IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0003 OF 2004S
(High Court Civil Action No. HBC 329 of 1998S)

BETWEEN:

PETER IAN KNIGHT

Appellant

AND:

DONALD ROSS AND ROBERT REILLY

First Respondent

AND:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

Second Respondent

Coram: Ward, President
Barker, JA
Tompkins, JA

Hearing: Tuesday, 16 November 2004, Suva

Counsel: Mr. V. Mishra for the Appellant
Mr. D. Sharma for the First Respondent
Mr. H. Nagin for the Second Respondent

Date of Judgment: Friday, 26 November 2004

JUDGMENT OF THE COURT

This appeal and cross - appeal from a judgment of Scott J., delivered in the High Court on 15 August 2003, raise interesting questions concerning the duties of solicitors to their clients and bankers to their customers.

The Judge heard evidence and made certain findings based on that evidence. There were also a statement of agreed facts and a bundle of agreed documents before him. We now record the essential facts, as established by the agreed material, or by the Judge's findings. At the commencement of the appellate hearing, the Court allowed

supplementation of the record and additional grounds of appeal which basically enlarged those already filed.

Narrative

On 1 October 1996, the First Respondents, who are United States citizens, entered into a preliminary agreement to purchase freehold land at Savusavu. The necessary consent of the Minister for Lands to the transaction was obtained on 12 December 1996. The vendors were an American couple named Carrigan.

On 26 February 1997, a formal agreement for sale and purchase was entered into whereby the First Respondents agreed to purchase the land from the Carrigans for $US350,000, taking possession on 28 February 1997, but with a completion date of 23 December 1997.

The agreement provided, inter alia, for:

(a) a deposit of $US25,000, payable by the Purchaser prior to execution of the agreement, "into the joint names of the Vendor and the Purchaser at the ANZ Bank, ANZ House Branch in Suva.... ."

(b) The Purchaser (First Respondents) "undertake to effect all payments under this agreement in the currency of the United States of America such payments to be made at the place or places as lawfully directed by the vendor notwithstanding anything herein contained, subject to any conditions detailed in the granting of consent by the Government of Fiji."

(c) Monthly payments of no less than $US2,000, commencing 15 March 1997, until settlement, to be paid on account of the purchase price. These instalments were to be paid directly into the Carrigan's US Bank account.

Both parties instructed lawyers in Suva to act for them on the transaction. Parshotam and Company acted for the vendors. The Appellant, Mr Knight, who practises as a sole practitioner under the firm name of Cromptons, was appointed solicitor for the First Respondent. A staff solicitor, Mr. Muaror, handled the transaction. Mr Knight did not become involved in the transaction until difficulties emerged much later.

After the execution of the preliminary agreement, Mr Muaror had advised the First Respondents to pay the necessary deposit of $US25,000 by way of a cashier's cheque in favour of "Parshotam and Company – Escrow Account."

On 2 November 1996, Cromptons sent a cashier's cheque for $US25,000, made out to "Parshotam and Company - Escrow Account", to the vendor's solicitors who then banked it in a US currency account which they opened with the Second Respondent, the ANZ Bank at its Suva Branch. This account, which they opened without difficulty, was a monthly term deposit account styled "Parshotam and Company as Trustees for Carrigans/Robert Reilly/Donald Ross."

In a letter to the First Respondents dated 28 October 1996, Mr Muaror had advised them that the above manner of payment of the deposit was proposed in order "to avoid complications in relation to currency fluctuations." Mr Muaror had had no previous experience of settlements of land transactions involving foreign currency. He occasionally forwarded a cheque drawn on a US bank by the First Respondents to Mr Parshotam. Presumably, these cheques were for some of the $US2,000 monthly payments.

Settlement of the First Respondent's purchase did not take place on 23 December 1997, as the agreement for sale and purchase had provided. For reasons which are not here relevant, settlement was extended by consent until 22 January 1998. It did not actually take place until somewhat later. Mr Muaror had sought the extension from Mr Parshotam by letter dated 15 December 1997, wherein he advised, *inter alia*, that payment for the "full and final balance" "will be slightly delayed." Nevertheless, the First Respondents knew that the money for the purchase had to be provided within a short time frame.

