IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CIVIL APPEAL NO.ABU 37 of 2022
High Court Civil Case HBC153 of 2021

BETWEEN	:	**RONAL RAKESH NAND**
		RON'S WOOD SHAVING PTE LIMITED
		Appellants
AND	:	**HOME FINANCE COMPANY LIMITED**
		Respondent
Coram	:	**Jitoko, P**
		Andrews, JA
		Clark, JA
Counsel	:	**Mr. D. S. Naidu and Mr. K. Chand for the Appellants**
		Mr. R. P. Singh and Ms. A. Swamy for the Respondent
Date of Hearing	:	**16 November 2023**
Date of Judgment	:	**30 November 2023**

JUDGMENT

Jitoko, P

[1] I am in total agreement with the judgment of Andrews, JA.

Andrews, JA

Introduction

[2] This is an appeal against rulings made by his Honour Justice A Tuilevuka in the High Court at Lautoka on 1 March 2022 ("the first ruling")[1] and 23 March 2022 ("the second ruling").[2] The appeal raises issues as to the construction of a General Lien, the point at which it crystallised, and the ability of the appellants to challenge the second ruling. In this judgment I will refer to the first appellant (Ronal Rakesh Nand t/a Westwood Sawmill) ("Mr Nand") and the second appellant (Ron's Wood Shavings Pte Ltd) ("RWSPL") collectively as "the appellants", except where it is appropriate to refer to them individually, and I will refer to the respondent Home Finance Company Bank, as "HFC".

Factual background

[3] Pursuant to a letter of offer dated 4 December 2015 ("the offer letter"), HFC granted a loan facility to Mr Nand. The purpose of the loan was stated in Schedule 1 to the offer letter as being the consolidation of existing business advances into three facilities totalling $2,680,765. The term of the facilities was 240 months, at an interest rate of "6.50% per annum Variable", with monthly repayments totalling $37,110.01 (at that interest rate).

[4] Schedule 2 to the offer letter recorded that the following securities were held by HFC, and would continue to secure advances up to $4,334,980:

1. A General Lien ("the Lien") executed by Mr Nand on 19 July 2011, over all his business and personal assets (marked "Currently stamped to $4,334,480");

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1 *Home Finance Company Ltd v Nand* [2022] FJHC 102; HBC 153.2021 (1 March 2022).
2 *Home Finance Company Ltd v Nand* [2022] FJHC 135; HBC 153.2021 (23 March 2021).

2. A first registered mortgage ("the Mortgage") over the land comprised in iTaukei land lease No 29773, together with all improvements, executed on 9 May 2012 (marked "Stamped Collateral to Item 1"); and

3. Three bills of sale ("the Bills of Sale") over specified machinery (each marked "Stamped collateral to Item 1").

[5] In a "Variation Letter of Offer" dated 11 February 2020 ("the variation"), it was recorded that HFC had approved a rental holiday for January and February 2020. The variation recorded that the current loan balance (over two accounts) was $3,294,753 and that the revised total monthly repayment required was $37,516.61. The variation further recorded that the securities set out above continued to be held to secure advances up to $4,334,480.

[6] By letters dated 31 March 2020, 24 June 2020, 29 July 2020 and 30 October 2020, HFC allowed Mr Nand repayment moratoriums, as specified in each letter, to assist him in respect of the impact of Covid 19 and the associated global economic downturn.

[7] On 21 January 2021 HFC wrote to Mr Nand, ("the 21 January letter") recording that:

[a] the current loan balances over the two facilities were $2,823,716.52 and $692,463.22, respectively;

[b] the arrears were $14,694.83 and $9,588.11, respectively;

[c] each of the facilities was 16 days in arrears; and

[d] there were "compliance issues and inconsistencies maintained" in respect of "Outstanding FRCS Tax and FNPF Compliance certificate" and "No Insurance Cover/Policy provided over the security properties and machinery's held as security".

The 21 January letter continued (emphasis as in the original letter):

> *In view of the foregoing, we wish to advise that HFC Bank seeks clearance of existing arrears as well as provision of above outstanding documents before 31st January 2021, and you are encouraged to refinance the entire debt to other banks, with confirmation of same provided by way of confirmed refinance letter by no later than 28th February 2021.*

Failing which the bank will have no option but to instigate recovery action to recover our advances, ...

[8] Mr Nand acknowledged receipt of the 21 January letter on 26 January 2021, but did not pay the arrears or provide the required documents.

[9] On 12 March 2021, Mr Nand transferred ownership of ten vehicles (at that time registered in his own name) ("the vehicles") to RWSPL. None of the vehicles was specifically referred to in either the Lien or any of the Bills of Sale. Mr Nand is the majority shareholder and director of RWSPL.

[10] On 20 April 2021, HFC's solicitors wrote to Mr Nand ("the 20 April letter"). They referred to the offer and the variation, the agreed monthly repayment of $37,516.61, Mr Nand's failure to pay the required monthly repayment and the current arrears of $94,289.77, then continued as follows (emphasis as in the original letter):

> ...
>
> 3. *In breach of your obligations as contained in the aforementioned offer letter and the securities executed by you, you have failed to pay the required monthly repayment and are in arrears of your repayment to our client in the sum of **$94,289.77 (Ninety Four Thousand Four Hundred Eighty Nine Dollars and Seventy Seven Cents)** as of 20th of April 2021.*
> 4. *That several notices have been issued and served on you for the repayment of arrears by the Bank, however to date you have failed to pay the same.*
> 5. *That you have proceeded to dismantle and remove improvements from the said land.*
>
> ***Please note as follows;***
>
> 1. *As you have failed to pay your monthly repayment of the sum of **$37,516.61 (Thirty Seven Thousand Five Hundred Sixteen Dollars and Sixty One Cents)** you are in default and in breach of your legal obligation to pay our client under the securities held by our client and the offer letter.*
> 2. *As you are in default of your obligation to pay the monthly repayment our client can exercise its rights held under the securities executed by you in favour of our client.*
> 3. *The sum of **$94,289.77 (Ninety Four Thousand Two Hundred Eighty Nine Dollars and Seventy Seven Cents)** is now due and payable to our client within 30 days from receipt of this notice and if you fail to pay this sum, our client will*

demand and require immediate payment of the entire debt sum due and owing to our client under the Letter of Offer, General Lien, First Registered Mortgage over iTLTB comprised in 29773 and Bill of Sale that would not otherwise have been payable. The entire balance debt stands at ***$3,576,499.65 (Three Million Five Hundred Seventy Six Thousand Four Hundred Ninety Nine Dollars and Sixty Five Cents)*** *as at 20th April, 2021.*

4. *In this event our client to enforce all securities without further notice.*

TAKE NOTICE

(a) For and on behalf of our client we demand that you pay the sum of ***$94,289.77 (Ninety Four Thousand Two Hundred Eighty Nine Dollars and Seventy Seven Cents) together with interest from 20th April 2021 with cost in the sum of $600.00 within 30 days*** *from receipt of this notice failing which the Bank will exercise its rights under the securities executed by you in favour of the Bank.*

(b) In which event you will be liable to pay for all costs associated with the tender and sale process.

