WASAL KHAN and ARSALA KHAN (t/as KHAN BULLDOZING WORKS) and Anor v EPARAMA TURAGA and 2 Ors (HBC0344 of 1996)

HIGH COURT — CIVIL JURISDICTION

FINNIGAN J

22 March 2006

Damages — contract — assessment — quantum of damages — lawful ownership over machine — whether Defendants liable to Plaintiffs and damages proper — damages awarded.

The Plaintiffs claimed ownership and sought damages over a bulldozer (machine) that was allegedly bought from a third party and formerly owned by their partnership. The Plaintiffs alleged that they owned the machine since they had a bill of sale over it and they used it for their business and it remained in their possession. They filed for third party notice and directions and obtained judgment against the Defendants by default. The Plaintiffs also filed for interlocutory application which was decided 5 years later by the High Court judge. The third party never participated in the proceedings although both parties and their witnesses were ready for hearing. On the other hand, the Defendants countered that they owned the machine since they bought it from the third party who had lawful title over it and they had the right to repossess the machine by virtue of an asset purchase agreement (APA). The issues were whether: (1) the second Defendant (D2) and its agent, the first Defendant (D1) were liable to the first and second Plaintiff (P1 and P2); and (2) damages (special, general and exemplary) and interest would be awarded.

Held — (1) D1 and D2 were liable to P1 and P2 for any losses suffered by them. The basis of the claim by the Defendants that D2 owned the vehicle was exhibit D1. Solely on the basis of the witness for D2 and making no judgments about the absent third party, D2 acted carelessly and without due diligence. Exhibit D1 was a bill of sale and it had long been cancelled when it was produced to them by the third party. D2's modus operandi was to require from the borrower an invoice which apparently indicates, to those who know, that the borrower was selling to the lender the chattel over which security was being given. He names as a price the amount which D2 agreed to lend, and that was what happened in this case. D2's APA was a worthless document and of no effect either to transfer ownership of the machine or to secure the loan that D2 so hastily advanced.

(2) Special damages may only be awarded if fully pleaded and proved by evidence including documentary evidence of the losses claimed. The very limited evidence given by the Plaintiffs' witness and the calculations made and handed up by P1 did not warrant special damages.

The general damages awarded were $60,000. The reinstatement of the machine was approximately $16,808.76 and it may cost more, but the Plaintiffs have only themselves to blame. The repair costs were at $20,000, rounded off. Allowing another other day per week as downtime for repairs, maintenance, transport between jobs and slack time between contracts (all speculation) required a reduction of 29%, and reduced the notional total to $54,421.50. It yielded a total of $74,421.50. The Plaintiffs' contribution to their own loss was by their failure to mitigate it was at 20%. It reduced the sum to $59,537.20.

The pleadings contained no claim for exemplary damages but the evidence permitted such a claim. D2 was liable to pay exemplary damages assessed at $25,000. Apart from the word of the third party, it had no reason to believe that the machine even existed. When it sent a bailiff to take possession of the machine, it ran a high risk that it was interfering with property that belonged to somebody else.

The interest of $8800 was awarded on the whole of the other general damages at a reduced rate, 2% per annum from the date of filing the writ until the date of judgment, that is 7 years and 4 months. The Plaintiffs borrowed no money at commercial rates and D2

lent money at commercial rates. To add interest to the damages at 13.5% would overcompensate the Plaintiffs and serve only as punishment to the Defendants.

Determination made.

Cases referred to

Ilkiw v Samuels [1963] 1 WLR 991; [1963] 2 All ER 879, adopted.

ANZ Banking Group Ltd v Koi (unreported, Fatiaki J, Civil Action No 231/1992S, 10 January 1994); *McEntire & Maconchy v Crossley Brothers Ltd* [1895] AC 457; *Sharma v Dominion Wire & Cables Ltd* (unreported, Civil Action No HBC 352/1998L, 1 July 2005), cited.

British Westinghouse Electric Co Ltd v Underground Electric Railways Co Ltd [1912] AC 673; *ANZ Banking Group Ltd v Merchant Bank of Fiji* [1994] 40 FLR 266; *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118, considered.

Messrs Gordon & Company for the Plaintiff

Messrs Patel & Sharma for the first and second Defendants

No appearance by the Third Party

[1] Finnigan J. The Plaintiffs commenced this action in 1998. They claim that the third Plaintiff (P3) was and is the lawful owner of a Caterpillar D6D bulldozer and that the first and second Defendants (D1 and D2) illegally, unlawfully, without colour of right and wrongfully seized the bulldozer and they claim damages.

Preliminary — The third party

[2] The Defendants' defence is that they had lawful title to the machine. They say they got that from Mohd Nasir Khan. In January 1999, they served a third party notice on Mohd Nasir Khan and on 2 August 1999 filed an application for third party directions. In the meantime the Plaintiffs had obtained judgment against them by default and on 25 June 1999 they had filed a summons for an order to set aside that judgment. That interlocutory application was heard by a judge in this court on 17 February 2000. The judge reserved his ruling and the following year left the High Court at Lautoka and removed the file from the registry. He was able to deliver his four-page ruling 5 years and 1 week later on 25 February 2005. Thereupon the D1 and D2 immediately filed their statement of defence and the Plaintiffs filed a reply and the matter came up in a general callover on 18 April 2005 during which many unheard cases were set down for hearing. Only counsel for the Plaintiffs appeared and a hearing date was allocated, 20 June 2005 with a backup date, 27 September 2005.

[3] On 20 June 2005, counsel for both Plaintiffs and Defendants appeared and apparently the witnesses were ready because both counsel advised the court that fruitful talks were taking place and a settlement conference within 3 weeks was envisaged. A letter or notice was to be served on the third party and the matter was listed 3 days thence, 24 June 2005 for the third party to appear. Both parties were advised that a 27 September hearing date was still reserved. There is nothing on the file to indicate that anything happened on 24 June.