Cromptons' offices closed for the Christmas vacation from 24 December 1997 to 5 January 1998. Despite Mr Muaror's evidence to the contrary, the Judge accepted the evidence of the First Respondents that they did not know about the closure of the offices. Mr Muaror went on holiday to Rotuma until 13 January 1998 without making any arrangements to deal with the contingency that funds in United States currency might arrive from the First Respondents in his absence. He said in evidence that he had not been told exactly when the funds would be arriving. Otherwise, he would have made arrangements to have the funds protected. Mr Muaror had earlier advised the First Respondents of the Cromptons' Trust Account number at the Bank.

In particular, Mr Muaror

(a) did not advise the Bank that a large amount might arrive over the holiday period from the United States from clients of the firm which amount was to be held by the Bank in US Currency.

(b) failed to have a 'back-up' arrangement with his employer, the appellant, whereby the appellant or another staff member would be sufficiently briefed by Mr Muaror to deal with the situation, should US funds arrive from the First Respondents during Mr Muaror's vacation.

(c) failed to advise the First Respondents to instruct their Bank in the United States to place an appropriate notation on the Telegraphic Transfer (TT) that the funds were to be held in US currency by the ANZ Bank in Suva.

On 29 December 1997, Cromptons received a fax from the First Respondents' agent advising that $US290,000 had been wired to Fiji "today". No action was taken on that fax which arrived whilst Cromptons' offices were closed. On 2 January 1998, there arrived at the ANZ Bank Suva, a Telegraphic Transfer (TT) for $US295,994, via the ANZ Bank, New York, from the First Respondent's Bank in the United States. This TT document, apparently in standard form, showed as "beneficiary" of the TT "Cromptons Trust Acc. ANZ Bank,

Dominion House Fiji." The correct account number was given. There was no notation on the TT to the effect that the amount was to be retained by the receiving bank in US funds. Cromptons' Trust Account was maintained in Fiji currency only. The Bank could have opened an account in US dollars for these funds. This had been done at Mr Parshotam's request in respect of the $US25,000 deposit. Alternatively, the Bank could have held the funds in US dollars for a few days until Cromptons' offices opened. One of the First Respondents, Mr Ross, operated a US dollar account at Westpac in Savusavu, which could have received and retained the funds in US currency. He was never advised by Mr Muaror that the funds required for the purpose could be so routed.

On 2 January 1998, a Mrs Annie Grant of the Bank's staff telephoned Cromptons to advise them of the receipt of such a large sum in overseas currency into their trust account. She received no reply to her call, because the office was closed.

Mrs Grant then decided to convert the funds into Fijian dollars on her own initiative. After deducting commission, she paid the resulting sum into Crompton's Trust Account. Although she may have suspected that Cromptons offices would be open on 5 January 1998, she decided to effectuate the conversion then and there on 2 January 1998. In evidence, she gave as her reasons:

(a) The beneficiary named in the TT was Cromptons Trust Account which account could hold only Fijian dollars and

(b) If she had delayed the conversion for 3 days, there could be some exchange loss and Cromptons might hold the Bank liable for that.

The Appellant, Mr Knight, strongly contended in evidence that there was a practice requiring the Bank to advise clients of the receipt of foreign funds. The Judge held that Mr Knight was sincere in this view. However, the evidence of Mrs. Grant, Mr Parshotam and a Mr Prakash from the Bank did not support any assertion of a long-standing practice. The Judge held that such practices did not become either "inflexible rules, accepted trade

practices or contractual terms", merely on the basis of convenience and past good relations. The Judge's view, formed after hearing the witnesses, cannot seriously be challenged on this aspect.

The Judge also noted the following evidence from a former employee of the Reserve Bank, Ms Motufaga, and from Mrs Grant.

(a) In 1998, no solicitors in Fiji held foreign currency accounts, although many now do, with Reserve Bank approval.

(b) The ANZ Bank, as an authorized foreign currency dealer, was authorized to hold funds in a foreign currency.

(c) It was not unusual for a Bank, if instructed so to do, to retain foreign funds in the currency in which they had been remitted

(d) If foreign currency had been received unexpectedly without advance arrangements, a Bank could apply to the Reserve Bank to hold the sum in a foreign currency account. Alternatively, it could return the funds to the remitter.