[11] HFC issued this proceeding against the appellants in the High Court at Lautoka on 14 July 2021, seeking (inter alia) declarations:

1. that the Lien was valid security over the vehicles and that HFC was at liberty to seize and take possession of them;
2. that the appellants refrain from dealing with the vehicles in any manner whatsoever, and not engage in any conduct which interferes with HFC's rights under the Lien; and
3. for costs.

[12] On 15 July 2021, the Judge made an *ex parte* order restraining the appellants from dealing in any way with the vehicles.[3] On 22 July 2021, the Judge made an *inter partes* order that HFC could take possession of nine of the vehicles and that the vehicles were to be kept at a specified location pending determination of the issues in the case.[4] The vehicle registered as FX923 (RDKING) was excluded from the order for possession, but the appellants were ordered to maintain it and not dispose of it, or encumber it in any way.

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3 *Home Finance Company Ltd v Nand* HBC153.2021 (15 July 2021).
4 *Home Finance Company Ltd v Nand* HBC 153.2021.

The First Ruling

[13] After summarising the factual background, the Judge addressed the question whether the Lien created a floating charge. The Judge said that "the hallmark of a floating charge is that the borrower is free to deal with the business assets as usual until the charge crystallises". He accepted HFC's submission that the Lien was a floating charge over all Mr Nand's assets, until such time as the charge crystallised and transformed into a fixed charge over Mr Nand's assets and properties.[5]

[14] The Judge then considered when the charge created by the Lien crystallised. He recorded Mr Nand's submission that the Lien did not include any express crystallisation clause which would create a fixed charge, but accepted HFC's submission that cl 8 of the Lien was an "express crystallisation clause", and that upon default in payment and issuance of the "Demand Notice" (which the Judge defined as being the 20 April letter)[6], the Lien crystallised and became a fixed charge that was enforceable over all Mr Nand's assets and properties, including the vehicles.[7]

[15] The Judge considered a submission made by the appellants that the "Demand Notice" was invalid, and that in the absence of a prior valid demand notice the Lien could not crystallise into a fixed charge. It appears from the terms of the "Demand Notice" set out by the Judge[8] that he was referring to the appellants' submissions as to the 21 January letter, not the 20 April letter, which the Judge had referred to as the "Demand Notice". The Judge did not make any finding in respect of this submission, but, as recorded above, found that the Lien crystallised upon default and issuance of the "Demand Notice".

[16] The Judge rejected the appellants' submission that Mr Nand was *non est factum*: that he had not received much formal education, and had not been given any independent legal advice as to the contents and legal effect of the instrument he executed. The Judge found

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5 First Ruling, at paragraphs 11-18 and 21.
6 At paragraph 5.
7 At paragraph 18.
8 At paragraph 20.

that Mr Nand was "an enterprising and seasoned businessman who had flourished in his business ventures and undertakings until he was derailed by the Covid 19 pandemic". The Judge observed that the instruments had been witnessed by a "prominent legal practitioner in Lautoka" who (as stated in the jurat to the document) had explained the document to Mr Nand who appeared to fully understand it.[9]

[17] The Judge also rejected the appellants' submission that the transaction was subject to the Consumer Credit Act 1999. He found that it was clear from the documentation that the HFC loan facilities were applied predominantly (that is, more than half) for the purposes of Mr Nand's business, not for personal, domestic, or household purposes. He held that according to s 6 of the Consumer Credit Act, that Act had no application.[10]

[18] Further, the Judge rejected the appellants' submission that HFC had acted in bad faith, by not taking into account the hardship experienced by him over the Covid 19 period, and had continued to advance money without conducting due diligence to determine his ability to service the loan. The Judge said that the evidence suggested that HFC had given Mr Nand a "payment holiday" of several months, and referred to the effects of Covid 19 on businesses all over the world, which could not be ignored. He also recorded that there was no suggestion in the submissions that HFC owed Mr Nand a duty of care in contract, tort, or equity to extend the payment holiday indefinitely.[11]

[19] The Judge then found that there was no third party which might have a bona fide interest over the vehicles, which should take priority over HFC's interest under the lien. He found that the purchaser of the vehicles (RWSPL), was a volunteer rather than a bona fide purchaser for value.[12]

[20] The Judge made the declarations sought by HFC, as set out in paragraph [11], above, and ordered that the vehicles be released to HFC. The vehicle FX923 (RDKING) was not

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9 At paragraph 22-24.
10 At paragraphs 25-28.
11 At paragraphs 29-30.
12 At paragraphs 31-35.

excluded from the order. The Judge also ordered that costs of $2,500 were to be paid to HFC, within 14 days. The first ruling was sealed on 2 March 2022.

The Second Ruling

[21] The appellants did not file an appeal against the first ruling. On 3 March 2022 they filed a Summons pursuant to Order 29 of the High Court Rules (as to applications for interim orders) seeking orders that HFC release and give up possession of nine vehicles then held by HFC, and that the tenth vehicle (FX923 (RDKING)) remain in their possession. They also sought an order that HFC was not entitled to costs of $2,500, as ordered in the first ruling, and an order that HFC pay them costs of $2,500. An Amended Summons was filed on 14 March 2022, in which they sought a further order, that the orders made in the first ruling be stayed until determination of the Summons. A Second Amended Summons was filed on 15 March 2022 in the same terms, except that it was said to be made pursuant to Order 20 Rule 10 (as to the correction of clerical mistakes, slips or errors in judgments or orders) as well as to Order 29.