[4] The matter next was called on 27 September 2005. Counsel for both Plaintiffs and Defendants were ready with their witnesses and the hearing got underway. The third party has never taken any part in these proceedings.

[5] This is important, because in his absence he turned out to be a pivotal figure in the case and I must bear in mind throughout that on all matters affecting him he remains unheard.

The statement of defence

[6] The Defendants deny the Plaintiff's pleaded claim of ownership and plead positively that the lawful owner of the machine is Mohd Nasir Khan, the third party. Their case as pleaded is that the third party purchased the machine in his own name in 1982 from Carpenters Fiji Ltd and executed a bill of sale for the machine on 11 August 1982 in favour of Carpenters as security for the balance of the purchase price. They say there was no legal transfer of the machine from the third party to the third named Plaintiff.

[7] They then plead that the D1 who is a registered bailiff repossessed the machine under powers given in an asset purchase agreement entered into on 22 October 1996 between the third party and the D2. They base their claim to a lawful right to repossess and retain the machine on the asset purchase agreement.

[8] As an alternative *"and without prejudice to the foregoing defence"*, they then state that the third party in October 1996 misrepresented to the D2 that he was the lawful owner of the machine and that in reliance upon his misrepresentation the D2 had entered into the asset purchase agreement and had advanced to the third party a sum of $70,000. In their proposed statement of claim against the third party they intended to pursue that claim against him.

The substantive issues

[9] It is entirely clear what the issues are. The Plaintiffs claim that they own the machine, were entitled to peaceful possession and use of it and were wrongly deprived of the machine and its income by the actions of the two Defendants. The Defendants claim that they have a bill of sale over the machine, having taken good title from the third party and, upon default by the third party in his payment obligations under the asset purchase agreement they were entitled to repossess the machine. There are also issues about damages, which I shall address later.

The asset purchase agreement

[10] The asset purchase agreement is to my eyes a strange creature but it has existed in Fiji for some years. Clearly from the evidence of the D2's witness previous determinations and comments by the courts about this instrument have not deterred the D2 from continuing to employ it. It needs to be said at the outset that the asset purchase agreement *"despite its misleading title, is a modern example (of a hire purchase agreement)"*, See *ANZ Banking Group Ltd v Koi* (unreported, Fatiaki J, Civil Action No 231/1992S, 10 January 1994). This proposition of law was upheld by the Court of Appeal in their judgment in the same case, to which I shall later refer and agreed to by the Supreme Court also.

The main facts and the finding in liability

[11] The evidence for the Plaintiffs was given primarily by the first Plaintiff (P1), Wasal Khan. The D1 gave evidence and the current Manager Western Division of the D2 gave evidence but he had no knowledge himself of the transactions in question. He none the less was able to produce a file of the D2's documents relating to the D6D Caterpillar and was well-placed to give evidence of the D2 policies and he was able to indulge in some well-informed speculation. Nowhere however did the evidence of the Defendants meet the claims of the P1 head-on. Nothing the Defendants' witnesses were able to say could dent the credibility of the P1 whom I observed over several days and who was skillfully cross-examined by Mr Singh. There is no room for doubt that the P1's claims to ownership of the machine are correct. After hearing and observing this witness

I am satisfied beyond reasonable doubt that he and his uncle (the second Plaintiff (P2)) formed a partnership and purchased the D6D Caterpillar from Carpenters Fiji Ltd (Carptrac). I am satisfied that for reasons valid at the time the purchase deposit was provided by the third party Nasir Khan who was a relative in the family of the P2 and P3 who are themselves brothers. I am satisfied by the evidence of Wasal Khan that Ex P1 is a calculation written out by Nasir Khan in his own hand. It states the purchase price of the D6D Caterpillar with the correct serial number and advises Wasal Khan in detail what repayments were to be paid to Nasir and on what dates. It states what other payments Wasal Khan was to make, including the cost of the bill of sale and the insurance premium. I am satisfied that for reasons valid at the time the bill of sale securing to Carpenters the $45,000 balance of the purchase price (Ex D1) was entered into between Mohammed Nasir Khan and Mohammed Yakub Khan jointly. However, all that was secured to Carpenters by the bill of sale was to be paid by the partnership.

[12] Thereafter, the P1's evidence and parallel with that the series of documents Exs P1–P8 inclusive, establish that from that moment all parties treated the machine as the property of the P1 and P2. I am satisfied they repaid Nasir Khan and that they paid the balance to Carpenters. I am satisfied that by early 1984 the partnership had fallen into arrears in the payments to Carpenters and arranged a bank loan with the National Bank of Fiji. They gave in their own names and the name of the partnership a bill of sale to the bank for $39,000: Ex P7. This bill of sale was registered and stamp duty paid. The bill of sale given by Nasir and Yakub Khan to Carpenters (Ex D1) had also been registered and cancelled. The handwritten date in the cancellation stamp is carelessly written and illegible.

[13] The partnership used the machine for their business and eventually fell into arrears again. They borrowed what was needed to pay off their debts from the P1's father, P3. To secure the debt they "transferred registered ownership to his name" for the period of repayment of the loan, whatever that means. I understand this change of ownership was not registered with any state authority. During that period however the third party insurance was issued in the name of the P3. The whole arrangement seems an informal version of the "Asset Purchase Agreement" above. Possession of the machine remained with the P1 and P2 throughout and they used it for their business. Then, as the P1 said, *"when we paid off the loan he gave it back"*. It remained in their possession throughout and was used for their business until 28 October 1998 when the P1 loaded it onto a transporter and took it away.

