

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0011 of 2023
Court of Appeal No. ABU 0088 of 2019

BETWEEN

BANK OF BARODA

Petitioner

FUNWORLD CENTRE (FIJI) LIMITED

Respondent

Coram

The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court

Counsel

Mr D. S. Naidu for the Petitioner
Mr A. Chand for the Respondent

Date of Hearing

4 October 2023

Date of Judgment

27 October 2023

JUDGMENT

Temo, AP

- [1] I have read the draft judgment of His Lordship Mr Justice Young. I agree entirely with His Lordships judgment and proposed orders.

Gates, J

- [2] I have had the advantage of having reading Young J's following judgment. I am in entire agreement.

Young, J

The petition

- [3] On 17 October 2014, the Bank of Baroda (Baroda) took possession of a hotel and its contents owned by Funworld Centre (Fiji) Ltd (Funworld). In doing so, it purported to be acting under the powers conferred on it by a mortgage. Its seizure of the hotel and contents prompted the present litigation. In issue now are (a) the legality of Baroda's seizure of the hotel and its contents and (b) the extent of losses suffered by Funworld resulting from associated property damage (in the form of damaged and lost chattels and damaged fixtures) and business disruption. Following trial in the High Court at Lautoka, Ajmeer J held that the seizure of the hotel was unlawful and that Baroda was liable to pay damages of \$150,000. The Court of Appeal was of the same view as Ajmeer J as to the illegality of the seizure but reduced the award to \$100,000.
- [4] Baroda now petitions for leave to appeal from the judgment of the Court of Appeal. As the petition was filed late, Baroda seeks an extension of time.
- [5] Against the background I have just outlined, I have organised my reasons around the following headings:
- (a) Extension and leave criteria.

- (b) The dispute.
- (c) The finding that Baroda's seizure of the hotel and its contents was unlawful.
- (d) The damages awarded.
- (e) Orders.

Extension and leave criteria

- [6] The petition was filed a little over four months late. The explanation for the delay is of some, but not overwhelming, cogency. There being no substantial prejudice to Funworld arising out of the delay, I have addressed the merits of the petition. That being so, I see no point in refusing the application for an extension of time.
- [7] Under s 7(3) of the Supreme Court Act 1998 leave to appeal can only be granted if the proposed appeal involves "a far-reaching question of law" or matters "of great general or public importance" or "otherwise of substantial general interest to the administration of civil justice". In what follows, I have kept these criteria steadily in mind.

The dispute

- [8] In 2008, Baroda advanced \$4 million to Funworld. This was secured by a mortgage over a hotel developed and operated by Funworld at Nadi. The hotel is on leasehold land. On 16 September 2014, Baroda, relying on defaults by Funworld and in the purported exercise of its powers under the mortgage, sold the hotel conditionally to Tappoo Ltd ("Tappoo"). Shortly afterwards – on 22 September 2014 – Baroda's solicitors wrote to Funworld requiring it to comply with the conditions of the mortgage as to the payment of ground rent to the lessor of the land.
- [9] On 17 October 2014, Baroda took possession of the hotel. This was effected on its behalf by Pritika Singh. By this stage the agreement to sell the hotel to Tappoo had apparently become unconditional. The following day, 18 October 2014, Baroda allowed Tappoo into possession of the hotel. Funworld and Tappoo later reached an accommodation under which Tappoo

did not proceed with the acquisition of the hotel. On 7 November 2014, Funworld paid Baroda \$3 million and regained possession of the hotel and its then contents.

[10] Upon resuming possession of the hotel, Funworld complained to Baroda about property damage that it claimed had occurred between 17 October and 7 November 2014 and, as well, signalled a likely future claim for “loss of income and consequential loss”.

[11] In due course Funworld issued proceedings seeking compensation for both property damage and business disruption.

The finding that Baroda’s taking possession of the hotel and its contents was unlawful

Baroda’s complaint

[12] As I have noted, both the Ajmeer J and the Court of Appeal held that Baroda had not been entitled to take possession of the hotel. Before us, Mr Naidu, counsel for Baroda, contended that a challenge to the legality of the entry into possession by Baroda had not been properly advanced at trial and that the findings of the Ajmeer J and Court of Appeal that Baroda had acted unlawfully were thus not open or at least unfair.

How the case was presented in the High Court

[13] The claims in relation to property damage could have been advanced on two bases:

- (a) Baroda had not been entitled to take possession of the hotel and contents, it accordingly did so as a trespasser and was thus liable for any property damage that resulted; alternatively
- (b) Baroda as a mortgagee in possession breached its duties in relation to preservation of the assets it seized and was liable for property damage that resulted from those breaches.