(e) If foreign funds had been converted by mistake, they could be reconverted by the Bank without the necessity for Reserve Bank approval.

On 5 January 1998, when Cromptons offices opened, the firm's accountant noticed the large sum which the Bank statements revealed as having arrived in the trust account on 2 January 1998. She immediately rang Mrs Grant at the Bank who told her of the origin of the funds and of the conversion. After speaking also to Mr. Parshotam, she asked Mrs Grant to reconvert the funds, only to be told that there had been an exchange loss over the weekend of some $3,000. The accountant had no authority to authorize reconversion in

this circumstance. She told Mrs Grant that she would have to await Mr Muaror's return from holiday for instructions.

Mr Muaror, although in Rotuma, was telephoned by the accountant. He advised the First Respondent, Mr Reilly in the United States, of what had happened. Mr Reilly said in evidence that he was annoyed and did not see why he should bear a $3,000 loss which had been incurred without his fault. Mr Muaror said he told Mr Reilly that he saw no problem about reconverting the funds. Mr Reilly said his instructions to Mr Muaror were to reconvert.

Although large, the amount remitted by TT was not all the money required to settle the purchase. There were to be two more tranches. On 5 January 1998, the First Respondent, Mr Ross, withdrew $US4,000 from his Westpac US dollar account in Savusavu and took a bank draft for that amount along the road to the ANZ Bank, Savusavu for transfer to Cromptons Trust account at ANZ Suva. He was informed at ANZ Savusavu that, because Cromptons Trust Account was denominated only in Fiji currency, the funds would have to be converted into Fijian dollars, which is what then occurred with Mr Ross's consent. Mr Ross also spoke to Mr Muaror who told him he was on holiday. When advised by the Cromptons' accountant about what had happened, Mr Ross insisted that the funds be reconverted. He spoke also to a Mr Cakau at the ANZ Bank who told him about the exchange loss and the necessity for Reserve Bank approval for conversion.

Mr Ross faxed Mr Muaror and the Crompton's accountant from Savusavu on 6 January 1998, saying that he needed "to discuss a few matters" as soon as Mr Muaror returned.

The Judge, after seeing and hearing the First Respondents, held that Mr Ross did all he could in his Savusavu transactions to pay $US 4,000 into Cromptons' Trust account. The Judge rejected unpleaded allegations of contributory negligence against the First Respondents. He was clearly justified in so doing.

On 13 January 1998, a further remittance of $US24,994 was received from the First Respondents. This time, the moneys were retained by the Bank in a US dollar account.

By 13 January 1998, Mr Muaror had returned to work and he faxed the following letter to the Bank.

"The Manager
International Services
ANZ Bank
Dominion House
SUVA

Attention: Anne Grant

Dear Sirs

UNITED STATES CURRENCY REMITTANCE – $US24,000.00

I refer to our telephone discussion this morning (Kafora/Anne) and confirm that the above amount remitted from the United States to your bank is intended for the purchase of a property in Fiji. The vendor however is a United States Citizen also and therefore the same funds will be transferred to the Vendors Solicitors in United States Currency.

It is for this reason that we are requesting your bank to maintain the above amount in United States currency until final settlement of the property purchase which we expect to eventuate within 7 days from today if not a little more.

Whilst on this subject, may I also state that there were two earlier remittances from the same client in the United States to your bank for the sum of US$295,994.00 on or about the 2nd day of January 1998 and US$4,000.00 on or about 5th January 1998 respectively. I understand that your bank has converted these amounts to Fijian currency. However I would make a similar request on behalf of our client for the respective amounts to be re-converted back into the United States currency on the same exchange rate that was earlier applied. These amounts are also for the same transaction.

In the meantime, I am liaising with the Reserve Bank of Fiji on their requirements for such transactions. I hope to revert back to your office sometime tomorrow as I will be away in Nadi for the rest of the day.

I look forward to your cooperation."

What happened after that letter was sent is not entirely clear. Mr Muaror testified that he had spoken to Mrs Grant twice and that, on 19 January 1998, he had asked for a reply to his letter. Mrs. Grant could not recall speaking to Mr Muaror again after her initial refusal to reconvert. Mr Muaror said in cross-examination that he had spoken to Ms Motufaga at the Reserve Bank who told him that, if ANZ were happy, the Reserve Bank had no objection to reconversion. "I think I told that to Annie," said Mr Muaror. The Judge made no finding about these alleged conversations.

