IN THE COURT OF APPEAL FIJI
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 0011 OF 2012
(HIGH COURT CIVIL ACTION NO. 173 OF 2003)

BETWEEN : **MOTI CHANDRA & COMPANY LIMITED**

APPELLANT

AND : **CREDIT CORPORATION (FIJI) LIMITED**

RESPONDENT

CORAM : **Chandra, JA**
Lecamwasam, JA
Kumar, JA

COUNSEL : **Mr. Sharma D and Ms. Choo N for the Appellant**

Mr. Patel BC, Mr Kapadia V and Ms. N. Sharma N for the Respondent

Date of Hearing : **26 November 2013 (2.30p.m.)**

Date of Judgment : **5 December 2013**

JUDGMENT

Chandra JA:

I agree with the reasons and conclusions of Justice Kamal Kumar JA.

Lecamwasam JA:

I agree with the findings of Justice Kamal Kumar JA.

Kumar JA:

INTRODUCTION

1. On 2 March 2012 Appellant/Plaintiff filed Notice of Appeal dated 1st March 2012 for an order that Judgment of High Court delivered on 27 January 2012 by his Lordship Justice Calanchini in High Court of Fiji, Suva, Civil Action No. HBC 173 of 2003 be set aside.

2. Appellant filed its Submission on 5 June 2013.

3. Respondent filed its Submission and Respondent's List of Authorities on 25 and 28 June 2013 respectively.

4. Appeal was heard on 26 November 2013 at 2.30pm when Counsel for both parties informed that they mainly rely on the Submissions filed and emphasised certain aspects of the Appeal.

5. Appellant's claim in the Court below arose out of re-writing of Contract No. 61622 to Contract No. 67314 and seizure of Appellant's buses by the Respondent.

6. Appellant had initially claimed for damages for fraudulently re-writing Contract No. 61622 to Contract No. 67314, damages for trespass to Appellant's goods and damages pursuant to provisions of Fair Trading Decree 1992 as amended.

7. During the course of the trial which lasted for four days Appellant withdrew its claim for damages pursuant to Fair Trading Decree.

8. Respondent/First Defendant counter-claimed against the Appellant in the sum of $135,687.61 being the amount due owing by the Appellant to the Respondent as at 30 September 2003 plus default interest at 25% per annum.

9. On 27 January 2012 Judgment was delivered by the Court below whereby Appellant's claim was dismissed and Judgment entered in favour of Respondent in the sum of $1,088,503.91 being amount owing as at 31 October 2011, with interest thereon at 25% per annum and costs in the sum of $4,000.00.

GROUNDS OF APPEAL

10. Grounds of Appeal as stated in the Notice of Appeal are as follows:

"1. ***THAT*** *the Learned Judge erred in fact and in law in not giving due weight to the fact that at the time of seizure of the buses by the 2nd Respondent at 7th May 2003, whilst there may have been a Hire Purchase Account No. 67314 created by the 1st Respondent on its own computer system, there was no contractual document in existence that enable the 1st Respondent to seize the said buses.*

2. ***THAT*** *the Learned Judge erred in fact and in law in not giving due weight to the fact that the 1st Respondent was aware that it had no contractual document in its possession pertaining to a Hire Purchase Account No. 67314 as at 5th May 2003 and that according to the 1st Respondent's own records there was no debt that was owed under Hire Purchase Account No. 61622 but it still proceeded to seize the buses without seeking a prior preservation order, injunction or other similar order from the High Court of Fiji.*

3. ***THAT*** *the Learned Judge erred in fact and in law in not giving due weight to the fact that 1st Respondent's principal witness Uday Raj Sen had sworn an Affidavit in May 2003 to justify the seizure of the buses but in that affidavit he stated in unequivocal terms that the seizure was made under a Hire Purchase Agreement No. 61622 when he knew or ought to have known that there was no debt owed under account.*

4. ***THAT*** *the Learned Judge erred in fact and in law in not giving due weight to the fact that 1st Respondent's principal witness Uday Raj Sen had not made any reference to the existence of a Hire Purchase Agreement No. 67314 or to the fact that documents relating to the alleged Hire Purchase Agreement No. 67314 had been lost when he sought to justify the seizure of the buses under Hire Purchase Agreement No. 61622.*

