loan account and made a loan of $984,477. The Defendant required the Plaintiff to accept the offer

by signing the letter of offer and the new loan contract and the Bill of Sale. However, for one reason or the other, the Defendant reneged and did not refinance the Plaintiff. *The representative and the unprocedural seizure of Plaintiff's Securities was unconscionable.*

77. I find that the Defendant contravened *Section 55 (1)* of the *Fair Trading Decree* tentamounting to unconscionable conduct.

Breach of Contract

78. Evidence of the Plaintiff reveals that the Defendant by a loan contract of 4th February 2009 agreed to restructure the Plaintiff's account for $984,477 [Exhibits P25 & P26]. However, the Defendant subsequently reneged and refused to restructure the account and failed to release the Plaintiff's securities, and sold the securities [machines/vehicles].

Conclusion and Quantum

79. The Plaintiff had suffered substantial loss and damages as a result of the seizure and sale of the securities by the Defendant, resulting in the Plaintiff losing its Contract with Fiji Forest Industries and Fiji Pine Commission.

80. The Plaintiff's logging business was eventually totally closed down and Mr. Naidu's properties were also sold by mortgagee sale. The Plaintiff suffered loss of business, income and profit.

81. The Plaintiff in its Amended Statement of Claim is claiming for the following relief:

- Special damages,
- General damages for conversion, detention and trespass.
- General damage for Breach of Contract.
- Exemplary damages for wrongful seizure.
- Damages for humiliation, embarrassment, inconvenience and distress and
- Damages for loss of future income/profits, costs and interests.

Damages for conversion and trespass.

82. The Plaintiff at the time of its loan with the Defendant had placed altogether 19 machines and vehicles as securities against his loan, thirteen (13) of the machines and vehicles valued at $591,000 were lost by the Plaintiff as a result of the wrongful seizure by the Defendant on 30th April 2008 and thereafter sold by auction.

83. Damages in conversion is measured with the value of the goods converted [market value] or the lost of replacement. Case of **Hall v Barclay** [1973] 3 ALL ER 620, Roynat (supra at pg 144) refers whereas, the damages for trespass are limited to compensatory damages.

84. Further, it must be borne in mind that the burden of proof of the value of the machines and vehicles [securities] always rests with the Defendant whereas the Plaintiff has the benefit of the presumption whether the securities have a higher than a lower value. Case of **Royal Bank v W. Gott & Associates Electrical Limited**, 1994, CanLII 8922 (AB QB) at paragraph 36–38 refers.

85. The Plaintiff has not provided evidence of the market value of seized 13 machines and vehicles [securities] at the time of the loss. The total valuation for the 19 securities came to $856,000 approximately. However, as per the credit submissions [Exhibit P15] the valuation of the 13 securities that were repossessed by the Defendant Bank and sold would be around $591,000.

86. It is only just and fair that the Defendant is required to pay the full value of the assets converted as at the date of Conversion.

87. However, there would definitely be wear and tear of the machines and vehicles as securities and this must be factored in to determine the approximate award of damages to the Plaintiff.

• Original valuation of security as per credit submissions [Exhibit P15]	$591,000
• 13 machines/vehicles sold on auction after wear & tear	<u>$268,570</u>
	<u>$322,430</u>

88. Bearing above in mind, the Plaintiff is **awarded a sum of $322,430 in damages for Conversion** as would appear to be a reasonable and for value of the securities.

Damages for Loss of future income/profits.

89. The Plaintiff in his evidence told Court that he had logging contracts with Fiji Pine Limited and Fiji Forest Industries. From the deprivation of the monthly logging income between $21,000 to $22,000, he made monthly repayments to his loan account with the Defendant.

90. According to the credit submissions –

- In 2005 the Plaintiff made a net profit of $748,170.
- In 2006 the Plaintiff made a net profit of $454,541.

91. The credit submission evidence shows that the Plaintiff had the ability to service the Bank Debt and established his logging business with secured contracts with Fiji Pines Limited and Fiji Forest Industries.

92. The Plaintiff's evidence coupled with the credit submissions prepared by the Acting Manager, Mr. Lalit Chand and approved by its Chief Executive Officer, Mr. Parmesh Sharma as an agreed documents, establishes that the Plaintiff had suffered substantial logging business.