[22] The grounds of the Summons were (in summary) that the Judge had held that the Lien had crystallised on service of the Demand Notice (the 20 April 2021 letter), and that, therefore, the vehicles (having been transferred to RWSPL on 12 March 2021) could not be subject to the crystallised charge.

[23] The application was opposed by HFC, on whose behalf two preliminary points were raised, both of which were accepted by the Judge.

[24] First, HFC submitted that the appellants were in "continuous contempt" of the orders made in the first ruling such that, until the contempt had been purged, they could not be heard on the application. HFC referred to the judgment of the United Kingdom Court of Appeal in *Hadkinson v Hadkinson*,[13] in which it was held that there is an unqualified obligation on a person against whom an order is made to obey it unless and until the order is discharged –

[13] *Hadkinson v Hadkinson* [1952] 2 All ER 567 (UKCA).

even if the person believes it is irregular or void – and that person may not be heard on the matter until the contempt is purged. The Judge rejected the appellants' contrary argument based on comments made by Denning LJ in his separate judgment in *Hadkinson*, which were relied on by the High Court in Fiji in *Munishi v Munaf*,[14] which declined to follow *Hadkinson*. The Judge also took into account the principle of finality of proceedings.[15]

[25] Secondly, HFC submitted that the High Court was *functus officio*, on the grounds that the orders sought by the appellants all sought to set aside the orders made in the first ruling, which had finally determined HFC's proceeding. The Judge accepted that the first ruling had been perfected by being sealed, so it was not open to him to revisit it. The Judge held that he was *functus officio*, and the appellants' only option was to appeal the first ruling.[16]

[26] The Judge went on to comment on a matter that he said he had "merely alluded to" in the first ruling, which was that Mr Nand had "ceased trading as a going concern for quite some time", following the Covid 19 situation, from which the business had failed to recover. He also said that RWSPL had not engaged in any trade or commercial activity other than to receive the vehicles from Mr Nand, and it could not be said that the vehicles were transferred to RWSPL in the ordinary course of Mr Nand's business. The Judge referred to a second manner in which crystallisation of a floating charge may occur, which is as a matter of law, when the charger ceases to be a going concern. The Judge found that whether looked at from the point of view of cl 8 of the Lien contract, or by reference to the general law, it was hard to see how HFC was not entitled to the vehicles.[17]

Grounds of appeal

[27] The appellants filed a Notice of Appeal against both the first and second rulings on 8 July 2022. I note in passing that the appeal was filed some two months out of time. Pursuant

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[14] *Munishi v Munaf* [2016] FJHC 583

[15] Second ruling, at paragraphs 11-18.

[16] At paragraphs 20-24, 33.

[17] At paragraphs 25-33, citing the judgment of the Court of Appeal of Singapore in *Malayan Banking Bhd v Bakri Navigation Company Ltd* [2020] SGCA 41, at [73]-[74].

to r 16 of the Court of Appeal Rules, an appeal against the first ruling should have been filed within six weeks after the date the first ruling was sealed (2 March 2022), that is, by 14 April 2022, and an appeal against the second ruling should have been filed within six weeks of the date the second ruling was sealed (30 March 2022), that is, by 12 May 2022. However, as lateness of the appeals was not raised as a preliminary point, it is not necessary to consider the issue further.

[28] The appellants set out 46 grounds of appeal: 21 against the first ruling and 25 against the second ruling. There is considerable duplication and overlap in the grounds. There is some force in Mr Singh's submission that filing 46 grounds of appeal is vexatious and frivolous. However, as no application was made to dismiss the appeal on that ground, this Court will address the appeal issues, which I summarise as follows:

Appeal against the first ruling:

[a] the Judge should not have heard HFC's application and should not have found in favour of HFC, as HFC had no standing to bring the proceeding;

[b] the Judge erred in finding that the Lien created a floating charge over all of Mr Nand's assets, which crystallised before the vehicles were transferred to RWSPL;

[c] the Judge erred in seeking to bind Westwood Sawmill[18] to the Lien when it was not a party to the lien;

[d] the Judge erred in holding that Mr Nand had received sufficient independent legal advice as to the Lien;

[e] the Judge erred in holding that the Consumer Credit Act 1999 did not apply to the vehicles;

[f] the Judge erred in finding that HCF did not act in bad faith towards Mr Nand;

[18] As indicated by the intituling to this proceeding, "Westwood Sawmill" is the name by which Mr Nand traded.

Against the second ruling:

[g] the Judge erred in not allowing the appellants to be heard, on the ground that they were "in continuous contempt";

[h] the Judge erred in refusing to hear the appellants' summons to correct a "slip", and enforcing the first ruling;

[i] the Judge erred in finding that he was *functus officio* and therefore had no residual discretion to review the first ruling;

[j] the Judge erred in adding comments in the second ruling, and in so doing attempting to support the first ruling through additional reasoning;

[k] the circumstances and the Judge's actions in the proceeding would lead a fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased; and

Costs/damages

[l] the Judge erred in holding that HFC was entitled to costs on a higher scale and not awarding damages and costs to the appellants.

[29] Even summarised as above, the grounds of appeal are prolix and to some extent overlapping. Counsel for the appellants, Mr Naidu, acknowledged at the hearing that the core issue in respect of the first ruling is whether the Lien created a floating charge over all Mr Nand's assets (in particular, the vehicles) and if so, whether it crystallised and became fixed prior to the transfer of the vehicles to RWSPL. In respect of the second ruling, the core issue is whether the Judge erred in finding that the appellants should not be heard.

[30] The appellants have the onus of establishing that the Judge erred.

Appeal against the first ruling

1. Did HFC have standing to bring the proceeding?

[31] The appellants' objection to HFC's standing to seek orders was founded on their contention that the Lien did not create a floating charge which subsequently crystallised, and in the event that it did, it had no application to the vehicles.

[32] Mr Naidu raised the objection as to standing in his opening submissions in the High Court. His grounds for the objection were that the 21 January letter was not a demand notice (because it did not make demand for payment), and the 20 April letter was not a demand under the Lien, because it was headed "Demand Notice under Mortgage Number 758776" and did not state that the Lien had crystallised, or that a floating charge had become fixed. He also submitted that the vehicles had been transferred to RWSPL prior to the 20 April letter. He submitted that HBC had no standing to seek an injunction because the charge had not crystallised over the vehicles before they were transferred.