5. ***THAT*** *the Learned Judge erred in fact and in law in not giving due weight to the fact that Uday Raj Sen had specifically referred to Hire Purchase Agreement No. 61622 as the basis for the seizure of the bus in his Affidavit.*

6. ***THAT*** *the Learned Judge erred in fact and in law in holding that there was no material before the Court to indicate that the payment to Hire Purchase Agreement* ***Account 61622*** *of* ***$180,000.00*** *was intended by the parties to close the account. In this regard the Learned Judge*

overlooked the letter of 1st June 1999 [Exhibit 74] and the fact that from 1st June 1999 until March 2000 no steps were taken by the 1st Respondent to pursue the alleged debt in any manner or form whatsoever.

7. ***THAT*** *the Learned Judge erred in fact and in law in holding that the second and third paragraphs of Exhibit 74 were not correct when the contents of the said Exhibit was clear in their meaning whereby it was stated that the Account No. 61622 had been fully paid out and that there was a surplus of $13,426.67 that was owed to the Appellant and that the 1st Respondent had no further interest in the vehicles secured previously by Contract No. 61622.*

8. ***THAT*** *the Learned Judge erred in fact and in law in holding that Appellant knew or ought to have known that as at 1 June 1999 the second and third paragraphs of Exhibit 74 were wrong.*

9. ***THAT*** *the Learned Judge erred in fact and in law in not giving any probative value to Exhibit 74 when in fact it was not disputed that the letter was written on the 1st Respondent's letterhead and written by the person who was in charge of the Appellant's account as at 1st June 1999.*

10. ***THAT*** *the Learned Judge erred in fact and in law in not considering the fact that Arvind Anand was an employee of the 1st Respondent and the Officer in Charge of the Appellant's account on 1st June 1999 and that he may had had a similar discretion to allow rebates on Hire Purchase Agreement No. 61622 over and above the Contractual Rule of 78 Rule in the same way that the Learned Judge held that as at March 2000 Steve Darbyshire had such a discretion to allow rebates and waive charge that were owed over and above the Contractual Rule of 78 rebate.*

11. ***THAT*** *the Learned Judge erred in fact and in law in finding that the 1st Respondent's files in relation to the Appellant's accounts were removed when there was no independent evidence apart from Uday Raj Sen's assertions in Court that the files had been removed. That there was no previous claim by the 1st Respondent that the files had been removed. Mr Raj Sen did not make any such assertion when he swore an affidavit in May 2000 and neither was any other evidence such as a police report or internal investigation report or an Auditors Report to show that any file relating to the Appellant's account was missing. In the same token no weight was given to the fact that at no*

stage was the Appellant ever informed that any files pertaining to its accounts were missing.

12. ***THAT*** *the Learned Judge erred in fact and in law in making findings that there was a new Hire Purchase Agreement No. 67814 when in fact the evidence before the Court did not show that the Appellant had agreed to rewrite Hire Purchase Agreement No. 61622 or to enter into a new Hire Purchase Agreement No. 67314.*

13. ***THAT*** *the Learned Judge failed to give due weight to the fact that the 1st Respondent did not meet its own pleadings in paragraph 6(v), 7, 8, 9, 10, 11 of its Statement of Defence where it was specifically pleaded that the Appellant requested for its account to be rewritten. No evidence was adduced by the 1st Respondent to show that the Appellant had requested for a rewrite of its Hire Purchase Agreement.*

14. ***THAT*** *as to the issue of interest, the Learned Judge failed to take note of the fact that there was no evidence of any agreement on a Default Rate of 25 % per annum."*

11. It is apparent from the Submissions filed and Oral Submissions of the Appellant that the gist of the Appellant's grounds of appeal relates to following findings:-

(i) Existence of Hire Purchase Agreement between the Appellant and Respondent in relation to Appellant's Account No. 67314 with the Respondent pursuant to which buses were seized by the Respondent;

(ii) Accepting into evidence Standard Hire Purchase Agreement to determine the terms of the Hire Purchase Agreement;

(iii) Accepting evidence of Respondent's witness in respect to loss of Hire Purchase Agreement in respect to Account No. 67314.