[14] The basis of the claim by the Defendants that the D2 owned the vehicle is Ex D1. Solely on the basis of the witness for the D2 and making no judgments whatever about the absent third party, it seems to me that the D2 acted carelessly and without due diligence. By the appearance of Ex D1 it was a bill of sale and no more and it had long been cancelled when it was produced to them by Nasir Khan. By itself it was flimsy evidence of ownership and in any event if it did prove ownership then Nasir Khan was only a part-owner. The D2 completely ignored Yakub Khan. It appears Nasir Khan approached the D2 for a loan of $70,000 and offered the machine as security. The bill of sale was his only proof of his claim to own the machine. The D2 without further enquiry asked Nasir Khan for an invoice offering it the machine for sale at $70,000. The invoice came, issued by M Y Khan Ltd. It then immediately wrote a cheque for $70,000 made out to the company M Y Khan Ltd. Nasir Khan was director of more than one company. That initial cheque of the D2 was rejected by the bank to which Nasir Khan presented it and this is clearly evidenced by a handwritten note in the file.

This is odd, but no explanation for it was offered in evidence. It seems the D2 sought none. The D2 asked Nasir Khan to rearrange the invoice (about which more in a moment). He did so, sending one in his own name and it cancelled the first cheque, issuing another in the name of Nasir Khan. The D2 according to its witness assumed that Nasir Khan had done the necessary transfers of ownership internally. This entire transaction took place within the span of one business day.

[15] By way of explanation, the D2's *modus operandi* was to require from the borrower an invoice which apparently indicates, to those who know, that the borrower is selling to the lender the chattel over which security is being given. He names as a price the amount which the D2 has agreed to lend and that was what happened in this case.

[16] The first invoice was issued by M Y Khan Ltd and a cheque for $70,000 was made out the same day 22 October 1996. Later that day another invoice for the same machine with some errors in the identification numbers but clearly the same machine was delivered in the name of M Nasir Khan himself. The D2's eagerness to divest itself of $70,000 is breathtaking. As is the apparent ability of the third party to change his *persona* at will. A second cheque was issued to Mr Khan that same day. Along with evidence of all these matters in the D2's file is a handwritten check list of things to be done before loan money is paid out. There are seven headings including *"inspection report"*, *"financial statements", "satisfaction of repayment capacity (contracts etc)"* and a separate heading *"estimated value of security"*. Every one of these pre-loan checks was ticked *"no"* and the estimated value of the security was left blank. All the evidence is of an informal and hasty arrangement for Nasir Khan to be paid the sum of $70,000. On the inside cover of the file is a note in the same handwriting as mentioned above setting out the conditions of the approval for the loan which add a little but not much to explain why this transaction took place. From this note I think it possible that the lender had an ongoing relationship with Nasir Khan.

[17] Apart from the two bills of sale (above) none of the transactions over this machine were registered with any registration authority. The equities of ownership are however on the above facts clear. The P1 and P2 were intended by all concerned, including Carpenters who had to be paid, to be the owners of the machine from the time it was purchased in 1982. Any claim made by Nasir Khan on his own behalf or on behalf of any company in which he had an interest is not only without foundation but contrary to the evidence of the only document which he offered to the D2 as proof.

[18] I need now refer to the judgment of the Court of Appeal in the above case, *ANZ Banking Group Ltd v Merchant Bank of Fiji* [1994] 40 FLR 266 at 16:

> The judgment of Lord Herschell L.C. in *McEntire & Maconchy v Crossley Brothers Ltd* [1895] AC 457 at 462 makes it clear that for a person to be able to give a valid bill of sale in respect of any chattel he must have title to that chattel.

[19] The D2 asset purchase agreement is in no better position. In my view it is a worthless document and of no effect either to transfer ownership of the machine or to secure the loan that the D2 so hastily advanced.

[20] I therefore find the D2 and its agent the D1 liable to the P1 and P2 for any losses suffered by them which are both claimed and proved according to principle.

Damages

[21] Here I must set out the whole of the Plaintiffs' pleading for damages. *THAT* as a result of the actions of the Defendants the Plaintiffs have suffered substantial loss and damages and continue to suffer the same.

PARTICULARS

- Loss of income/revenue from not being able to use the said machine to earn income/revenue
- Loss of bargain/business reputation
- Unable to secure new contracts/business due to unavailability of the said machine
- Loss of present and existing customers.
- Loss of future and prospective customers.
- Unable to complete present contracts already entered into
- Loss of the said machine

Wherefore the Plaintiffs claim

(i) …………………..)
(ii) …………………(interlocutory injunctions)
(iii) *DAMAGES — Special and General*
(iv) *COSTS*
(v) *SUCH* further or other Relief that this Honorable Court deems just and expedient.

[22] The scope to award damages on those pleadings is not great. Within the fairly narrow boundaries set by those pleadings much depends on the evidence. The pleadings themselves do not distinguish between special and general damages. There is no claim pleaded for reimbursement of the cost of repairs. I accept the submission of Mr Singh that the court may award only special damages which are fully pleaded and then fully proved by evidence including documentary evidence of the losses claimed. I accept the authority he cited, *Sharma v Dominion Wire & Cables Ltd* (unreported, Civil Action No HBC 352/1998L, 1 July 2005). In that case, (see p 17 onwards) the Plaintiff did not in its statement of claim particularise the special damages which it claimed. Not only were the special damages not particularised as to quantum they were not particularised as to the alleged damage. The statement of claim did not claim some particulars which at the trial were stated in evidence. So, although succeeding in establishing liability the Plaintiff was awarded no special damages. His failure in general damages was on a different ground.