[33] On appeal, Mr Naidu submitted that HBC did not have standing because it did not provide any consideration or purchase money to obtain the vehicles, and that the Lien had not crystallised at the time of the transfer to RWSPL, with the result that HFC had no interest attached to the vehicles.

[34] Mr Singh submitted on appeal that there is no basis to the challenge to HFC's standing. He submitted that Mr Nand had not denied that HFC had provided the loan over which the Lien was executed. He submitted that HFC as banker had standing to institute proceedings to recover its security.

[35] The High Court record does not contain any ruling made by the Judge on the objection. However, it will be evident that the "standing" grounds are identical to the substantive issues the Judge was required to consider. By finding that the Lien crystallised, and that the vehicles had been transferred after crystallisation, the Judge can be taken to have

accepted that HFC had standing to issue proceedings against Mr Nand. The appellants' challenge to standing cannot succeed.

2. The Lien agreement: what did the parties agree?

[36] Mr Naidu's submissions for the appellants largely reflected those made in the High Court. He first submitted that the Lien did not create a floating charge over all Mr Nand's assets, because the Lien contract was between HFC and Mr Nand, an individual, as a sole trader, whereas a floating charge can only be granted by an incorporated company, and because HFC did not provide any consideration for after-acquired assets (Mr Nand said he purchased the vehicles using proceeds from the sale of land expressly excluded from the Lien). He further submitted (by reference to the provisions of the Lien agreement, in particular the absence of terms such as "floating charge", "fixed charge", "after-acquired assets" and "crystallisation"), that the terms of the Lien were inconsistent with a floating charge, but consistent with it creating a legal mortgage over existing assets.

[37] Mr Naidu further submitted that if the Lien were properly held to be a floating charge, then it did not crystallise and become a fixed charge prior to the transfer of the vehicles to RSWPL on 12 March 2021. He submitted that the Lien contained no express crystallisation clause (which is required to state explicitly that the floating charge has converted into a fixed charge) and cl 8 of the Lien (relied on by HFC) is devoid of any such language. He also submitted that crystallisation could not occur until such time as HFC took management and control of the assets away from Mr Nand. He further submitted that even if cl 8 were an express crystallisation clause, the terms of the 21 January letter could not constitute a demand, and those of the 20 April letter were not those of a proper demand. He submitted that in any event, the 20 April letter was too late to crystallise a charge over the previously transferred vehicles.

[38] Mr Singh's submissions also reflected those made in the High Court. He submitted that the Lien is a valid charge on Mr Nand's current and future assets until such time as it is discharged. He submitted that Mr Nand had taken the advances from HFC, and had executed the Lien agreement, on the basis of his trading as a business, and Mr Nand is

personally liable for his debts. He further submitted that the Judge did not err in finding that cl 8 of the Lien was an express crystallisation clause.

[39] Mr Singh submitted that crystallisation is determined on the terms of the contract between the parties, and pursuant to cl 8, crystallisation of the Lien occurred upon Mr Nand's defaulting in making repayments to HFC. He submitted that HFC gave Mr Nand notice of his default by way of the 21 January letter, and he remained in default on 12 March 2021 when he transferred the vehicles. He submitted that the 20 April letter was a demand required to commence the process of recovery.

[40] As recorded above, although the Lien was headed "General Lien", the appellants challenged:

[a] whether it was in fact a lien;

[b] whether it was a "floating charge";

[c] whether (if it were a floating charge) it crystallised; and

[d] when (if it were a floating charge) it crystallised.

[41] The issues set out above can only be considered by reference to the terms of the Lien agreement itself. It is 15 pages long (excluding the page containing the jurat), subdivided into a preamble followed by 28 numbered clauses. I highlight only the following provisions (emphasis as in the original Lien agreement):

[a] The agreement commences:

In consideration *of all or any loans advances credits or banking accommodation whether made created or given on the signing hereof or that may hereafter be made created or given by [HFC] ... to for or on account of [Mr Nand] (hereinafter called* ***"the Lienor"****) and/or for or on account of [Mr Nand] (hereinafter called* ***"the Customer"****) ...* ***DOTH HEREBY*** *(subject as hereinafter provided) Charge all [assets as set out in the document]...* ***AND*** *(for the consideration aforesaid) the Lienor* ***DOTH HEREBY COVENANT AND AGREE*** *with HFC ...*

[b] Clause 1:

That *the Lienor will on demand in writing pay to HFC free from all deductions the amount or balance which shall for the time being be owing or unpaid by the Lienor and/or the customer to HFC (and that although the whole or some part of such amount or balance by represented and/or secured by any mortgages bonds covenants guarantees bills of exchange... issued by HFC to or for the benefit or at the request of the Lienor and/or the Customer ...*

[c] Clause 2:

(a) ***That*** *so long as any principal money shall be owing or unpaid under or by virtue of this security the Lienor will pay interest thereon at the applicable rate or rates*

[c] Clause 3:

(a) This Lien shall be security for–

(i) the whole of the amount or balance referred to in Clause 1 hereof whether or not the Customer shall be legally liable to pay the same to HFC and whether or not demand shall have been made on the customer in respect thereof; ...

[d] Clause 7:

That *until finally discharged this Lien shall be and remain a continuing security for the due payment of all the principal interest and other moneys hereby secured and for the time being remaining unpaid irrespective of any sums which may from time to time be paid to the credit of any account of the Lienor and/or the Customer with HFC ...*

[e] It is necessary to set out clause 8 in full:

That *if default shall be made by the Lienor in payment of the principal interest and other moneys secured or any part thereof upon demand as aforesaid the Lienor doth hereby irrevocably authorize and empower HFC or any of the Officers of HFC but without any obligation so to do immediately thereupon or at any time or times thereafter and notwithstanding any previous neglect or waiver or any right to sooner exercise any of the powers herein mentioned or any act of abandonment or waiver whatsoever by HFC and notwithstanding any acceptance by HFC of any money or interest or any negotiations between or on behalf of the Lienor and/or the Customer and HFC after the service of any such demand and notwithstanding the currency of any promissory notes or bill of exchange or any other negotiable or other security or guarantee that now is or may at any time hereafter be held by HFC on account of any part of the moneys hereby secured all of which promissory notes bills of exchange and other negotiable or other securities*

and guarantees shall immediately on such demand as aforesaid and for these presents be considered to become immediately due and payable and notwithstanding any other matter or thing whatsoever and without the necessity of any further consent or concurrence in the part of the Lienor and without the necessity of any notice being given to or the expiration of time being allowed the Lienor to sell or otherwise realize the mortgaged securities or any part thereof and to receive the proceeds of any such sale or realization.