(iv) Not giving due weight to letter dated 1st June 1999 written by Mr Arvind Anand, the then Finance Manager of Respondent Company to the Appellant advising that Account No. 61622 which was re-written as Account No. 67314 has been fully paid.

12. It is undoubted and which was rightly conceded by Appellant's Counsel at the outset that the grounds of appeal challenge finding of facts by the Trial Judge.

LAW

13. It is well established that the Appellate courts will only interfere with the finding of facts based on oral testimony of the witnesses in extreme and exceptional cases.

14. In **Devries *v.* Australian National Railways Commission** (1993) 177 CLR 472, their Honours Brennan, Guadron and McHugh JJ stated as follows:-

> *"10. More than once in recent years, this Court has pointed out that a finding by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact ((12) See **Brunskill** [1985] HCA 61; (1985) 59 ALJR 842; 62 ALR 53; **Jones v. Hyde** [1989] HCA 20; (1989) 63 ALJR 349; 85 ALR 23; **Abalos v. Australian Postal Commission** [1990] HCA 47; (1990) 171 CLR 167.). If the trial judge's findings depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his (or her) advantage" ((13) **S.S. Hontestroom v. S.S. Sagaporack** (1927) AC 37, at p 47.) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" ((14) **Brunskill** (1985) 59 ALJR, at p 844; 62 ALR, at p 57.)."*

15. In ***Devries*** case the Plaintiff suffered injury to his back whilst trying to free tie tamper that was jammed under a railway sleeper.

    Plaintiff's oral evidence was inconsistent with the medical report he filed at the time of the accident.

    Based on the oral evidence of the Plaintiff and Expert witness, trial judge found that the Defendant has failed to provide reasonable care for the safety of the Plaintiff. Defendant appealed to Full Court of Supreme Court (SA) which held that due to the inconsistency in the statement given by Plaintiff and oral evidence the Trial Judge could not make the finding that Defendant failed to take reasonable care for Plaintiff's safety. Plaintiff then appealed to High Court of Australia which appeal was allowed.

16. The principle in ***Devries*** case was applied by the Fiji Court of Appeal in **Yaba *v.* The State** [2005] FJCA 76; AAU004J.2002 (25 November 2005).

17. In **Benmax *v.* Austin Motors Co. Ltd** [1955] ALR 326, Lord Reid at page 329 stated as follows:

"The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in ***Watt (or Thomas) v. Thomas*** *(3), and particularly the passage which I now quote ([1974] 1 All E.R. at p. 587):*

"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

18. In **Rae *v.* International Insurance Brokers (Nelson Marlborough) Ltd** [1997] 3 NZLR 190 (CA) his Honour Justice Thomas at page 199 stated as follows:

"As the evidence unfolds the trial judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.

An appellate Court has none of these advantages and must acknowledge that the Court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate Court to assert the capacity to be able to "second-guess" a trial Judge's findings of facts when it does not share those advantages. Exceptional caution in departing from the trial Judge's findings of fact are therefore regarded as imperative."

19. In **Stutchbery *v.* Tappoos Holdings Ltd** [2005] FJCA 12; ABU0034.2004S (18 March 2005), Fiji's Court of Appeal adopted from comments made by his Honour Thomas J in Rae's case and stated as follows:-

> *"An appellate court will not reverse the trial judges finding of fact unless there is clear and irrefutable evidence that the finding is erroneous."*

20. In respect to prior inconsistent statement their Honours Deanne and Dawson JJ in ***Devries*** (supra) stated as follows:

> *"Clearly the case was one in which the trial judge's observation of the witnesses was of critical importance to his finding that Mr Devries evidence about the first incident should be accepted. In particular, the explanation which the trial judge accepted of the inconsistent statements which Mr Devries had made in the earlier documents depended, to no small extent, on his observation of Mr Devries demeanour and linguistic ability. In these circumstances, the members of the Full Court were necessarily at a great disadvantage in considering whether the trial judge had been wrong in making that finding and accepting that explanation. Indeed, the circumstances of the case were such that, consistently with the obligation to make full allowance for the advantage which the trial judge had enjoyed; the Full Court could properly overturn the trial judge's finding only if it was vitiated by some error of principle or mistake or misapprehension of fact or if the effect of the overall evidence was such that it was not reasonably open to the trial judge to accept Mr Devries as a witness of truth."*