In contradistinction, any claim for damages for business disruption could succeed only if Baroda's seizure of the hotel had been unlawful.

[14] As to the pleadings:

- (a) The statement of claim sought compensation in relation to both property damage and business disruption but did not identify the legal basis or bases on which liability was asserted. There was thus no explicit pleading that Baroda's seizure of the hotel was unlawful albeit that, as I have explained, such a contention was logically implicit in the claim for damages for business disruption.
- (b) In its statement of defence and a later amended statement of defence, Baroda pleaded that "the appointment of Pritika Singh under the mortgage debenture was in order and lawful", a contention that was denied by Funworld in its reply. This alleged that "Baroda did not have any authority to appoint anyone, including Pritika Singh, to take over the hotel".

[15] A pre-trial minute of 14 May 2018 signed by the solicitors for the parties listed no less than 42 "issues to be determined". One of these was:

Whether [Baroda's] appointment of Pritika Singh under the mortgage debenture was in order and lawful

This confirms recognition that there was a controversy over the legality of the seizure of the hotel. As well, other issues addressed business disruption and were thus consistent with Funworld challenging the legality of Baroda taking possession of the hotel. There was, however, no issue that precisely addressed the basis for such a challenge.

[16] The primary factual controversies at trial were as to the extent, if any, of the property damage alleged and losses associated with business disruption. However, in the closing written submissions made on behalf of Funworld, counsel contended:

[Funworld's] hotel has been offered for sale by [Baroda] in non-compliance with the provisions of s 79 of the *Property Law Act*.

Before Baroda could exercise its rights under the Mortgage, it must give all relevant notices required under the law, the relevant period has elapsed, the money remains unpaid, and This was not the case in this instant.

[17] At this point, it is necessary to set out 77 and 79 of the Property Law Act 1971. Section 77 is in these terms:

If default is made in payment of the mortgage money or any part thereof, or in the performance or observance of any covenant expressed in any mortgage or in this Act declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is in such mortgage for that purpose expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the mortgage money or to perform and observe the covenants therein expressed or implied, as the case may be.

And s 79(1) provides

If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section 77, the mortgagee may sell or concur with any other person in selling the mortgaged property... .

[18] As a matter of legal logic, counsel's closing submission for Funworld must have rested on contentions that:

- (a) Section 79 was engaged by the actions taken by Baroda in conditionally selling the hotel to Tappoo, taking possession of the hotel, and then allowing Tappoo into possession.
- (b) The legality of these actions thus depended on a notice having been given under s 77 at least one month before 17 October 2014.
- (c) The only document in evidence that could be a s 77 notice was the letter of 24 September 2014.
- (d) One month not having elapsed between the sending of the letter of 22 September 2014 and 17 October 2014, Baroda's seizure of the hotel and its contents was illegal.

[19] Funworld's contention that the seizure of the hotel and its contents was unlawful was implicit in the claim for business disruption losses and explicit in (a) the reply to the statement of defence and (b) the issues to be determined at trial including a question as to whether

Baroda's action were "in order and lawful" and (c) the closing submissions. The legality of the seizure was thus on the table at trial (although perhaps only just) and it was open to Ajmeer J to make a finding of illegality. That said, I think it likely that at trial Mr Naidu did not appreciate the substance of the case he was facing as to non-compliance with s 79. I say this because in his closing written submissions he treated as a given the legality of the taking of possession of the hotel. Having regard to the stage in the proceedings at which inadequate notice was explicitly alleged by counsel for Funworld (in closing submissions) and the elliptical way in which it was expressed, his apparent lack of appreciation is not entirely surprising.

The approaches taken in the Courts below

[20] Both Ajmeer J and the Court of Appeal saw s 79 as engaged by Baroda's seizure of the hotel on 17 October 2014. As, s 79 does not restrict the exercise of the right to take possession of mortgaged property, this must have been on the basis that the purpose of seizing the hotel was to implement the sale to Tappoo and was thus part and parcel of the exercise of the power of sale provided for in the mortgage.

[21] Ajmeer J's reasons for his finding that the seizure were succinct:

[32] [Baroda] led no evidence that they complied with Section 79 of the Property Law Act

[33] On the evidence, I find that [Baroda] had proceeded with mortgagee sale and took possession of the mortgaged property irregularly.

[22] In the Court of Appeal judgment, the discussion was more elaborate:

[10] ... On consideration of the facts of this case, it is clear that [Funworld] had been in default of bank instalments for a very long period, which no doubt permits [Baroda] to exercise its right of a mortgagee sale. However, it can only exercise its rights within the confines of the law. [Baroda] had failed to comply with the requirements of Section 79 of the Property Law Act 1971, which permits a mortgagee to sell the mortgaged property, albeit at the expiration of 30 days from issuing notice on the defaulting party. The initial issuance of notice by [Baroda] is in keeping with the requirements of Section 77 of the Property Law Act. However, [Baroda] had not allowed for the expiration of the requisite 30 days before executing the sale as required under Section 79 of the Act.