[f] Clause 22:

***That** for the purpose of giving full effect to this security the Lienor doth hereby irrevocably during the continuance of this security appoint HFC and each of the Officers of HFC jointly and each of them severally the Attorneys and Attorney for and on behalf of the Lienor for and on behalf of and in the name of the Lienor ....*

[g] Clause 23:

***That** notwithstanding anything herein-before contained all or any of the powers or authorities hereby conferred upon HFC but without limiting the generality of the foregoing the power of sale may be exercised by any of the said attorneys at any time without the necessity for making demand for payment or requesting the Lienor or waiting for any neglect or refusal of the Lienor to observe or perform any of the covenants or agreements herein contained and on the part of the Lienor to be observed or performed.*

[42] This Court was referred to authorities, both judicial and academic, as to the nature of "floating charges", and the point at which a "floating" charge securing advances to a borrower "crystallises" and is transformed into a "fixed" charge, is respect of which recovery action can be taken by the lender.[19]

[43] It is not necessary to determine whether the Judge was wrong to call the security given by Mr Nand to HFC a "floating charge" or to determine whether the Judge erred because a "floating charge" can only be given by a company, and the Lien was executed by Mr Nand as an individual. How the agreement between the parties is labelled is not determinative. What is determinative is what the parties agreed to when executing the Lien agreement.

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[19] For example *Holroyd v Marshall* (1862) 10 HLC 191, 11 ER 99; *Vunimoli Sawmills Ltd v Shamshood* [2019] FJHC 313; HBC34.2013 (22 March 2019); *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] SGCA 41; Forde, HAJ: Principles of Company Law (5th ed), Butterworths 1990; Goode R and L Gullifer: Goode on Legal Problems of Credit and Security, Sweet & Maxwell 2009.

[44] It is clear from the terms of the Lien agreement that it was a "security", given by Mr Nand over all his assets, including after-acquired assets, to secure past, present and future advances up to the stated limit. There is nothing in the Lien agreement, or any of the authorities cited to us, to support the appellants' contention that it is invalid for the reason that it was not between HFC and a company. Mr Nand executed the agreement as an individual (with a trading name) and is personally bound by it.

[45] By way of the Lien, Mr Nand gave HFC a security charge over all of his assets. There is nothing in the Lien agreement to support Mr Nand's submission that it did not apply to assets paid for other than by way of an advance from HBC. During the term of the facilities, Mr Nand was able to buy and sell assets as he wished without having to discharge and recharge the securities as items were bought and sold, but he was required to make the agreed repayments. In that respect, the security charge created by the Lien can be described as "floating" over his assets. If Mr Nand defaulted in making repayments HFC immediately had the power to realise the assets. At that point the charge could be described as having "crystallised" and become "fixed". The core issue on appeal is whether the Judge erred in finding that the Lien crystallised before Mr Nand transferred the vehicles to RWSPL.

3. When did the Lien crystallise?

[46] It is well-established that crystallisation of a security occurs upon the occurrence of a "crystallising event". In the present case, it is necessary to determine what the parties agreed, when entering into the Lien agreement, would be the point at which the security crystallised over Mr Nand's assets. The parties took differing positions on this issue.

[47] Mr Naidu submitted that the Lien crystallised on "demand" being made – that is, the 20 April letter. He submitted that it was not until then that HFC took management and control of the assets away from Mr Nand. Mr Singh submitted on appeal that the Lien crystallised on "default" in Mr Nand's repayments, that the 21 January letter was a notice to Mr Nand

that he was in default, and the 20 April letter was the notice of demand required to commence the recovery process.

[48] I note in passing that it appears from the first ruling that Mr Singh argued in the High Court that the Lien crystallised upon a demand being served; the Judge's notes of the hearing record Mr Singh's submission that it crystallised when the 21 January letter was sent.[20] Further, the authority cited for HFC both in this Court and in the High Court as authority for the proposition that crystallisation occurs upon default (the judgment of Kamal Kumar J in *Vunimoli Sawmills Ltd*) in fact states that:[21]

> *General Lien is a floating security on chattels and intangible property of Lienor which in this case is 1st Defendant and becomes fixed when Lienee served Demand for payment of Debt.*

Notwithstanding that apparent inconsistency, we are concerned with the submissions made to this Court and the terms of the Lien agreement executed by the parties in this case.

[49] If the Judge correctly identified the 20 April letter as a "demand notice" which, upon being issued to Mr Nand had the effect of crystallising the Lien, then he erred in finding that the vehicles (which were transferred on 12 March 2021) had been transferred after demand had been made and the Lien had crystallised and become fixed. However, as discussed at paragraph [15], above, the Judge rejected the appellants' submission that a valid "demand" had been made, by reference to the terms of the 21 January letter – suggesting that he considered the 21 January letter to be a "demand". If so (and if the 21 January letter was a valid "demand"), then the Judge did not err in finding that the vehicles were transferred after the Lien had crystallised and become fixed. In the circumstances, this Court on appeal must itself determine when the Lien crystallised and became fixed.

[50] I have set out cl 8 of the Lien agreement in full at paragraph [41][e], above. It commences with the words *"That if default shall be made by [Mr Nand] in payment of the principal interest and other moneys hereby secured or any part thereof"*. It continues with the

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20 Cf first ruling at paragraphs 16 and 18 and Judge's Notes, High Court Record, at page 1407.

21 *Vunimoli Sawmills*, fn 19, above, at paragraph 143.

consequences that flow from "default": "*upon demand as aforesaid [Mr Nand] doth hereby irrevocably authorize and empower HFC ... upon such demand ... to sell or otherwise realize the mortgaged securities or any part thereof and to receive the proceeds of any such sale or realization.* I have concluded that the proper interpretation of the terms of the Lien agreement is that "default" is the point at which the lien crystallises, and that a demand is required for the purposes of recovery. For the purposes of the present case, this was at the time Mr Nand was given notice of the default by way of the 21 January letter.