On 20 January 1998, the Government of Fiji devalued the Fijian dollar by some 20%. This move was totally unexpected. Such a large devaluation had occurred on only one previous occasion, in 1987 after the first coup.. The consequence was that the funds converted into Fiji dollars by Mrs Grant on 2 January 1998 were now worth $F56,609.92 less than they had been at the date of remittance and conversion.

On 21 January 1998, the Bank through Mr Cakau, replied to Mr. Muaror's letter of 13 January 1998. Mr Cakau confirmed that the $US24,994 instalment of purchase price was being held in US currency. He declined to reconvert to US dollars either the major remittance or the $US4,000 banked at Savusavu by Mr Ross. No explanation was offered by Mr Cakau for this refusal. Mr Cakau is no longer in the Bank's employ and did not give evidence. The Judge did not address in his judgment the effect of the delay by the Bank in replying to Mr Muaror's letter of 13 January 1998 or indeed what Mr Muaror did or did not do after writing the letter.

Mainly because of the exchange loss, the First Respondents had to negotiate a first mortgage back to their vendors for $F65,000 at 10% interest, in order to complete the

purchase. Their legal fees on this mortgage were $660. There was no other evidence of other loss.

Claim

The First Respondents alleged negligence by the Appellant causing their exchange loss of $56,909 plus special damages of $26,040.50 relating to their mortgage and legal costs. The Appellant joined the Second Respondent ('the Bank') as a Third Party, alleging contribution or indemnity in the event that the Appellant were found liable to the First Respondents.

The Judge decided:

(a) The devaluation was not a novus actus interveniens. The currency loss was therefore reasonably foreseeable. He held that a devaluation was no more than a large currency fluctuation.

(b) If the Appellant had instructed the Bank to reconvert the funds immediately after their conversion, there would have been no loss.

(c) The Appellant should have ensured that Mr Muaror took steps to ensure that

  (i) he instructed the remitter to place a legend on the TT to contact the remittee and thus have the remittance retained in US currency and/or

  (ii) he instructed the Bank to open a foreign currency account for the funds. In making this finding, the Judge relied on the evidence of Mr Parshotam who testified as to his practice in such transactions. The Judge noted Mr Muaror's relative inexperience and that no approach had been made by him to the Reserve Bank to retain the funds in $US dollars.

(d) The Bank did not breach its contract with the Appellant or act negligently in converting the funds on 2 January 1998. The questions was whether by so doing, the Bank was following the First Respondent's instructions in the light of the Bank's responsibility to the Reserve Bank.

(e) On the evidence, the Bank could have held the funds in US currency for a few days until the remittee's wishes were known or enquiry had been made of the remitter. Both the Appellant and the Bank should have been more careful and should have prevented the conversion of the remitted funds as well as of the $US4,000 paid in by Mr Ross in Savusavu.

(f) There was a clear duty on the Bank therefore to advise either the Appellant or the First Respondents. The Bank must bear a "substantial part of the blame for what happened." If it had advised the Appellant, these arrangements to hold the funds in a US account could have been made speedily.

(g) The Appellant and the Bank were equally to be blame and should bear the First Respondents' loss equally.

In assessing damages, the Judge considered that the $F56,609.92 exchange loss was foreseeable, despite the devaluation and that, had the Appellant instructed the Bank to reconvert immediately after the conversion, then the devaluation would not have affected the situation.

He gave judgment against the Appellant in favour of the First Respondents for the $F56,609.92. In addition, he gave judgment in their favour for interest at 10% from the date of the mortgage from 6 February 1998 to 6 May 2003 i.e. $F26,050.50 plus mortgage and ancillary costs of $F2,000.

There had been little or no evidence on the special damages aspect of the claim. The Judge accepted calculations set out in the submissions of the First Respondents' counsel. It was established that the mortgage had been discharged on 21 July 1999. The

liability for the Respondents to pay 10% interest on the mortgage ceased on that date. Also, their proved legal costs for arranging the mortgage were only $660.

On the subject of interest, the statement of claim sought

(a) Interest on the judgment until paid in full.

(b) Interest on $US56,,609 in US currency at 10% and

(c) Out -of -pocket expenses of at least $2,000 Fijian.