[23] The court in that judgment (at 16) cited from *McGregor on Damages*, 17th ed, at [43-010]:

> *What constitutes special damage follows by exclusion from this area covered by general damage. Various types of situation stand out by this exclusion.*
>
> *Where the precise amount of a particular item of damages becomes clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.*

[24] In respect of special damages, I adopt without hesitation the citations put before me by Mr Singh from *Ilkiw v Samuels* [1963] 1 WLR 991; [1963] 2 All ER 879 (*Ilkiw*), particularly the words of Willmer LJ at All ER 886H and those of Diplock LJ at All ER 890I. The principles of pleading and proving special damages are long established and well-known and I do not need to set them out again here.

[25] Having made that point, Mr Singh went on to discuss the seven particulars of damages pleaded and made out a very good case for a proposition that these are all claims in special damages. He then referred me to a dictum of Viscount Haldane LC in *British Westinghouse Electric Co Ltd v Underground Electric Railways Co Ltd* [1912] AC 673 at 689; [1911–13] All ER Rep 63 at 69E:

> Subject to these observations I think that there are certain broad principles, which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps.

[26] That was a case in contract, but any authority in tort would say much the same. By way of damages, the Plaintiff is entitled to plead and prove his pecuniary losses but what may be awarded must be reduced by the amount the Plaintiff could reasonably have made by *"taking all reasonable steps to mitigate the loss consequent"*. He is debarred *"from claiming in respect of any part of the damage which is due to his neglect to take such steps"*. I accept all that.

[27] On that basis Mr Singh submitted that if any damages are awarded they should be for loss of use from 28 October 1998 only until 28 December 1998. He relied on the evidence (see below) that the Defendants tried to return the machine on 28 December 1998 and took it to Wasal Khan's home, who refused to accept it and he submitted it was not the fault of the Defendants that it was not delivered until the following August. He submitted that from December 1998 onwards any losses should be borne by the Plaintiffs because they themselves had control of the situation wherein they did not take the machine back and did not take any steps to repair any damage and get it working.

[28] Mr Singh's final submission on quantum was that the Defendants acted without malice because they had no knowledge of the existence of any of the Plaintiffs or of any claim they might have on the machine.

Special damages

[29] I accept Mr Singh's authorities. I am not prepared to construct out of the pleadings a recognisable claim for any particular special damages as invited by Mr Gordon. These pleadings are a poor foundation for special damages and I will not draw upon the very limited evidence given by the Plaintiffs' witness (See below) or upon the calculations made and handed up by Mr Gordon. There is no basis for any award in special damages.

General damages

[30] I turn to the claim in general damages. Mr Wasal Khan gave evidence at length about ownership of the machine but his evidence of loss was in a fairly narrow compass. The machine was taken on 28 October 1998. On 23 December 1998 the parties settled the terms of a consent order. The order was made and the machine was to be returned immediately. For reasons to which I shall return, the Plaintiffs did not get the machine back until 6 August 1999. For reasons to which I shall return they have not used it from that day to this. Essentially, their claim is that it is so badly damaged that they cannot afford to get it repaired. Despite that, Mr Wasal Khan said in evidence *"today it would have been doing logging*

… people want to hire it … it doesn't work, parts are missing". In other words, it could have been working, perhaps repaying any money borrowed to get it going again. All it needed was the repair of the known damage. That is the present situation. About the beginning of the period, from 28 October 1998 onwards, his evidence was *"we lost all the contracts for that machine, our other machine was not suitable, it had a ripper but no winch"*.

[31] In respect of quantum he stated that for roading the machine rate was $66 per hour. For native bush the partnership was paid $45 per cubic meter and for pine bush it was paid $10 per tonne and the average as at 28 October 1998 was 60 tonnes per day that is, an income of $600 per day gross. He estimated running expenses to be deducted from that at between $150 and $200 per day. He said he had made a calculation which he did not produce as evidence, saying that Mr Gordon would use it for his submissions. He summarised his claim in damages as being for the unlawful detention by the D2 from 28 October 1998 until it was returned on 6 August 1999 and then for the money that would have been earned on the working days lost (in that first period), plus the costs of repairs to the machine which have still not been done and the loss from days not worked for the second period, that is, since the return of the machine on 6 August 1999 until the date of judgment.

[32] In respect of the costs of repair he produced a quotation by Carpenters for the necessary work and an account for their inspection of the machine.

[33] In respect of mitigation of the Plaintiffs' loss, he stated he had worked from 1998 until 2005 but was no longer working. He said that if he had had the machine he would have been logging and farming with the income going to the partnership.

The general damages claim broken down

[34] In my opinion, I am required to establish:

> Losses to the partnership from the contract that was interrupted on 28 October 1998 and from any reasonably foreseeable subsequent contracts until a reasonable date of return.
>
> 1. The effect if any on this claim of the Plaintiffs' refusal to accept the machine when it was delivered on 23 December 1998 (about which more later).
> 2. The extent to which the machine was damaged upon its return.
> 4. The liability if any of the Defendants for that damage.
> 5. The liability if any of the Defendants for losses suffered by the partnership from the reasonable date of return to the present day.
> 6. The effect of any actions or inactions by the Plaintiffs to mitigate their losses.

[35] All of this must be considered within the ambit of the pleadings ie, the seven particulars that are pleaded. I agree with the submissions of Mr Singh about these. The second particular *"loss of bargain/business reputation"* has no evidence explaining or supporting it and may be overlooked. The other six particulars all amount to the same thing. The Plaintiffs want to be compensated for income lost by the unlawful seizure and claimed incapacitation of the machine by the Defendants. For this they need to prove by evidence the amount that they actually lost or might reasonably be expected to have lost and to prove that that amount is due to them after allowing full credit for any mitigation of their loss that was within their power.