[51] The consequence of this conclusion is that I am not persuaded that the Judge erred in finding that Mr Nand transferred the vehicles to RWSPL after the Lien crystallised and became a fixed charge over the vehicles (and all Mr Nand's other assets). This ground of appeal must fail.

[52] I refer, briefly, to Mr Naidu's submission that the Judge erred in holding that Mr Nand did not make any repayments towards the loan after December 2020. It was clearly open to the Judge to do so. The evidence before him from Mrs Sharma of HFC was that Mr Nand had existing arrears under the facilities as at the date of the 21 January letter, and that:[22]

> *... despite being made aware of the existing arrears, [Mr Nand] continued to default in making repayments and refused to pay the agreed instalment to reduce the advance by [HFC]*

Further, the 20 April letter included the statement that:[23]

> *... several notices have been issued and served on you for the repayment of arrears by the Bank, however till to date you have failed to pay the same.*

[53] am not persuaded that the Judge erred in finding that Mr Nand had not made the repayments. There is no doubt that he had defaulted on his obligation to make repayments at the time of the 21 January letter, and thereafter.

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[22] Affidavit of Vandhana Sharma, sworn on 13 July 2021, at paragraph 12.
[23] 20 April letter, at paragraph 4.

4. Did the Judge err in rejecting Mr Nand's submission of *non est factum* and that he had not received sufficient legal advice as to the Lien?

[54] Mr Naidu submitted that the absence of an express crystallisation clause in the Lien agreement demonstrated that the executed documents were radically different from what Mr Nand thought they were, and that Mr Nand could not have been aware of the nature of the charge held against his assets or have received adequate legal advice explaining the charge. He further submitted that the certificates as to independent legal advice had been drafted by HFC (rather than Mr Nand's own counsel) and therefore held little value. He submitted that pursuant to the *contra proferentem* principle, they should be interpreted in Mr Nand's favour.

[55] Mr Singh submitted that there is no merit in this ground. He submitted that Mr Nand first obtained a loan in December 2015 and refinanced it subsequently, and had sufficient opportunity to understand the repercussions of the documents he executed. He further submitted that Mr Nand had not raised any objection to the documents until recovery proceedings were taken against him, and had therefore waived his right to raise an objection at this stage.

[56] I am not persuaded that the Judge erred in rejecting Mr Nand's claim that he did not receive any, or sufficient, independent legal advice, with the result that he was not able to understand the document he executed. The Jurat to the Lien agreement is signed by the witnessing solicitor (Mr Tunidau, a Barrister and Solicitor and Commissioner for Oaths) and includes the standard statement:

> *Lienor (individual):*
>
> ***SIGNED** by the said **RONAL RAKESH NAND a.k.a. RONALD RAKESH NAND t/a WOOD SHAVING SUPPLIER** after the contents hereof were read over and explained to the Lienor in the English language and the Lienor appeared fully to understand the meaning and effect thereby in the presence of:*
>
> *[Signed]*

In addition, on the same day as he executed the Lien agreement, Mr Nand signed a statement (again witnessed by Mr Tunidau) confirming that he had perused and understood the security documents he had executed, that he had been advised and informed that he was entitled to seek independent legal advice, and that he had sought independent legal advice.

[57] In its judgment in *Hewitt v Habib Bank*,[24] the Court of Appeal said, in relation to a submission that the appellant had signed security documents without knowing what she was signing, and was therefore *non est factum* (case references omitted):

> *... it is settled law in Fiji that a defence of non est factum will not lightly be allowed when a person of full age and capacity has signed a written document embodying contractual terms ... The general rule is that a party of full age and understanding is bound by his/her signature to a document whether he/she reads or understands it or not. ... We see no reason to depart from this rule in this case.*

[58] This ground of appeal must fail.

5. Did the Judge err in holding that the Consumer Credit Act 1999 did not apply to the transaction?

[59] Mr Naidu submitted that the Consumer Credit Act 1999 ("the Act") applied to the vehicles, because Mr Nand is an individual, not a company; he purchased the vehicles with personal funds not funds provided by HFC; the vehicles were held in his own name and did not form part of his business assets; and he had at no time expressly contracted out of the protections afforded to him under the Act.

[60] Mr Singh submitted that the Act only applies to domestic lending, and HFC's advances to Mr Nand were for commercial purposes and resulted in a commercial debt. He submitted that the submissions for the appellants were "plainly erroneous".

[61] Section 6 of the Act sets out the application of the Act:

> ***6 Provision of credit to which the Act applies:***

[24] *Hewitt v Habib Bank* [2004] FJCA 33; ABU0007.2004S (26 November 2004).

(1) This Act applies to the provision of credit (and to the credit contract and related matters) if, when the credit contract is entered into, or, in the case of pre-contractual obligations is proposed to be entered into–

(a) the debtor is a natural person ordinarily resident in Fiji;

(b) the credit is provided or intended to be provided wholly or predominantly for personal, domestic, or household purposes;

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider.

[62] I am not persuaded the Judge erred in holding that the Act did not apply. It is clear that the HFC advances were not "provided ... wholly or predominantly for personal, domestic, or household purposes". As stated in Schedule 1 to the offer letter, the purpose of the loan was to consolidate existing business advances. On the evidence, the Judge did not err in finding that the advances were predominantly for the purposes of Mr Nand's business. It does not assist the appellants to claim that the vehicles were purchased with Mr Nand's personal funds, not funds advanced by HFC, as pursuant to the Lien, Mr Nand gave HFC a security charge over all or any of his assets (with no exclusion for personal assets) and thus gave HFC the authority to resort to his personal assets for the purpose of recovering the outstanding debt. This ground of appeal must fail.

6. Did the Judge err in finding that HFC did not act in bad faith towards Mr Nand?

[63] Mr Naidu submitted that the Judge erred in awarding costs (on a higher scale) to HFC, because HFC acted in bad faith. He submitted that rather than move against Mr Nand's mortgaged assets to offset the debt, HFC "unreasonably chose to argue a legal fiction that floating charges existed over Mr Nand's assets" under the Lien. He also submitted that HFC was attempting to prolong the matter so that the loan would continue to accrue compound interest, and it could incur costs related to management of the loan, handling and storage of vehicles, as well as significant legal costs. He submitted that HFC chose to do this despite the value of the vehicles being "miniscule" to justify the costs of the litigation or offset the arrears under the loan.