21. In ***Rae's*** (supra) his Honour Justice Thomas quoted following passage from **Hutton *v.* Palmer** [1990] 2 NZLR:

> *"The principles are not in doubt. An appeal such as the present is by way of rehearing and the Court has an obligation to come to its own conclusion. Running across that principle is another, namely, that an appellate Court is under the disadvantage that is has not seen or heard the witnesses. In a case which depends on an opinion as to conflicting testimony* ***an appellate Court will not interfere unless it can be shown that the trial Judge has failed to use or has palpably misused his advantage; it ought not to reverse the conclusions at which he has arrived merely from its own comparison and criticisms of the witnesses and its own view of the probabilities of the case; SS Hontestroom v. SS Saggaporack*** *[1927] AC 37, 47. Thus an appellate Court will interfere where the evidence accepted by the trial Judge is inconsistent with facts incontrovertibly established by other evidence or is patently improbable;* ***Edwards (Inspector of Taxes) v. Bairstow*** *[1956] AC 14, 39;* ***Brunskill v. Sovereign Marine & General Insurance Co Ltd*** *(1985) 62 ALR 53. (Emphasis added)"*

22. Appellant by its Counsel submitted that the Trial Judge erred in admitting the standard Hire Purchase Agreement in evidence.

23. The rule for admission of secondary evidence (document) was stated in **Whitfield *v.* Fausset** [1750] 1 Ves Sen 387, at 388, by Lord Hardwicke and quoted in **Masquerade Music Ltd and Ors. *vs.* Springsteen** [2001] EWCA Civ 513 (10 April 2001) as follows:

> *"The rule is that the best evidence must be used that can be had, first the original; if that cannot be had,* ***you may be let in to prove it any way, and by any circumstances the nature of the case will admit.*** *This extends not only to deeds, but to records; ....But for this the law requires a proper foundation to be laid; and two things are necessary. First, to prove that such a deed once existed.....The next step is to shew some ground that the deed is lost; or being in his adversary's hands, cannot be come at. What I go upon is, that there is sufficient evidence to trace this into the hands of the defendant, who is the purchaser of the estate.....This, the, is a strong foundation to let the plaintiff in to read the draft....." (My emphasis) (page 12)*

24. The Learned Trial Judge took into consideration section 10 of Civil Evidence Act before he admitted the standard Hire Purchase Agreement into evidence.

25. Hence, the manner in which secondary evidence is to be admitted in evidence to prove a document is upto the trial judge and will depend on the circumstances of each case.

GROUNDS OF APPEAL

26. For the sake of convenience I will deal with the Grounds of Appeal in the following Order:

Firstly: Grounds 1 to 5 - relating to existence of Hire Purchase Agreement signed by the Plaintiff on 7 March 2000 for Account No. 67314;

Secondly: Grounds 6 to 10 - relating to Exhibit 74 being letter dated 1st June 1999 written by Arvind Anand, the then Finance Manager of the Respondent (Document No. 23 of Copy Records Volume 1);

Thirdly: Ground 11 - relating to evidence in respect to lost files;

Fourthly: Grounds 12 and 13 relating to re-writing of Hire Purchase Contract No. 61622 into Hire Purchase Contract No. 67314;

Fifthly: Ground 14 - relating to award of default interest of 25%.