Further facts

[36] It is necessary now to return to the facts. First, the dealings of the D2 with Nasir Khan. Mr Singh submitted that the D2 dealt *bona fide* with Nasir Khan. It loaned him $70,000 on the security of this machine. The only proof that it had that he owned the machine was a bill of sale which showed that 14 years previously Nasir Khan and Yakub Khan had given Carpenters security over it. By itself this was insufficient proof of ownership in my opinion, even in the days when ownership of vehicles was not registered. The D2 was misled, but it had its eyes open. As its witness said it relied on Mr Khan to make whatever internal arrangements were necessary within his companies for him to be the owner of the machine when he gave them at their request the two invoices purportedly requesting payment for it on 22 October 1996. The conclusion is inescapable, it did not care. The D2 carried out no checks at all to verify the existence, ownership, condition or value of the purported security. None of its officers ever saw the machine. Neither they nor Mr Nasir Khan knew where it was. In my opinion, the D2 made insufficient enquiries. Its claim to a *bona fides* dealing is a bit thin.

[37] It seems clear that Nasir Khan did not know where the machine was. He knew only that Wasal Khan and/or his uncle and/or his father had it. He defaulted on his payments. The D2 sent him a repossession notice and this was delivered by the D1 as bailiff. The D1 gave evidence that he delivered this notice to Nasir Khan on a date he could not remember, but from the D2's file copy probably 29 December 1997. Nasir Khan phoned Robert Allport, the Manager of the D2, who had approved this loan and made some arrangements with him as a result of which the D1 was sent away by Mr Allport. Eventually Nasir Khan defaulted again and again the D1 as bailiff went to him with a repossession notice. This was Ex D14 dated 31 August 1998. Nasir Khan told him he did not have the money (said in the notice to be $37,717.43) and directed him to go and repossess the machine. He not only sent the bailiff away with *carte blanche* to help himself to the machine but the witness said he called his cousin brother and he made available his own staff to help the bailiff locate, load and repossess it. However he could not tell the bailiff where it was except that it was in Yaqara and the bailiff spent long and arduous hours with much effort on the search before he located it on 28 October 1998. It was a member of Nasir Khan's staff and his vehicles which were hired by the bailiff to load the bulldozer and take it away. The bailiff was positive unshaken and credible in his claim that the D6D would not start, so he used another bulldozer to dig a hole into which the transporter was reversed. The D6D was then pushed on to the transporter by the other bulldozer.

[38] After this court made the consent order on 23 December 1998 for return of the machine the bailiff loaded it and headed for Tavua where Wasal Khan lives. He was unable to go beyond Tavua without a guide and since Wasal Khan was not waiting at the police station he went eventually with a police officer from that station to Wasal Khan's home. By that time, whichever account one accepts and the policeman was independent and credible, it was late in the night when the bailiff knocked on Wasal Khan's door and told him the bulldozer was on the transporter up on the road. Wasal Khan and some members of his family came up to the machine and walked around it and he refused to accept it because he was unable to see in the dark what condition it was in. He told the bailiff to take it away and he would be glad to inspect it in the daylight. The bailiff's evidence is that he deposited the machine at Dee Cee's transport yard in Lautoka. Wasal Khan came and inspected it there. The bailiff said that was about a week later.

The second affidavit's witness said that the D2 after December 1998 took it to Suva, possibly for storage. From there he said it was delivered to Mr Gordon's office, in Lautoka on 6 August 1999. Why it went to Suva and was not offered back to Wasal Khan in compliance with the consent order was not explored. Wasal Khan says many parts were missing from it and he later (in August 1999) had it inspected by Carpenters who gave him a bill for the inspection and a quotation *"for replacing or repairing as needed"* and he produced these documents in evidence. After hearing his explanations about why he simply did not have the machine reinstated and put back into work after he got it back, his fundamental explanation is that the partnership could not afford the cost.

Decision on quantum

[39] In my opinion that explanation is insufficient. This was a working machine with its own maintenance and running expenses. If not used it could only deteriorate. The partnership had not hesitated in the past to borrow large sums of money to purchase the machine and to keep it running. Mr Wasal Khan said that eventually the cost would have been about $15,000 although the quotes given to him by Carpenters in August 1999 were a little higher than that. These proceedings were by that time on foot. There was already a claim in the court for the damages. The Plaintiffs had a duty to mitigate their losses. They did not and none of that can be visited on the Defendants.

[40] Having said that, I have to acknowledge the appalling situation caused by the court itself. A simple interlocutory decision caused removal of the file from the registry and a delay of over 5 years. But what solace for the Plaintiffs arises from that? Was the court in control of the machine? Was there any reason why the Plaintiffs should not put it back to work? None emerged from the evidence. They chose to wait, for 5 years.

[41] I return now to the D2. Having taken possession of the machine in October 1998 in order to recover the substantial amount still owed to it by Nasir Khan, what did it do? First it left the machine in a transport operator's yard (Dee Cee's). Wasal Khan inspected it there about a week later, in the company of a police officer. Then it consented to release of the machine to Wasal Khan. This was done by way of a consent order that the partnership would keep accounts of the income earned by the machine and pay those to the D2 if the court ultimately held that the D2 had been entitled to possession. Was there some obligation on the D2 to mitigate its own losses? It was aware or should have been aware that the machine had lain idle from December 1998 until the present day. It has done nothing to advance the repairs or to ensure that it would have an income available to it in part satisfaction of its loan should the decision be in its favour. Neither has it taken any steps, I am assured by its witness, to recover any money from Nasir Khan. Both the outstanding loan balance and the purported security have lain untouched for nearly 8 years. Nothing has been done about recovering the money. The reason given by the witness is that the D2 is waiting for the court to decide who owns the machine. Why should the court control the situation? Both the Plaintiffs and the D2 were operating businesses for profit. Both of them sat idle. The Plaintiff was not quite idle, he said he tried to repair the machine with second hand parts but they did not work.