[64] Mr Singh submitted that there was nothing before the High Court that would establish an inference that HFC acted in bad faith. He submitted that the Bank had given Mr Nand a repayment holiday for at least nine months, on account of Covid 19. He also submitted that following the 21 January letter, the bank had waited some three months before taking legal action against Mr Nand. Further, he submitted that HFC had instituted legal action against Mr Nand only after it had exhausted all avenues to recover the debt, and Mr Nand had at all material times been given sufficient opportunity to make repayments to HFC.

[65] Mr Naidu's submission that HFC chose to recover the vehicles rather than other assets must be rejected. In her affidavit on behalf of HFC, Mrs Sharma stated that on 26 April 2021 HFC issued a proceeding in the High Court at Lautoka seeking orders against Mr Nand, alleging that he was in the process of dismantling, and had damaged, structures on the land subject to the mortgage.[25] Interlocutory orders were granted the same day, and leave to issue Committal proceedings was given on 15 June 2021. Mrs Sharma also stated that HFC had proceeded with seizure and sale of vehicles and machinery under the Bills of Sale, however almost all had been stripped and damaged by Mr Nand.

[66] Further, there is nothing in the Offer Letter or the Lien agreement to indicate that HFC was required to realise its security over the land (or any other security) before it could realise assets under the Lien. To the contrary, the entries "Stamped collateral to Item 1" (which was the Lien) on each of the Mortgage and Bills of Sale listed in Schedule 2 to the Offer Letter might be taken as indicating that the Lien was to be regarded as a prior security. Further, pursuant to cl 8 of the Lien agreement, HFC retained the right to sell or realise its security at any time:

> *... at any time or times [after default] and notwithstanding any previous neglect or waiver of any right to sooner exercise any of the powers herein mentioned or any act of abandonment or waiver whatsoever by HFC...*

[67] Mr Naidu's submission that HFC acted in bad faith by choosing to argue a "legal fiction" is answered by the Judge's findings concerning the Lien. Further, as the Judge recorded in

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[25] *Home Finance Company Limited v Nand* High Court Lautoka HBC 109.2021

the first ruling, there was no suggestion that HFC owed Mr Nand a duty of care in contract, tort or equity to extend the repayment holiday indefinitely. I am not persuaded that the Judge erred in so finding. This ground of appeal must fail.

7. Did the Judge err in seeking to bind Westwood Sawmill under the first ruling, when Westwood Sawmill was not a party to the Lien?

[68] This ground of appeal was not referred to in the list of issues on appeal set out in Mr Naidu's written submissions, and it was not addressed in his oral submissions to the Court. As recorded earlier in this judgment, Westwood Sawmill was Mr Nand's trading name, and was named as such in the Lien agreement. Mr Nand is personally liable under the agreement. It cannot be said that the Judge "sought to bind Westwood Sawmill". The Lien agreement simply recorded it as Mr Nand's trading name. This ground of appeal must fail.

Appeal against the second ruling

1. Preliminary issue: did the appellants require leave to appeal against the second ruling?

[69] In his written submissions filed on 27 October 2023 Mr Singh submitted that the second ruling was an interlocutory decision which required leave to be obtained for an appeal, pursuant to s 12(2)(f) of the Court of Appeal Act, which provides:

> *(2) No appeal shall lie–*
>
> ...
>
> *(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases*
>
> *(i) where the liberty of the subject or the custody of an infant is concerned;*
>
> *(ii) where an injunction or the appointment of a receiver is granted or refused;*
>
> *(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies act in respect of misfeasance or otherwise;*

(iv) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;

(v) in such other cases as may be prescribed by rules of Court.

[70] This matter was not addressed by counsel for either party in oral submissions to the Court. Mr Singh's submission is noted, but as it was not taken any further, the matters raised in respect of the second ruling will be addressed.

2. Did the Judge err in not allowing the appellants to be heard on their application, on the grounds that they were in "continuous contempt"

[71] As recorded earlier, the Judge followed the English Court of Appeal in *Hadkinson*.[26] In that case, a wife petitioned for divorce. A decree nisi was granted, which directed that the couple's child should remain in his mother's custody but that he should not be removed out of the jurisdiction without the sanction of the Court. After the decree was made absolute, the wife re-married and (without the sanction of the Court) removed the child to Australia. The father obtained an order requiring the mother to return the child to the jurisdiction. The mother appealed.

[72] The Court of Appeal declined to hear the mother's appeal. It held:[27]

> *It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.*
>
> *Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience or orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.*

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26 *Hadkinson v Hadkinson*, fn 13, above.

27 At 569, per Romer LJ.

[73] In a separate judgment, while not disagreeing with the outcome in the particular case, Lord Justice Denning reviewed the history of the rule that a party in contempt will not be heard and concluded:[28]

> *Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. ...*
>
> *Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.*
>
> *The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its orders in respect of him. ...*

[74] I do not accept Mr Singh's submission that it is "trite law that if you are in contempt of an order of Court you cannot be heard on a new complaint until you have purged the contempt". As Lord Denning said in his separate judgment in *Hadkinson*, the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard. Consideration must be given to whether the disobedience is such as to impede the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make. *Hadkinson* was not followed by Master Nanayakkara in his judgment in *Munishi v Munaf*,[29] where the defendant had not complied with orders to give up possession of a parcel of land, and to pay costs. The Master found that the *Hadkinson* rule had no application, as there were other means of enforcing the orders.

[75] In the present case the submission that *Hadkinson* applied, so as to deprive the appellants of a hearing, was founded on their refusal to give up possession of one of the vehicles (FX

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[28] At 574. (The report of this judgment records that four days after the judgment was delivered, the child was brought back into the jurisdiction, the mother's appeal was heard, and allowed.)

[29] *Munishi v Munaf*, fn 14, above.

923 (RDKING)). The Judge, while "mindful that it is a strong and serious matter to deprive a person of a hearing," found that there was a "grave public policy consideration applicable to the circumstances of the case", this being the principle of finality of proceedings.[30] The Judge did not address the issue of whether the appellants' disobedience was such as to impede the course of justice in the case by making it more difficult for it to ascertain the truth of the matter, or to enforce any orders that might be made, or whether there were no other means of securing the appellants' compliance with the order to give up possession of the vehicle.