Grounds 1 to 5

27. The learned Trial Judge's finding on the existence of the Hire Purchase Agreement dated 7 March 2000 are stated at pages 12 and 13 of his Judgment where the Learned Trial Judge stated as follows:

> *"Mr Mohan stated that he met with a Mr Derbyshire the then General Manager of the First Defendant in March 2000 in Derbyshire's office in Suva. He said the meeting was arranged at the request of the First Defendant. At the meeting Derbyshire told Mohan that account 61622 was in arrears. Derbyshire would not say by how much. Mohan asked for details and documentation. Derbyshire wanted the Plaintiff to start making payments of $2,960.00 per month commencing on and from the end of March. Mohan was not told for how many months. If payments did not start the buses at Lautoka would be repossessed and possibly Dee Cee buses in Suva also. Mohan told Derbyshire that account 61622 had been cleared. Mohan later discussed the matter with his father Dewan Chand who instructed him to start making the payments. The first payment was made at the end of March 2000. That was the evidence given by Mr Mohan for the Plaintiff.*
>
> *Mr Sen's evidence differed significantly. Mr Sen stated that in March 2000 he took a document to Mr Dewan Chand for signing. He went to the Plaintiff's Head Office in Vatuwaqa. Sen had been told by Derbyshire that he and Dewan Chand had discussed account 61622. Derbyshire gave Sen an internal memo instructing Sen to arrange for account 61622 to be refinance.*
>
> *The account was to be refinanced in the amount of $96,000.00 at 12% over 48 months. The amount of $96,000.00 was the balance in account 61622 after rebates had been calculated and deducted. Derbyshire told Sen that this was the amount that the parties had agreed would be refinanced. Sen instructed the compliance team to prepare the documents being the standard asset purchase agreement, a letter and a schedule of securities. After he had checked the documents he telephoned Dewan Chand and told him the documents were ready. He then went to the office in Vatuwaqa in early March 2000. Sen spoke to Dewan Chand briefly and then Dewan Chand signed where indicated by Sen. Dewan Chand said he would get the other director to sign as two signatories were required for the personal guarantees. Sen stated that Dewan Chand signed the standard printed Asset Purchase Agreement and the guarantee. A standard agreement form was admitted into evidence as exhibit 79. The signed documents were returned to the First Defendant on 7 March 2000 with the company seal affixed. Sen said that he had taken only one set of documents to Dewan Chand for signing. Photocopies of the documents were made after they had been returned and*

after they had been stamped (duty). A copy of the agreement with a letter and a deposit slip book were then sent to the Plaintiff by ordinary mail. Thirteen monthly payments in the sum of $2,960.00 were made by the Plaintiff between 23 March 2000 and 8 March 2001 being a total of $38,480.00. Sen stated that after the documents had been returned by the Plaintiff to the First Defendant account 67314 was opened with a principal of $96,000.00 and charges of $46,080.00 for a total amount of $142,080.00. The material before the Court indicated that nearly all of the monthly payments of $2,960.00 had been made by the Plaintiff using pre-printed deposit slips bearing the account number 67314.

28. I find that the Learned Trial Judge had the advantage of hearing the oral testimony of the witnesses and assessing their demeanour and there is nothing to suggest that the Learned Trial Judge has *"failed to use or has palpably misused for his own advantage"* or *"has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence"* or which was *"glaringly improbable"* ***Devris; Benmax; Rae; Yaba; Stutchbery***.

29. Counsel for the Appellant referred to Affidavit of Uday Raj Sen (main witness for the Respondent) sworn on 13 may 2003 in Opposition to Application for Interlocutory Injunction in the High Court Action in support of the Appellant's submissions that the witness in the said Affidavit did not at any time mention the existence of Hire Purchase Agreement dated 7 March 2000 and in the said Affidavit stated the seizure of the buses were pursuant to the Hire Purchase Agreement dated 2nd November 1998.

30. Mr Uday Sen during cross-examination stated that he made mention of Hire Purchase Agreement in respect to Contract No. 61622 as the basis for seizure of the bus in his Affidavit as a result of legal advise received by Respondent.

31. Counsel for the Plaintiff highlighted that the receipt of legal advise was only stated by Mr Sen during cross-examination.

32. Counsel for the Respondent in response submitted that the value of the evidence is not affected by at what stage it is given. **Hamilton & Ors. *v.* Allied Domecq Plc (Scotland)** [2007] UKHL 33 (11 July 2007) p. 17.