There was no stated claim for interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 28). ("The Law Reform Act").

The Appellant appealed against the finding of liability and against the quantum of damages. The Bank cross-appealed against the finding that it had to contribute one-half of the First Respondents' loss. The Appellant also sought to increase the contribution of the Bank in the event that he was liable to the First Respondents.

Parties' Submissions in this Court in Summary:

Trimmed down to their essentials, the submissions of counsel for the parties on the appeal were as follows:

Appellant

(a) The Judge was wrong to hold that the devaluation was not a novus actus but merely a large currency fluctuation, albeit an unexpected one. The devaluation was too remote as to be causative of the First Respondent's loss.

(b) The claim for interest and expenses had not been proved as to quantum. The only losses proved by the First Respondents were interest on the mortgage until it was repaid and $660 legal fees on registering the mortgage.

(c) The Judge erred in holding that the Bank was not in breach of duty to its customer, the Appellant and/or in breach of contract to him by failing to obtain the Appellant's instructions prior to converting the US dollars to Fiji dollars. The Judge was wrong to exclude the existence of the practice referred to by Mr Knight in evidence.

(d) The Judge erred in not finding the Bank negligent or in breach of duty in failing to carry out the Appellant's instructions to re-convert the funds contained in the Crompton's letter to the Bank of 13 January 1998. As noted earlier, the Judge made no finding in this point.

(e) The Judge erred in finding equal blame on the part of the Appellant and the Bank. He should have found a greater share of liability on the part of the Bank. In other words, the Bank should have reverted to Cromptons before converting the US dollars in view of past practice.

The Appellant also questioned the Judge's finding of no contributory negligence but, as already stated, that ground cannot succeed.

In counsel for the Appellant's submissions at paragraph 2.1.4, there is an admission that the Appellant's negligence lay in failing to advise the Bank in advance of the expected arrival of the funds from the United States and in failing to have the Bank secure these funds in a US dollar account. Alternatively, the Appellant should have advised the remitter of the funds to stipulate in the TT that the funds be retained by the remittee in US currency. However, under this scenario, the argument was that the Appellant's only liability was $3,000. The greater devaluation loss was not caused by the Appellant's negligence.

First Respondents

(a) The reasons why the Appellant did not have the Bank reconvert the funds prior to the devaluation, was that he did not want to incur the $3,000 loss. The subsequent devaluation whilst unusual, was not too

remote. Foreign currency values are notorious for their fluctuations. Novus actus had not been pleaded.

(b) Interest can be claimed at 10% despite the repayment of the mortgage. The claim for $2,000 was reasonable for expenses. There was an adequate pleading for interest under the Law Reform Act.

(c) The Bank had a duty to the Appellant to hold the US funds until instructions were obtained as to their destination. Mrs. Grant had confirmed that there was no risk to the remitter, had the funds been so held. The Bank made a profit on the conversion. It would have been prudent for it to have held the funds in US currency for the few days involved.

(d) There was no requirement for the remitter to state that a remittance in US currency had to be held in that currency by the remittee. If the remitter had wanted the funds converted to Fiji dollars, it would have said so in the TT.

(e) If in doubt about what to do with the remittance, the Bank should have sought advice from either the remittee or the beneficiary. There was no requirement by the Reserve Bank for immediate conversion without reasonable time for consultation.

(f) Whether or not there was a general practice about notifying beneficiaries of overseas remittances, Mrs. Grant should have been more careful to ascertain Cromptons' instructions about a remittance which was in US dollars destined to be placed in an account which could not hold US dollars.

(g) ANZ should have reconverted after 5 January 1998. and left the issue of the $3,000 exchange loss to be sorted out later. Even if the Appellant were negligent, the bank was equally or more so, since it converted the funds without authority and then refused to reconvert them.

These latter submissions, essentially supportive of the Appellant, are curious, given that the First Respondents elected not to sue the Bank – nevertheless, the points made are worthy of consideration.

Second Respondent (Bank)

(a) The Judge was wrong to lump the $US4,000 paid by Mr Ross in Savusavu with the major remittance received by the Bank on 2 January 1998. Mr Ross could have refused to credit his $US4,000 into the Trust Account in Fiji dollars. The conversions was done at his instruction after he had been told that a payment in US dollars could not be made into that account. Presumably, Mr Ross knew of Clause 3.3 of the sale and purchase agreement.