[11] The failure of [Baroda] to comply with the above requirements had caused an otherwise regular action to be irregular, as correctly observed by the learned High Court Judge. Had the bank waited at least till 22nd October 2014, its conduct would have been without blame.

The challenge to the finding that the seizure was illegal

[23] As I have explained, I consider that the challenge to the legality of the seizure of the hotel and contents was a live issue at trial. In light of this, the success of Mr Naidu's challenge to the finding that the seizure of the hotel was unlawful must depend on the fairness issue.

[24] Mr Naidu said in argument before us that a mortgagee sale process had been under way in relation to the hotel since 2013 and, despite an interruption by reason of legal proceedings, the events of September and October 2014 were just a continuation of that process. His broad position was that that if he had been properly on notice, and had appreciated, that non-compliance with s 79 was alleged, he would have been in position to prove at trial that s 77 notices had been given at least a month before 17 October 2014 and thus that s 79 had been complied with.

Evaluation

[25] If this were a first appeal from the judgment of Ajmeer J and Baroda had laid an appropriate foundation for an application to call further evidence, I would be inclined to at least entertain such an application. For these purposes, an appropriate foundation would involve affidavit evidence of the notices that would have been produced at trial if the s 79 argument had been particularised. If such affidavit evidence were produced, Funworld would have to be provided with an opportunity to respond. Given that the relevant events occurred so long ago, a process along the lines just outlined might give rise to evidential difficulties; by way of examples, as to whether (a) the notices were actually given, and, if so, (b) they could properly have been regarded as current at 17 October 2014.

[26] I have looked carefully through the written submissions made to the Court of Appeal on behalf of Baroda. I can see no hint in them of the unfairness complaint now advanced to us. Instead, to the extent that those submissions engage with s 77 and 79, they appear to proceed on the basis that the letter of 22 September 2014 met the notice requirements (which it plainly did not). There was nothing explicit to suggest that if the ss 77 and 79 argument had been

signalled more clearly, Baroda would have proved compliance by reference to earlier notices.

[27] If the fairness argument was to be raised, it could, and should, have been advanced to the Court of Appeal. The exercise that we would have to go through now to get to the bottom of this argument if leave were granted is not appropriate for a court of final appeal.

[28] I would not grant leave to appeal to enable a challenge to the finding that the seizure of the hotel was unlawful. Granting leave would not be consistent with the constraints imposed by s 7(3) of the Supreme Court Act. It does not turn on “a far-reaching question of law” and the issues raised are so particular to unusual facts as not to involve matters “of great general or public importance” or “otherwise of substantial general interest to the administration of civil justice”.

The damages awarded

The evidence led at trial

[29] As to property damage, Funworld’s case as to damages was based largely on inventories produced by a Funworld witness. It was, however, supplemented by the evidence of a former employee of Baroda who, in response to the initial complaints from Funworld, had inspected the hotel in November 2014, not long after Funworld had resumed possession. In his evidence, he confirmed in reasonably general terms that some items appeared to have been removed and that there had been some damage to fixtures. The claim for compensation for business disruption was primarily based on evidence of bookings that had been cancelled because of the seizure.

The approach of the High Court

[30] The reasons given by Ajmeer J as to damages were as follows:

[37] The plaintiff claims a sum of \$447,645 for missing and damaged hotel items. The plaintiff has given a full list of the missing items. A sum of \$50,940.00 is claimed for suffered loss of income and a further sum of \$1,094.48 for electricity consumed by the defendant. In addition, the plaintiff claims a sum of \$800,000.00 as general damages.

[38] The above figures are plaintiff’s own calculations. The plaintiff did not sufficiently explain how they came into those figures. The plaintiff’s evidence was that hotel items were missing and damaged. There was no evidence as to when the missing

items were purchased and whether they were brand new or used ones. There was also no evidence on whether the damaged items were partly or damaged beyond repair.

[39] In order to prove loss of income, the plaintiff did not provide their audited profit and loss accounts in the previous years and in the year of taking possession back from the defendant.

[40] I would accept the defendant's submission that the plaintiff was [not] able to [establish] loss and damages of \$499,678.40 or loss of income as a result of the takeover through unsubstantiated and unsigned accounts tendered by them during the trial.

[41] Taking all into account, I am prepared to allow a sum of \$150,000.00 as damages which include general damages of \$50,000.00. I would decline pre-judgment interest.