93. It is evident, that the totality of the Defendant's conduct had the effect on the Plaintiff's logging business resulting in its in operational and eventual closure. Had the Plaintiff continued its logging business comfortably, without being faced with any obstacles; as the Plaintiff faced herein when the Defendant Bank as the financer of the loan with the Plaintiff securities, decided to wrongfully seize the securities and sell the securities by auction; the timeframe of two days delay in receiving the repayment rather than giving an opportunity and reminder to the Plaintiff and failing to serve a Demand Notice on the default repayment; the Plaintiff could have flourished in its logging business and earned a substantial profit. This evidentially can be ascertained from the credit submissions prepared by the Defendant [Exhibit P15]; which showed that the Plaintiff was in a sound financial position and a profitable company.

94. The Plaintiff had the ability to service the debt and had established its logging business with secured contracts with Fiji Forest Industries, Fiji Pine and Waiqele sawmills.

95. The Plaintiff's financial position as a 31st December 2006 stands with a net profit of $407,840 whilst in 2005 the net profit was $695,742 .

If an average profit per year x 15 years is taken into consideration:	$ 500,000
	x 15
	$7,500,000

96. One has to always factor in the weather conditions, labour charges coupled with the availability of the logging business all around the year.

97. Therefore, it is difficult to articulate precisely the Plaintiff's income, losses and profits.

98. No doubt the Plaintiff suffered the loss when the 13 of the 19 securities were seized from its logging operational sites, hampering its logging business. An auction was held and the sale earned $268,570 from the sale of its machines and vehicles.

99. The Plaintiff at its best is entitled to a total sum of $600,000 in damages for the loss of profits calculated as follows-

average profit per year	$ 40,000
	x 15 years
	$600,000

Damages for Breach of Contract

100. Breach of Contract is a civil wrong and actionable for damages. Such damages are assessed for the loss to the Claimant (Plaintiff) from the Breach of Contract. (**Titto v Waddell (no 2)** 1977 ch 106), it is compensatory in nature.

101. Evidence heard was that the Defendant lent an advanced certain sum of money to the Plaintiff and had a Bill of Sales security over the chattels [machines and vehicles] and executed a loan contract.

102. However, the Plaintiff's Accounts was in arrears for at least two days and the Defendant bank's Bailiff unlawfully seized and took away the said securities x 13 (machines and vehicles) from the Plaintiff's respective job sites in breach of the Plaintiff's rights and refused to give the Plaintiff back the chattels on Plaintiff's request, unlawfully detained them and thereafter sold the chattels (machines & vehicles) on auction at a total price of $268,570.

103. The Plaintiff's have established on the balance of probabilities that the Defendant was in Breach of the Contract accordingly.

104. The Plaintiff no doubt is entitled to compensatory damages for breach of contract.

105. Considering all the factors and circumstances of the Defendant bank's conduct, it is appropriate and fair that I award a sum of **$190,000 compensatory damages** for breach of contract.

Exemplary Damages for Wrongful Seizure

106. Exemplary Damages, better known as punitive damages refers to extra damages awarded beyond that actually incurred by the Plaintiff.

107. The Defendant's wrongful seizure of the Plaintiff's securities (machines and vehicles) was in contumelious disregard of the Plaintiff's rights and therefore entitles the Plaintiff to award of Exemplary Damages.

108. The conduct of the Defendant was high-handed, considering the evidence of [PW2] Chief Executive Officer, Mr. Parmesh Sharma and [PW3] Chief Executive Officer, Mr. Nouzab Fareed. Upon analysis of their evidence, it supports the preposition that taken by the Plaintiff that the Defendant Bank was required to make a demand for the payment first. ["….some of the actions need explanation since not in accordance with the set down policies and ethics of the Merchant Finance………." "The normal process is to issue arrears notice to the customer with time frames of 7, 14 and 21 days…….."].

109. The high-handed attitude of the Defendant can be ascertained in the manner in the way the Defendant seized and sold the Plaintiff's machines and vehicles without first serving onto the Plaintiff any notice of demand and/or making demand for payment and without affording the Plaintiff any reasonable time for payment before seizing the securities.

110. Seizure should not have commenced until the demand was first issued and the rule in **Lister v Dunlop** was followed and adhered to.

(In **Lister supra**: the principle that '*the requirement of for service of demand principle governs seizure under security instruments and overrides any terms of the security instrument that conflict with the principle.*']

111. The Defendant's decision to seize and sell the Plaintiff's machines and vehicles without any notice for demand of payment and without allowing the Plaintiff time for compliance was *ab-initio* wrong in principle.

112. Thus, entitles the Plaintiff to an award of **Exemplary Damages in the sum of $50,000**.

Damages for humiliation, embarrassment, inconvenience and distress.

113. No doubt the Plaintiff's machinery and vehicles were seized by the Defendant under the security and the Plaintiff experienced the loss of business and profit.