Peripheral matters

Re-examination

[42] All of the documents on which the partnership relies to substantiate its claim for income loss, Exs P14–P16 were produced, with some other documents, in the course of re-examination. Mr Gordon's justification for this course was that

they are old contracts which he had got out at the request of Mr Singh but about which Mr Singh had asked no questions. By the time Ex P16 was produced Mr Singh was objecting to this new evidence and I reserved my ruling. As it happens, they are indeed old documents and no specific reference was made to them in submissions and I see very little of assistance in them. My ruling, consistent with my general practice about evidence in re-examination, is that no new evidence unrelated to cross examination will be admitted in re-examination, so these documents are excluded.

Transfer from Nasir Khan

[43] Wasal Khan said in evidence that Nasir Khan had actually taken steps to divest himself and presumably Yakub Khan of any interest they may have had in the machine. Without any documents to support his statement he said *"Nasir signed a consent in the solicitor's office, that's how the transfer was done so that the National Bank could give us the loans. The National Bank came and checked the machine as well as the land. That consent is with the Solicitor. Yakub did not sign it but Nasir did on behalf of his company"*. He said that when the partnership took the loan from the bank it actually gave two bills of sale to the bank, pledging two bulldozers and two bills of sale pledging two pieces of land. I accept this to be true and find a deep contrast between the bank's manner of securing a loan for $39,000 (Ex P7) with the practice of the D2 for a loan of $70,000.

Accounts

[44] Any sympathy one may feel for the partnership over the totally undeserved loss of its machine in October 1998 may or may not be slightly enhanced by Wasal Khan's explanation for a lack of hard evidence about pecuniary loss. He named the partnership accountant who used to make up the partnership accounts. The raw material from the field was given to the accountant who did the books and then kept the invoices etc that he had been given. The accountant passed away in October or November 2005 and his brother was going to search for the materials but 2 or 3 weeks later he also passed on. The Plaintiffs now have no records for the period up to October 1998 and the income in that period would have been crucial to any conclusion the court might reach about pecuniary loss since that date. It was not said that the accountant actually produced any annual accounts nor was I told where they are now if he did.

Mr Gordon's submissions on quantum

[45] In respect of quantum, Mr Gordon first addressed the damage that was done to the bulldozer after seizure. On the unchallenged evidence of the bailiff that the machine would not start, I have some hesitation accepting that the bulldozer was in working order until seizure. I have to take that into account. I accept that when the Defendants gave it back it was not in working order. Mr Singh challenged the credibility of Exs P12 and P13 but I accept these documents as proving the list of damaged and/or removed parts and the cost of reinstatement including labor. I accept Mr Gordon's implicit submission that the Defendants had a duty of care to the Plaintiffs in respect of the machine for the time that it was in their possession. I accept that the evidence establishes a finite list of the damage and of the cost in 1999 of reinstatement. I accept on balance that the evidence has established this damage occurred in breach of the Defendants' duty to take care of the machine while it was in their custody and I hold that they are liable to the Plaintiffs for that damage. Exhibit P13 proves an amount of $250 including VAT for the inspection on or about 2 August 1999 and

the exact amount of the parts quotations given on 9 August 1999. I have calculated and accept Mr Gordon's assertion that they total $11,496.26. The other two quotations for labour and material and for painting plus VAT come by my calculation to $7650. The total is $19,396.26. The defects themselves as at 6 August 1999 are set out in Exs P11 and P23 establishes that it was on that day the machine was delivered to Messrs Gordon & Co Solicitors on behalf of Wasal Khan in the condition set out in that defect report (P11).

[46] The basis on which Mr Gordon placed his submissions in respect of damages for loss of income was first the evidence of Wasal Khan that the income was $10 per ton less the running costs and he said all of this is sufficient and should be accepted. He then handed up several pages of calculations which in his submission set out the Plaintiffs' pecuniary loss.

[47] On the first page there is a calculation of total days that the machine was in the possession of the D2 between 28 October 1998 and 6 August 1999 which, allowing 21 days for a Christmas close-down he says totals 175. His second page adopts part of the evidence of Wasal Khan that the gross income of the machine when working fine was $600 per day, but so far the calculations ignore the other evidence given at the same time about rates for native bush and for roading which I have set out above. The third page is said to be a calculation of the daily expenditure on the machine which was grease diesel and oil said to total $162. The only evidence of Mr Wasal Khan on oath was that it was between $150 and $200 and he agreed with Mr Gordon that Mr Gordon's calculation which would be used later in submissions was correct. This is not very good evidence.

[48] On the fourth page of the calculations Mr Gordon calculates total gross income at $600 per day for 175 days and deducts $162 for 175 days, yielding a total called *"net loss incurred for the 175 days of illegal detention: $76,650.00"*.

[49] His fifth page is the calculation of the amounts set out in the Exs P12 and P13. The total by his calculation is *"total costs of repair: $19,396.26"*. That sum matches my calculation.

[50] The next page is the simplest of calculations headed "*Further loss being incurred as machine cannot be used at present*". There are said to be 2,396 days from 6 August 1999 until 28 February 2006. The hearing concluded on 22 February 2006. This figure multiplied by the net yield on one of the earlier pages ($600-$162=$438) is said to yield a total of $1,049,448. This amount is claimed. There was however no evidence about the number of days per year the machine normally worked.

[51] The last page of the document contains the totals I have just mentioned and goes on to state claims for $25,000 as exemplary and/or punitive damages for conduct of the Defendants. No claim is pleaded for exemplary damages and interest on that at 15% per annum as a commercial rate. Mr Gordon submitted that since the damages are awarded for conduct in the course of conduct of business then the rate should be commercial. I have however no evidence about commercial interest rates. Finally, in the last line of his summary Mr Gordon states a claim for costs on an indemnity basis to be summarily assessed at $35,000, without any breakdown or any bill of costs.

Decision on quantum of damages

[52] Much of this submission including the claim for costs I find well outside the ambit of the evidence.