(b) The Bank had not been alerted to the likely arrival of the large remittance from the United States. Nor had it been told that the settlement of the land purchase was to be in US dollars. Mrs Grant properly obeyed the instruction in the TT and paid the funds into Crompton's Trust Account in the only way legally possible – i .e. by converting the funds into Fiji currency.

(c) The Judge did not accept Mr Parshotam's evidence to the effect that he would advise the remittee of US funds to place an appropriate notation on the TT for the funds to be retained in US currency and that he would not have instructed payment into an account which was able only to receive Fiji currency.

(d) The Judge appeared to treat the Bank and the Appellant as co-defendants and not defendant and third party.

(e) The Bank had a duty to retain the money even until Cromptons opened after the weekend. It should not have to bear any exchange risk. If it had not converted and there had been a collapse of the US dollar, then the other parties would blame it for any resultant loss. The Bank is not required to assume an unusual risk.

(f) The Judge erred in saying that Mrs Grant, Mr Prakash (a Bank witness) and Mr Parshotam were wrong in their view that the TT required conversion into Fiji dollars. If moneys were not to be so converted, there should have been a notation on the TT.

(g) The Judge should not have set out to assess first the Bank's liability. He should have concentrated first on ascertaining the Appellant's liability (if any), and then assessed the Bank's contribution (if any).

(h) The Judge was wrong to call a devaluation a currency fluctuation. It is a fiscal tool of the government. The previous one had been 10 years previously Mr Knight had characterized the devaluation as "Fiji's best-kept secret."

(i) The Judge did not attempt any evaluation of the respective culpability of the Appellant and the Bank. He just 'does a one liner' finding them both equally at fault.

(j) In any event, damages should be limited to $3,000 There was no evidence to suggest the Bank did anything other than what a prudent bank would have done.

We have to say that there are indications in the Judgment that the Judge did not follow the approach of, first, ascertaining the negligence of the Appellant and, secondly if such negligence had been proved, ascertaining whether the Bank should contribute to the loss under normal principles of contribution under s.6(2) of the Law Reform (Contributory Negligence and Tortfeasors) Act (Cap.30). In coming to our decision, we shall follow this approach.

Liability of Appellant

We are in no doubt that there was liability for professional negligence in the actions or omissions of Mr Muaror as outlined in the narrative and as found by the Judge.

He knew of the requirement in the sale agreement that the settlement was to take place in US dollars. He knew what had happened when the deposit, in a US dollar draft, was placed in a special US dollar account at the Bank by Mr Parshotam and held on behalf of both sets of parties to the transaction. Despite this knowledge, he instructed his clients to send US funds to a trust account which could receive only Fiji currency. Nor did he advised his clients (the remitter) to ensure a notation on the TT requiring the funds to be held in US dollars.

It is hard to see why he did not think to do this in view of what had happened with the deposit. If his failure was due to his inexperience with foreign currency transactions, then he should not have undertaken such a transaction without taking proper advice as to how to conduct it.

Moreover, he should have known that the funds might arrive during his vacation. He did not advise the Bank that this sizeable sum might arrive during his absence nor did he leave instructions with the Appellant as to what the Bank was to do with it. As Mr Muaror's employer and the solicitor for the First Respondents, the Appellant should have taken a greater interest in the transaction.

Once he knew what had happened, despite being on holiday, Mr Muaror should have instructed his secretary, the firm's accountant or the Appellant to have the Bank reconvert the funds and argue about the $3,000 loss later. There seemed to have been a

reluctance on his part to acknowledge that the Appellant might have to bear this loss because of his lack of instruction to the Bank over the fate of the likely remittance

Even when Mr Muaror wrote to the Bank on 13 January 1998 on his return to the office, he was not unequivocal in his requirement to reconvert. He rather diluted the urgency of the situation by his intimation that he would contact the Reserve Bank. He does not seem, from the meagre record of evidence over this period, to have been insistent on the necessity for reconversion. He must have known that reconversion was his clients' wish.