The approach of the Court of Appeal

[31] In his reasons (which were adopted by the other members of the Court), Lecamwasam JA noted that the High Court Judge had "refused to rely on the ... inventories [produced by Funworld] on the basis that those inventories were unaudited and unsubstantiated. He then commented:

[14] However, we should not forget the fact that the inventories were prepared by the General Manager, who is a responsible official of [Funworld]. It is accepted practice for organizations to do their own inventory without relying on auditors or accountants to furnish official audit reports immediately. The employees of the hotel have to first be satisfied that certain items are in fact missing, for which purpose an inventory is useful. ... [T]he General Manager and the person who prepared the inventory, in his evidence spoke to the truth of these inventories. Therefore, having regard to regular business practices, the said inventories cannot be rejected on the basis that those are unaudited and unsubstantiated, merely because those are not signed or audited by an audit officer.

[15] While I am satisfied that some items had been lost during the relevant period, in order not to fall victim to complacency, I will now examine the said inventories thoroughly.

Lecamwasam JA's careful examination of the inventories revealed several anomalies.

[32] Having discussed those anomalies, he went on:

[21] Even though I reject the inventories due to the inconsistencies between them, I am satisfied that some damage has been caused to the hotel. I am aided by the evidence of [the bank manager], who in his evidence ... has stated that, when he visited the hotel on the request of [the General Manager] he had observed some items such as TVs and kettles were missing from the rooms and that some of the locks were damaged. He further states that the wires which connect the TVs to the power outlets were cut and that the damaged locks showed some evidence of force being used. ...

The generality of the above evidence suggests that significant damage has been caused to some of the rooms of the hotel. Therefore, although [Funworld] has failed to prove the exact damage or the value of the damage by way of inventory, I am satisfied that certain damage has been caused to the hotel during the relevant period.

[22] In addition, the loss of income resulting from cancelled reservations claimed by [Funworld] must also be taken into consideration. [Funworld] has had to cancel all the reservations made for the relevant period, i.e. from 17th October to 7th November In the absence of the said evidence regarding the above reservations being challenged in court by Baroda], I presume those entries to be correct. The Plaintiff was deprived of the opportunity to accommodate prospective clients, which undoubtedly led to the loss of substantial income.

[33] Having referred to authorities as to the assessment of damages on uncertain evidence, Lecamwasam JA concluded:

[27] On the strength of the above, I am satisfied that this is a fit case where the court must "*do the best it can*" and award a suitable amount of damages to [Funworld], despite the damage suffered by [Funworld] not being readily quantifiable. Acting on this premise, I have reviewed the damages the learned High Court Judge awarded [Funworld]. After due consideration of the alleged losses suffered by [Funworld], I set aside the amount of damages ordered by the learned high court judge in his order dated 23.9.2019 i.e. the sum of \$150,000.00. I substitute in its place the sum of \$100,000.00 in favour of [Funworld] payable by [Baroda].

Evaluation

[34] I approach this aspect of the case on the basis that:

- (a) Baroda took possession of the hotel and its contents as a trespasser.
- (b) There was a substantial evidential basis (based in part on the evidence of Baroda's former employee) of at least some property damage.
- (c) The abrupt shutting down Funworld's business mid-stream must have caused appreciable business disruption and consequential loss.

An award of more than nominal damages was thus inevitable.

[35] I accept that the evidence of loss was both limited and open to criticism. The necessarily open-textured nature of the exercise that the Court of Appeal was forced to carry out means that there is scope for argument whether the loss assessment was too generous. That said, the essentially factual issues raised by Mr Naidu were given careful and detailed consideration by Lecamwasam JA in his reasons.

[36] As I see it, Mr Naidu’s invitation to us to engage in what would be a third examination of the same factual issues does not engage the criteria in s 7(3) of the Supreme Court Act. The proposed appeal would not involve “a far-reaching question of law”. Nor would it raise matters “of great general or public importance” or “otherwise of substantial general interest to the administration of civil justice”.

Orders

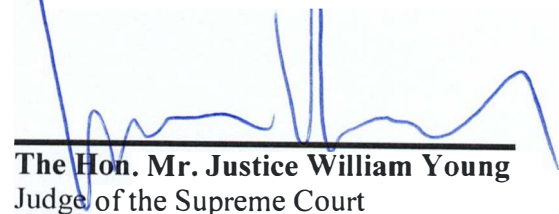
[37] I would extend time for the filing of the petition as requested by Baroda but, as the proposed appeal does not meet the criteria specified in s 7(3) of the Supreme Court Act, I consider that the petition should be dismissed. I would also order Baroda to pay summarily assessed costs of \$10,000 to Funworld.



The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court



The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court



The Hon. Mr. Justice William Young
Judge of the Supreme Court