[53] It is easiest to deal first with items 3 and 4 of my breakdown. Clearly, my finding on the balance of probabilities that the damage shown in the defect report, which was not challenged in evidence or in submissions (Ex P11) was caused by the Defendants' breach of their duty to take care of the machine (for whoever owned it). The proof is of the cost to reinstate it at the relevant time, August 1999 and I hold that the Defendants should in principle pay these costs as damages.

[54] I am not persuaded however, because there is no evidence that the painting quoted for arises out of the Defendants' neglect of the machine. The defect report is barely legible, although I do see an item *"front frame cover (radiator)"*. The parts list in Ex P12 does not suggest any particular need for painting. I must assume that the quotation is for painting the whole machine. I feel safe in allowing a sum for repainting whatever is replaced but can only guess what painted parts they would be. For assessment purposes, I allow one-third of that, say $1,200 plus VAT for painting including labour and materials.

[55] Starting with the total (above) of $19,396.26 I calculate a new total of $16,808.76.

[56] I turn now to items 1 and 2 on my breakdown, pecuniary losses till a reasonable date of return, the latter point first. I hold it was reasonable of the Plaintiffs to refuse to accept the machine without being able to inspect it upon delivery late in the night. But to send it away was folly, as things transpired. I think it was a foolish decision anyway, as Wasal Khan claimed he wanted it back. Nobody tried to start the machine either then or later and the evidence of the bailiff that he could not get it to start colours the Plaintiffs' refusal to take it back. In hindsight, Wasal Khan had he really wanted the machine would have been wise to let the bailiff unload it in some convenient place off the road (assuming the bailiff was able to do so and this was never questioned). The machine could have been inspected the next morning and an independent assessment made of it within a few days. The Plaintiffs' claim had already been filed 4 weeks before. The machine could have been reinstated and working from early 1999.

[57] Without lengthening this judgment any further I hold there is only one item in the evidence to put at the Defendants' door the fact that the machine lay idle from December until August 1999. It removed the vehicle to Suva and put it out of the Plaintiffs' reach. Mr Gordon submitted that the D2 was using it elsewhere. At best the evidence of what the machine did from December 1998 until August 1999 is unclear. Wasal Khan gave no evidence at all about what he did to try to get it back. It is clear that by August 1999 the demand was being strongly made but no reliable evidence from either party about what occurred in the meantime.

[58] On balance, I hold the D2 was responsible for the delay and fix a reasonable date for return of the machine, reasonable to both parties, at 6 August 1999, when it finally brought the machine back from Suva.

[59] I accept for simplicity that in the period 28 October 1998–6 August 1999 it would have been used exclusively for pine work and I accept the unchallenged basis of $600 per day for pine work less running expenses. I find it convenient to accept Mr Gordon's assertion of running expenses, $162, because the evidence, such as it was, went unchallenged. By this calculation the daily net income would have been $438. There was no evidence that the machine worked 7 days per week with 21 days off for Christmas as asserted by Mr Gordon. For assessment purposes, I accept Mr Gordon's calculation of that period to be 196 days and deduct the 3-week Christmas break. Had the machine been fully used

then the balance is 175 days. Multiplying the daily net income yields a result of $76, 650. This is very high and will have to be reduced, but it gives me some idea of the loss.

[60] I come now to item five of my breakdown, liability for losses from the date of reasonable return until now. I can find no basis on which to award any damages to the Plaintiffs for any losses they may have endured from non-use of the machine after the date when reasonably it should have been back in their possession. I do acknowledge a period of up to one further month during which the machine may have been needed for repairs but there is no evidence and since I am considering general damages that decree of sensitivity is not required. Under this head I make no award.

[61] The total of my calculations thus far is $16,808.76 plus $76,650, which yields a total of $93,458.76.

[62] I now come to item six, mitigation by the Plaintiffs. I believe a deduction must be made from any damages that I award on the above basis because although what I have allowed is for damage and loss up to the reasonable time of return, the Plaintiffs were required to mitigate before 6 August 1999. First I have some small doubt whether the machine was actually in good condition when the bailiff tried to start it and second, I hold that Wasal Khan might reasonably have accepted it back on 23 December 1998 and got the repairs done then.

[63] I now come to consider what I should allow in general damages. It seems to me that some of these sums I have calculated could have been claimed as special damages because they are within the definition in *McGregor* (above). The evidentiary basis for the latter sum is not entirely satisfactory, but overall and despite the fact that I think the latter sum is on the high side, the figures do give some reasonable indication the measure of the Plaintiffs' lost.

[64] In allowing general damages for what should have been claimed as special damages I am bound to proceed with caution. I have already referred above to *Ilkiw*. The English Court of Appeal in that case addressed this very procedure. There the judge at first instance was faced with a claim for lost earnings in the past. The claim was made in evidence and had not been pleaded by way of special damages. He was unable to award them as special damages for that reason. He did say, "If I give effect to it, I shall give effect to it in a different way". He then made an award in general damages which on its face was rather high. It was not clear whether he had taken into account the unpleaded past lost earnings and included them in the general damages award.

[65] The Court of Appeal held that had he done so then he was in error. On the hand, citing from the judgment of Willmer LJ at All ER 887D:

> *If I thought that, in coming into that result, the judge was doing no more then taking into consideration this man's over-all loss of earning capacity, past, present and future, as merely one factor to be considered amongst the other factors in awarding a global sum by way of general damages, I should certainly have hesitated before saying that we ought to interfere with that approach.*

[66] So, that is as far as I can go. I can take the above sums into consideration in deciding the value of the Plaintiffs' overall loss of earnings as merely one factor to be considered among all the other factors in awarding a global sum by way of general damages. The same applies to the cost of the repairs.