Quantum of Damages

We do not consider that the Appellant's liability is limited to the $3,000 initial exchange loss. Whilst we disagree with the Judge's categorisation of devaluation as a currency fluctuation, a devaluation, which is a tool of government fiscal management, was within the bounds of reasonable foreseability. Although rare, a devaluation may occur for a variety of reasons, some unconnected with Fiji, but concerned with international market slumps, world catastrophes and the like. Foreign exchange movements are notoriously fluctuating. As Fleming on Torts (5th edition) notes at 207, legal responsibility ceases with the occurrence of an event "quite outside the range of normal experience." We cannot so describe a devaluation.

The loss would have been restricted to $3,000 if the Appellant and/or Mr Muaror had not used up more time after the 2 January reconversion and Mr Muaror had been more demanding of reconversion in his 13 January letter to the Bank and in the following 6 days before the valuation. Consequently, the figure of $F56,609.92 must stand.

We do not exempt from the amount of damages the $US4,000 converted by Mr Ross at Savusavu. He was operating with a lack of information from Mr Muaror. The proper advice would have been for him to leave the money in the Westpac US currency account until it was needed at settlement.

As to special damages, the only loss proved was interest at 10% from 6 February 1993 to 21 July 1999 plus legal costs of $660. That is all to which the First Respondents are entitled. Once their liability to pay 10% interest ceased, they cannot continue to receive interest at that rate. They are like any other claimants. Counsel should be able to make the necessary calculations.

Counsel for the Appellant and the Bank submitted that interest could not be granted under the Law Reform Act from 21 July 1999 until the date of judgment because it had not been pleaded. However, a claim for interest had been made, albeit at a higher rate (10%) than that which is customarily given under the Law Reform Act (5%)

Despite the interpretation of the relevant Rule of Court (Order 18 Rule 16(1) that appears inflexibily to order that interest under the Law Reform Act cannot be awarded if it has not been pleaded, we prefer to follow the more relaxed approach of this Court in its quantum judgment in ***Attorney-General & Others v. Pacoil Fiji Limited*** (ABU0014 of 1999S, judgment 7 January 2001, Tikaram P, Casey and Barker JJA).

There, the trial in the High Court had been divided into liability and quantum payments. There had been no claim for interest pleaded in the statement of claim initially filed.

By the time the quantum hearing was under way, a detailed statement of claim had been furnished which made it quite clear that recovery was sought of interest on bank loans. The Court held that any pleading requirement had been satisfied and there could be no surprise to the Respondent.

In other words, if there is a claim for interest, albeit one too highly pitched, there is sufficient compliance with the rule of practice enunciated in ***Kiran v. Attorney General*** (FCA 25/85 – 23 March 1990) and followed by this Court in ***Shankar v. Naidu*** (ABU0003 of 2001S, 18 October 2001, Eichelbaum, Henry and Gallen JJA). A subsequent appeal to the Supreme Court in **Shankar** (24 October 2003) did not consider the point since there was no relevant special leave point before the Court. The Supreme Court did speak however of 'this well-established requirement.'

The members of this Court consider such a pleading requirement too inflexible, since there is no formal requirement in the Rules. The wording of the Act is unrestricted in the power it gives to the Court to award interest. The **Kiran** judgment does not appear to compare the breadth of the statutory power with the practice requiring a specific pleading which practice seems to have been borrowed from an English Rule. There is no exact Fiji equivalent.

For the sake of completeness, we note that the Supreme Court on 11 July 2004 overruled the earlier liability judgment in **Pacoil** given in this Court on 29 November 1996. It was not necessary for the Supreme Court to comment in depth on the quantum judgment. There was therefore no reference by the Supreme Court to this Court's approach to the pleading of interest.

Accordingly, we consider that there was a sufficient pleading of a claim for interest, albeit a mistaken one. There is no reason why interest should not be allowed as is usual. The First Respondents are therefore entitled to interest at 5% under the Law Reform Act from 21 July 1999 until the date of this judgment (26 November 2004) on $56,609.92.

Liability of Bank

The liability of the Bank at the time of receipt of the funds is not entirely crystal clear. On the one hand, the instruction to it in the TT was to pay a large remittance in US dollars into an account which could receive Fiji dollars only. The only way to obey this instruction was to convert.

On the other hand, the sum was very large; was clearly expressed in US dollars: the beneficiary was a well-known and reputable law practice which was closed for the vacation but which would reopen in a few days time. The practice was clearly a good customer of the Bank.