114. It becomes very embarrassing when you lose machines and vehicles left as security against a loan and end up in humiliation, inconvenience and go under distress as if your hands have been amputed. Hence, the Plaintiff's business came to an end.

115. There is sufficiency of evidence before this Court to dwell onto this subject matter and award **Damages/ Compensation in the sum of $60,000**.

General Damages under Fair Trading Decree

116. **Section 127(1)** of the Fair Trading Decree "*empowers the Court to award compensation to the party to the proceedings who has suffered loss or damages by reason of a contravention of the decree.*"

Section 126 provides "*that a consumer, which the Plaintiff was, who suffers loss or damages may then recover for such loss or damage by bringing in a civil action.*"

Section 127(5) empowers the Court "*to make an award of damages and refund of monies.*"

117. The Plaintiff had suffered loss of damages by reason of a contravention of damages and is entitled to award of **Damages in the sum of $150,000.**

Damages for Loss of Future Income/profits

118. The Plaintiff had contracts with Fiji Pine Limited and Fiji Forest Industries and doing logging for Fiji Pine Limited and Fiji Forest Industries and from the income received from logging, the

Plaintiff paid $21,000 to $22,000 monthly installments to the Defendant prior to the restructure of the loan.

119. The Plaintiff was in a sound financial position and had a profitable company. The credit submissions shows in 2005, the Plaintiff made a net profit before tax of $748,170 and in 2006 $454,541. The Plaintiff had the ability to service the debt and established logging business with secured contracts.

120. The Plaintiff sustained and suffered substantial losses by reason of the matters complained by him. However, the evidence reveals that the Plaintiff did suffered huge losses. The Plaintiff has not been able to precisely establish in dollars terms the amount and extent of its losses.

121. There was no challenges made to the credit submissions since it was prepared by Acting Manager, Mr. Lalin Chand and Chief Executive Officer Mr. Parmesh Sharma and it was an agreed document tendered in evidence.

122. The Plaintiff relied on its financials for years 2005, apart from the evidence of the Plaintiff.

123. <u>The totality of the Defendants conduct had the substantial effect of the Plaintiff's logging business eventually being closed down.</u>

124. It depends how lucrative the Plaintiffs logging business was. This logging business(s) operated has two sides of a coin. The business may flourish and earn profits and/or may vary depending on the weather allowing its operation and availability of logging materials in order to carry out its operation successfully and profitably. There will always be ups and downs. However, such is the case herein.

125. The Plaintiff is therefore, entitled to a sum of $300,000 in damages for loss of profit for 15 years calculated as follows:

Average profit per annum $40,000 X 15 Years = $600,000

Interest

126. The Plaintiff pleads and seeks for interest. Section 3 of the Law Reform (Miscellaneous provision) (Death and Interest) Act, Chapter 27 refers.

Under **Section 3**, "*the award of interest, the rate and the period for which interest is to be awarded is a discretionary matter for the Court.*"

127. The fundamental principle as that ***"interest is to compensate a party for having to stand out of the money to which he or she was entitled***."

128. The Defendant charged the Plaintiff's interest of 14% per annum [Loan Contract, Exhibit 14 refers] and is seeking for interest on the award of damages from the date of filing of this action (9 October 2009) to the date of trial at 14% per annum.

Defendant's Amended Counterclaim

129. The Defendant's counterclaim of 13th July 2017 is for $1,072,904.30 against the Plaintiff together with interest.

130. According to the Defendant, Mr. Dineshwar Lal in his capacity as a manager testified that in 2008 the Plaintiff was in default and due to default, the Defendant repossessed the chattels [machines and vehicles] of the Plaintiff over the Bill of Sale [Exhibit 14]. The Plaintiff owed the Defendant a total sum of $1,072,904.30 [Exhibit 44].

131. The paragraph 29 of its Counterclaim, the Defendant pleaded that "as at 30th April 2008, the Defendant was in repayment of arrears of $468,342.88 comprised of principal sum, interest and change accruing thereon as specified in the Bill of Sale and the Loan Agreement.

132. However, in paragraph 10 of its defence to Counterclaim, the Plaintiff has denied Paragraph 29 of the Defendant's Counterclaim. The Defendant in its evidence failed to establish that $468,342.88 was owing as at 30th April 2008. No evidence was produced by the Defendant.

133. It will be noted that on 30th April 2008, when the Defendant's bailiff repossessed the Plaintiff's machines and vehicles, the Plaintiff's Account at that very time was in arrears of only $21,416.39 and the total outstanding balance was $1,284,938.40 [Exhibit P17 - Bailiff's authorization notice refers].