[67] Coming now to assess a global sum I am satisfied that it will cost about $16,808.76 to reinstate the machine. It may well cost more, but the Plaintiffs have only themselves to blame for that. I take into account my assumption that they

would have needed to borrow money to make the repairs so some element of addition for interest is allowable, but I cannot manufacture evidence for that. I do have evidence in Ex D15, the D2's file, that Nasir Khan was paying 11% per annum for interest (though this was not the true rate, which was not calculated) but I am not going to speculate. I will simply round out the repair costs for assessment purposes at $20,000.

[68] The other sum, $76,650 is based on a selected part of the evidence and on an assumption that this machine worked 7 days per week and for both those reasons is in my view more than what is needed to compensate the proved loss of income. Reducing it by even 1 day per week (14%) brings the notional loss down to $65,919. Allowing another other day per week as downtime for repairs, maintenance, transport between jobs and slack time between contracts (all speculation) would require a reduction of 29% and reduces that notional total to $54,421.50. I can accept that as realistic and with the $20,000 (above) add it yields a total of $74,421.50.

[69] There now needs to be a deduction because of my finding that the Plaintiffs could have mitigated their loss by taking back the machine on or about 23 December 1998. There is also the element of doubt introduced by the bailiff that the machine could not be started and required the extra effort of a second transporter and second bulldozer. I take my doubts into account. For that reason, the deduction for contribution will go to both the repair costs and loss of use. Quite arbitrarily I assess the Plaintiffs' contribution to their own loss by their failure to mitigate it at 20%. By my calculation this reduces the notional sum to $59,537.20.

[70] My assessment therefore, making the best I can of the pleadings and the evidence, is an award in general damages rounded out at $60,000.

[71] I turn now to exemplary damages. There was no claim in the pleadings for exemplary damages but Mr Gordon voiced a claim in submissions. This is permissible if the evidence warrants such a claim. Mr Gordon cited no authority for this claim but the court is often guided by a decision in the High Court of Australia, *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at 129; [1967] ALR 25 at 31 where Taylor J said:

> Prior to *Rookes v Barnard* the law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complaint of, the conduct of the Defendant had been high-handed insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the Plaintiff's rights.

[72] In the case before me the D2 had no sound reason for believing it had any title to the bulldozer. It accepted flimsy evidence which by itself should have caused them to a question about Yakub Khan and abandoned all the other checks listed in its own document. Apart from the word of Nasir Khan, it had no reason to believe the machine even existed. Hence, when it sent a bailiff to take possession of the machine it ran a high risk that it was interfering with property that belonged to somebody else. In my view its action was high-handed and rather than *bona fide* was instead *mala fide* in that sense. It was without legal and without reasonable foundation and thus exhibited a contramilious disregard of the Plaintiffs' rights. It was the cause of much grief and legal wrangling. For that reason, the D2 in view is liable to pay exemplary damages which taking account of all the circumstances I assess at $25,000.

Interest

[73] Here again the claim is bedevilled by poor pleadings and bold submissions. Had I been able to award the cost of reinstating the bulldozer as special damages I would not have added interest to a judgment for that amount because the Plaintiffs need only to receive the money and spend it. They have been compensated for being unable to do so until August or September 1999 by the factors I have taken into account and the award which I have made. The question is whether I may allow interest on part of the general damages. The problem is resolved by looking at the claim for interest at commercial rates. No basis whatever for that claim made in submissions was established. The Plaintiffs borrowed no money at commercial rates. The D2 have been lending money at commercial rates, including the money I have assessed against them as damages due by it since about August 1999. Their evidence suggests they lend at about 13.5% (true rate). To add interest to the damages at that rate would overcompensate the Plaintiffs and serve only as punishment to the Defendants. Why should I do that? Neither party merits that. In any event that aspect is taken care of by the award in exemplary damages.

[74] My view is that the interest on the damages in this case could be assessed exactly as in the personal injury cases which Mr Gordon urged me not to follow. Had the cost of reinstatement and the pecuniary losses been awarded as special damages, interest might have been awarded at 3% per annum. That presupposes however that expenditure such as the cost of reinstating the damaged machine, has actually been incurred and the money spent. That did not happen in the present case. There is no foundation for interest on the cost of reinstatement.

[75] The other aspect of the damages however reflects a liability, which I have retrospectively imposed on the Defendants since August or September 1999, six-and-half years ago. They should pay interest on that unpaid liability for that period. I exclude the exemplary damages. Making the best of it, I award interest on the whole of the other general damages ($60,000) at a reduced rate, 2% per annum from the date of filing the writ until the date of judgment, that is 7 years and 4 months. By my calculation that is $8,800.

[76] I accept the assurance of the D2's witness that the D2 accepts responsibility for all that the D1 did, as evidenced by the joint statement of defence which was filed. I direct that the D1 be exempt from liability for payment of these damages and the costs unless further order is made.

[77] I turn now to the application for costs. I am able to assess costs summarily and there is some merit in the claim for indemnity costs. The actions of the D2 were wrong and without any legal justification, the result of its own careless actions. I fix costs higher than usual at reasonable solicitor and client costs for a two-and-half day hearing (one full day and three half-days) and by rule of thumb preparation for twice that time, that is, 5 days, a total of seven-and-a-half days. Mr Gordon is to render a full bill of costs and disbursements to Mr Singh. I expect counsel can agree but if not then the deputy registrar will assess an amount as the reasonable costs and disbursements. I allow a further $1,000 on the interlocutory matter of December 1998, wherein the question of costs was reserved by consent until the present hearing.

Summary

[78] Leave is reserved for either party to apply to correct any error in calculations.

- My award in general damages is $60,000
- My award of interest is $8,800

- My award in exemplary damages is $25,000.
- Costs to Plaintiffs are full reasonable solicitor/client costs to be agreed or assessed.

Determination made.