On balance, we consider that Mrs Grant was too precipitate in converting the currency who Fiji dollars without either

(a) waiting over the weekend until Cromptons re-opened or

(b) seeking instructions from the remitter or

(c) sending the funds back to the remitter.

It was clear from her own evidence that funds like this could be held for a few days in US currency. Clearly, she did what she thought was best but acted in the Bank's interests rather than its customer's. As an experienced Bank staff member, she could not have been unaware that the legal vacation was drawing to a close and that, come Monday, she would be able to speak to someone at Cromptons to obtain instructions. The risk to the Bank in holding the US funds over the weekend would not have been huge.

As the Judge noted, the Bank made money out of the conversion. If the involvement of or lack of action by the Bank, ceased on 2 January 1998, its liability might be limited to contributing to the $3,000 loss. However, it gave no real explanation for its inaction over Mr Muaror's letter of 13 January 1998. True, that letter indicated that Mr Muaror would get back to the Bank after he had spoken to the Reserve Bank. There is no finding by the Judge on either Mrs Grant's failure to remember speaking to Mr Muaror after 13 January or Mr Muaror's claim that he spoke to the Bank on 19 January about its failure to reply.

Whatever the situation, we consider that the Bank should have actioned Mr Muaror's letter earlier. If it had done so before the devaluation on 20 January, then there would not have been the large devaluation loss. It should have discussed options with Mr Muaror such as putting the funds into a US dollar account and leaving the $3,000 question for later discussion. It knew that there would be no problem with the Reserve Bank about opening such an account. It had done so for Mr Parshotam in respect of funds to be used in the same transaction.

Contribution Assessment

Therefore, we consider that the Bank must contribute to the loss. The question is whether the Judge was right to go so far as a 50% contribution. Whilst appellate courts are loathe to upset findings on contribution, we feel that we are able to do so because of the failure of the Judge to address the Bank's inaction on the 13 January letter.

Fleming on Torts (5th edition), 246 deals with the basis of apportionment. The author notes that trial Judges do not make a practice of elaborate explanations for apportionment being content usually to rely on a "just and equitable" assessment. The formula in the statute about joint tortfeasors is substantially the same as that for contributory negligence. Culpability and responsibility for the occurrence are taken into account but, essentially, apportionment should be "dealt with somewhat broadly and on commonsense principles" (**The Volute**, [1922] 1A.C. 129, 144).

Looking at the facts in the way just indicated we are compelled to the view that the fault of the solicitor was far greater than that of the Bank. Even after the initial error, Mr Muaror did nothing to prevent the exposure of his clients to currency variations of whatever sort including devaluation. He left the funds in Fiji dollars. Whilst the Bank should have been less intransigent and come to some accommodation with the Appellant about the $3,000, its culpability must be far less than his.

Accordingly, we fix the contribution of the Bank at 25% and not at 50% as assessed by the Judge.

Costs

The costs orders made below reflect the partial success of the Appellant in reducing the quantum of damages and of the Second Respondent in reducing the contribution.

Result

(a) Appeal allowed in part and judgment in favour of First Respondents in High Court varied.

(b) Cross-appeal allowed and judgment against Second Respondent in High Court varied.

(c) Judgment for First Respondents (Plaintiffs in High Court) against Appellant (Defendant in High Court) for

(i) $F56,609.92

(ii) Interest at 10% on $56,609.92 from 6 February 1998 to 21 July 1999.

(iii) Legal costs on mortgage, $660.

(iv) Interest at 5% on $56,609.92 from 21 July 1999 to 26 November 2004 under the Law Reform Act.

(d) Judgment in favour of Appellant (Defendant in High Court) against Second Respondent (Third Party in High Court) for 25% of the total in (c) above.

(e) Costs on appeal

(a) By Appellant to First Respondent $800 plus disbursements.

(b) By Appellant to Second Respondent $1,000 plus disbursements.

Ward, President

Barker, JA

FIJI COURT OF APPEAL

Tompkins, JA

Solicitors:

Cromptons, Suva for the Appellant

Messrs R. Patel and Company, Suva for the First Respondent

Messrs. Sherani and Company, Suva for the Second Respondent