33. I tend to agree with Respondent Counsel's submission in this respect.

34. I do not find that the Learned Trial Judge's finding on the existence of Hire Purchase Agreement dated 7 March 2000 on the face of the Affidavit signed by Mr Sen was *"vitiated by some error of principle or mistake or misapprehension of fact or if the effect of overall evidence was such that it was not reasonably open to the trial judge to accept"* Mr Sen *"as a witness of truth."* ***Devris***

35. In fact at third paragraph on page 16 of his Judgment the Learned Trial Judge stated as follows:-

> *"In this action the First Defendant relied on the oral evidence of Mr Sen to establish the execution of the asset purchase agreement by the Plaintiff. I accept this evidence as to the execution of the agreement by Mr Dewan Chand in his presence in the Plaintiff's office at Vatuwaqa in early March 2000. I also accept his evidence that the duly executed agreement was received by the First Defendant on 7 March 2000 and that stamp duty was subsequently paid by the First Defendant. I also accept his evidence that copies of the stamped agreement were then made and that a copy of the agreement together with a covering letter and deposit slip book were sent to the Plaintiff by post at its registered office at Vatuwaqa. I accept this evidence on the bases that no reasonable explanation was offered as to why Mr Dewan Chand was not called to give evidence. He was the one person who could have given evidence that would have challenged the evidence given by Mr Sen. I have therefore inferred that had Mr Dewan Chand been called to give evidence the, on this issue, his evidence would not have been of any assistance to the Court. (See **Jones v. Dunkell** (1959) 101 CLR 298)."*

36. The Learned Trial Judge drew inference from the evidence given by witnesses and as such he had the advantage of assessing the credibility of the evidence.

37. In view of what has been said aforesaid and the legal authorities I do not see any reason to disturb the Learned Trial Judge's findings in respect to matters raised in Grounds 1 to 5 as he had the full advantage of hearing the witnesses and assessing their demeanour.

Grounds 6 to 10

38. Counsel for the Appellant emphasised a lot on Exhibit 74 being letter written by Arvind Anand, the then Finance Manager of the Respondent on 1st June 1999 which letter was reproduced by the Learned Trial Judge at page 10 of his Judgment.

39. Exhibit 74 has been thoroughly analysed by the Learned Trial Judge when making the following findings:

(i) There was no evidence of any other payments to account other than $7,600.00 and $180,000.00 [from sale of bus];

(ii) Balance owing after $180,000.00 was credited to Appellant's account was $162,483.60;

(iii) No material evidence put before the Court as to how the then Finance Manager arrived at the position in the Exhibit;

(iv) Plaintiff knew or ought to have known that the 2nd and 3rd paragraphs of the letter were wrong;

(v) No evidence that Appellant made any demand for payment of the surplus amount;

(vi) Writer of letter was not called to give evidence;

(vii) The then Accountant of the Appellant was not called to give evidence;

(viii) Appellant made thirteen monthly payments of $2,960.00 between 23 March 2000 and 8 March 2001 (i.e. well after the letter of 1 June 1999) towards payment of its debt in respect to Account No. 67314;

(ix) Appellant was very much aware about the existence of debt subject to Account No. 67314 as it used the deposit slips bearing that account number.

40. In fact the only reason that Contract No. 61622 had zero balance was that the amount owing under this contract was re-written to Contract No. 67314. The Appellant knew or ought to have known this fact and any attempt to rely on this letter tantamount to misleading and deceptive conduct on its part.

41. I find that the Learned Trial Judge did not err in attaching virtually no weight to second and third paragraph of "Exhibit 74".

Ground 11

42. The finding in respect to the lost file was based on the oral testimony of Mr Sen which was not contradicted by the Appellant.

43. The Counsel for the Appellant pointed out various letters written by Appellant's Accountant and Solicitors seeking details of the Hire Purchase Agreement and the Account during the period 2nd November 2000 and 14th March 2001. It was submitted that the Respondent at no time indicated to the Appellant or its representatives that the Appellant's file had been lost.

44. The Respondent's Counsel in reply submitted that the reason not to inform the Company whose file had been lost could have been a commercial decision bearing in mind that the file as found by the Learned Trial Judge at paragraph two of page 16 of

the Judgment was lost in late 2000 and the correspondences mentioned in paragraph 43 of this Judgment commenced from late 2000.