134. Further, the Defendant sold 13 of the repossessed vehicle at $268,570 [Exhibit P41].

135. However, it cannot be denied that the Plaintiff was lent and advanced a sum of $744,416.54 and secured the repayment inter-alia by Bill of Sale over the chattels [machines and vehicles] made on 30th May 2007. The Plaintiff also executed a loan contract.

136. No doubt, the Plaintiff's debt increased because the Defendant continued to charge the Plaintiff's interest on the principal sum lent in advanced.

- Principal Sum of Loan - $ 744,416.54
- Increased to this amount at 30/4/08 - $1,284,938.40
when arrears was $21,416.39
- 13 vehicles/machines sold on auction - <u>$ 268,570.00</u>
- Actual amount owed at the date of trial <u>$ 1,016,408.00</u>

137. The amount calculated as above shows that the Plaintiff owed the Defendant a sum of $1,016,408.00.

138. Mr. Dineshwar Lal's evidence was that that the Defendant's loss was $1,729,043. How that amount was made up and stood was not established with any clear concrete evidence by the Defendant.

139. However, the Defendant failed to establish that the Plaintiff owed the Defendant an outstanding loan of $1,016,408.00.

140. Therefore, the Defendant is not entitled to $1,072,904.30 or any sum at all for its conduct and for the following reasons:

- The Defendants adopted a wrongful procedure on 30th April 2008 in seizing the Plaintiffs machines and vehicles.
- The Defendants agreed to restructure the Plaintiffs loan Account but after extensive delay reneged and refused to restructure.
- By letter of offer dated 11th September 2008 the Defendant advised the Plaintiff that it agreed to restructure the Loan. The Defendant then changed its position and failed to restructure the Plaintiff's Loan Account. The fault lies with the Defendant.
- The Defendant at no time advised the Plaintiff that it was proceeding to repossess the Plaintiff's vehicles and machines.

141. By reason of the Defendants conduct the Plaintiff's debt increased because the Defendant continued to charge the Plaintiff exorbitant interest on the loan amount. However, the Defendant has failed to disclose the total interest it charged on the arrears of loan.

142. For the aforesaid rational, the Defendants counterclaim fails and is accordingly dismissed in its entirety.

Costs

143. The Plaintiff seeks to recover costs from the Defendant.

144. The award of costs is discretionary. This Court has an absolute and unfettered discretion to award or not to award costs. That discretion is to be exercised with reason and justice.

145. The Court has the jurisdiction to award such cost as may be appropriate in the circumstances and needs to take into account factors that will justify an award of costs.

146. **Order 62 rule 7(4) of the High Court (Amendment) Rules, 1988** allows a Court to award a gross sum in lieu of taxed costs to avoid the expense, delay, aggravation involved.

147. In the circumstances, taking into consideration relevant factors, Civil Action No. HBC 333 of 2009, getting to its disposition in 2025 tentamounts to delay, pending in the system for at least 15 - 16 years timeframe and witnesses subpoenaed etc.

148. It is only appropriate that I award a summary assessed cost of $50,000 against the Defendant to be paid to the Plaintiff within 21 days timeframe.

149. I now proceed to grant the following orders-

Orders

(i) A Declaration that the seizure of the chattels was premature, unreasonable and unlawful.
(ii) A Declaration that the Plaintiff was entitled to be given a reasonable time notice to pay the moneys due before the seizure of the securities.
(iii) General damages for conversion in the sum of $322,430.
(iv) General damages under the Fair Trading Decree in the sum of $150,000.
(v) General damages for breach of contract is awarded to the Plaintiff $190,000.
(vi) Exemplary damages for wrongful seizure is awarded to the Plaintiff in the sum of $50,000.
(vii) The Plaintiff is awarded Damages for humiliation, embarrassment, inconvenience and distress in the sum of $60,000.
(viii) The Plaintiff is awarded a sum of $600,000 Damages for loss of future income/profits.
(ix) The Plaintiff is awarded a sum of $50,000 costs on indemnity basis.
(x) Grant interest on award of damages from the date of filing of the writ [09th October 2009] to the date of trial [13th July 2017] at 14% per annum.
(xi) There will be a Grant of interest from the date of filing of the writ [09th October 2009] to the date of trial [13th July 2017] at 4% per annum.
(xii) The Defendants counterclaim is dismissed in its entirety for the reasons appearing in the judgment hereof.

Dated at Suva this 2nd day of October , 2025.

VISHWA DATT SHARMA
PUISNE JUDGE

CC: Naidu Law, Suva
Reddy and Nandan, Suva