45. I tend to accept the Respondent's Submission in this respect.

46. It is also apparent that the nature of evidence that the Learned Trial Judge needs to determine whether the file had been lost or not was entirely at the Trial Judge's discretion.

47. In this instance the Learned Trial Judge believed the oral evidence of Mr Uday Sen when he stated as follows:-

> *"...I find that the First Defendant's file in relation to Plaintiff's accounts were removed and that accounts were removed and that the documents in those files went missing. I accept the uncontradicted evidence of Mr Sen on that matter."*

48. Accordingly I dismiss this ground of appeal as well.

Grounds 12 and 13

49. It is submitted that by the Appellant's Counsel that no written request was made by the Appellant or no evidence has been produced to establish that Appellant agreed to re-write Contract No. 61622 to Contract No. 67314.

50. The summary of facts stated at paragraph 39 of this Judgment shows that the Appellant had agreed to refinancing of Account No. 61622 to Account No. 67314.

51. Also there is nothing stopping parties dealing with financial institutions to enter into arrangements for re-writing of the debt.

52. I disagree with Appellant's Counsel that parties cannot agree orally to re-write contracts as happened in this instance.

53. Appellant by its Counsel referred to answer by Mr Sen in cross-examination that Respondent relied on clause 10 of the Hire Purchase Agreement to re-write contract No. 61622 and submitted that clause 10 requires a written request of the applicant.

54. Even though clause 10 says written notice is required, the parties by acting outside of clause 10 have waived the requirement of clause 10 and there was nothing stopping parties to agree orally to re-write the contract.

55. The Learned Trial Judge analysed the evidence such as execution of Hire Purchase Agreement for Account No. 67314, thirteen payments made by the Appellant towards

payment of the outstanding debt from March 2000 to March 2001, using deposit slip bearing Account No. 67314 to hold that both parties agreed to re-write Contract No. 67314.

56. Counsel for Appellant also emphasised that since deposit of $180,000.00 in Appellant's Account on 31 May 1999 there has been no transaction recorded in repayments stated by document No. 176 in Volume II of Copy Records.

57. The reason for this was stated by Mr Sen as the large deposit of $180,000.00 being made to the Account 61622 (page 334 of Volume II Copy Records).

58. It is also possible that since there has been lump sum payment, no interest on overdue account was charged which was the only transaction recorded 31 May 1998 to 31 May 1999.

59. Since this is evidence of fact that was given at the trial it was open to the Learned Trial Judge to either accept or disregard it based on his observation of the witness.

60. I find no reason to interfere with the Learned Trial Judge's findings in respect to matters raised in Grounds 12 and 13 of the Appeal.

Ground 14

61. Having accepted the existence of the Hire Purchase Agreement dated 7 March 2000 the Learned Trial Judge accepted the oral evidence of Mr Sen for the Respondent that Appellant had under the Agreement agreed to pay default interest of 25%.

62. The agreement by Appellant to pay 25% default interest is consistent with the Hire Purchase Agreement signed between the Appellant and Respondent on 29 October 1998 (Document No. 171 of Volume II of Copy Records).

63. The Learned Trial Judge after referring to provision of Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 and Law Reform (Miscellaneous Provisions) (Death and Interest) Decree 2011 and relevant legal commentaries came to the following conclusion:

> *"The views expressed above leads to the conclusion that the purpose of section 17 of the Judgments Act 1938 and section 4 of the Fiji legislation is to provide for a post judgment interest rate that will automatically apply unless the parties have agreed that a higher rate is to be applied as default interest when there is a breach of the contract. Under those circumstances I have conducted that the First Defendant is entitled to post judgment interest at the rate of 25% from the date of the judgment will payment."*

64. I find that the Learned Trial Judge did not err in any respect in awarding agreed default interest rate on the judgment sum.

CONCLUSION

65. The Orders of this Court are:-

(i) Notice of Appeal and Grounds of Appeal dated 1st March 2012 and filed on 2nd March 2012 is disallowed and dismissed;

(ii) Appellant to pay Respondent's cost of this Appeal in the sum of $3,000.00.

.....
Hon. Justice S. Chandra
JUSTICE OF APPEAL

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice K. Kumar
JUSTICE OF APPEAL