[76] The facts of the present case bear no resemblance to those in *Hadkinson*. It was not a case of a child being removed from the court's supervisory jurisdiction: it was a case of one vehicle being retained contrary to an order to deliver it up to HFC. Further, there was an alternative means of enforcement available: HFC could have sought a Writ pursuant to Order 45, r3(1)(a of the High Court Rules.

[77] I conclude that the Judge erred in concluding that it was appropriate to follow *Hadkinson*. However, that is not determinative of the appellants' appeal against the second ruling.

2. Should the Judge have heard the appellants' Summons to correct a "slip"?

[78] As recorded earlier, the appellants did not appeal against the first ruling. Rather, they filed a Summons which (as set out in the Second Amended Summons) sought orders pursuant to Order 20 Rule 10 and Order 29 of the High Court Rules that HFC release and give up possession of the nine vehicles then held by HFC, and that the vehicle FX923 (RDKING) remain in their possession, that the orders made in the first ruling be stayed until determination of the Summons, that HFC was not entitled to costs of $2,500, as ordered in the first ruling, and that HFC pay them costs of $2,500.

[30] Second ruling, at paragraphs 17 and 18.

[79] Order 20 Rule 10 is commonly referred to as the "slip" rule. It provides:

> *10. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omissions, may at any time be corrected by the Court on motion or summons without an appeal.*

[80] Although the slip rule was referred to in the Second Amended Summons, the parties' written submissions filed in the High Court prior to the second ruling do not include any submissions for or against the application of the rule (they focused on the issues of contempt and *functus officio*). In oral submissions at the hearing on 21 March 2022 Mr Singh submitted that the slip rule would allow correction of a mistake in sealing the earlier orders, or a typographical order, but would not allow the appellants to have the orders set aside.[31] Mr Naidu referred to the Judge's findings that the 20 April letter crystallised the charge and the vehicles were transferred on 12 March 2021 and submitted that the slip rule allowed the Judge to amend the first ruling in order to give effect to his intention.[32] The Judge did not address his jurisdiction under the slip rule in the second ruling.

[81] In his submissions to this Court Mr Naidu referred to a number of cases in which, he submitted, the slip rule had been applied to amend court orders. None of the judgments in *Bristol-Meyers Squibb v Baker Norton Pharmaceuticals Inc*,[33] *Swindale v Forder*,[34] *Koya v Naicker*,[35] *Sharma v Verma*,[36] *Wati v Registrar of Titles*,[37] and *Santos-Albert v Ochi*[38] concerned an application to the presiding Judge in the matter to alter the substantive decision, but rather were concerned with correcting sealed orders so that they properly reflected those made by the Judge, or to properly reflect the terms of an agreement between

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31 High Court Record, at Vol 4 page 1448.

32 At Vol 4 page 1451.

33 *Bristol-Meyers Squibb v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414 (sealed costs order did not reflect the Judge's decision).

34 *Swindale v Forder* [[2007] EWCA Civ 29 (sealed order as to possession of matrimonial property amended so as to reflect the Judge's decision).

35 *Koya v Naicker* [2014] FJHC 63; HBC35.2011 (14 February 2014) (description of land in sealed order for transfer amended to reflect agreement between the parties).

36 *Sharma v Verma* [2009] FJHC 212; HBM10.2009L (24 September 2009) (sealed consent order amended to include time period for compliance with court order).

37 *Wati v Registrar of Titles* [2018] FJCA 52; ABU0006.2016 (1 June 2018) (consent application to ensure that the sealed order reflected terms of the order applied for).

38 *Santos-Albert v Ochi* [2018] EWCA 1277 (Ch) (sealed orders corrected so as to reflect the wording of the Judge's decision).

the parties. They are of no assistance in the present case, where it was sought to use the slip rule in order to amend the substantive judgment.

[82] The power given to a Court under Order 20 r 10 to correct clerical mistakes and accidental slips or omissions does not extend to the "operative and substantive part" of a judgment.[39] The amendment the appellants sought pursuant to the slip rule in the present case (that is, the Judge's finding as to crystallisation of the Lien) was very much the "operative and substantive part" of the first ruling. The slip rule does not allow the amendment sought by the appellants. I am not persuaded that the Judge erred in not applying the slip rule. This ground of appeal must fail.

3. Did the Judge err in finding that he was *functus officio* and therefore had no discretion to review the first ruling?

[83] Mr Naidu submitted that the Judge erred in finding that he was *functus officio*, on the basis that he failed to take account of an exception to the *functus officio* rule, namely to correct clerical mistakes or errors under the slip rule. Mr Singh submitted that the Judge had discharged his duty by issuing the first ruling, which was a final decision: the issued raised in the proceeding had been argued and dealt with by the Court.

[84] It is well-established that with the exception of the application of the slip rule, a final order or ruling of a court cannot subsequently be altered or varied except on appeal. In *Ambaran Narsey Properties Ltd v Khan*, the Supreme Court said in relation to the *functus officio* rule:[40]

> *Once the court's order has been finalized, the court has no further role to play in respect of the issue which the court's order addressed. To use the time-honoured Latin maxim, the court is said to be functus officio. That means that apart from correcting clerical mistakes or accidental slip or omission under the slip rule, the court has no power to alter the order it made.*

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39 See *Thynne v Thynne* [1955] 3 All ER 129, at 146I-147A, per Lord Morris.

40 *Ambaran Narsey Properties Ltd v Khan* [2016] FJSC 13; CBV003.2015 (22 April 2016), at paragraph 17. See also *iTaukei Land Trust Board v Sogari* [2017] FJCA 80; ABU0051.2012 (22 June 2017).

That is, except for the application of the slip rule, a court order stands or falls as it was made, albeit subject to any right of appeal.

[85] Mr Naidu's submissions on the *functus officio* issue focused on the slip rule: he submitted that the Judge should have applied the rule and amended the judgment as sought in the Second Amended Summons. As recorded at paragraphs [81]–[82], above, I have concluded that the slip rule did not allow such amendment. I am not persuaded that the Judge erred in finding he was *functus officio*. This ground of appeal must fail.

4. Did the Judge err in adding "Comments" to the second ruling and in so doing attempt to support the first ruling through additional reasoning?

[86] Mr Naidu submitted that in spite of deeming himself *functus officio*, the Judge independently and improperly included additional reasons, raised new arguments and cited supplementary case authorities in the second ruling, in the section headed "Comments". He submitted that this provided further assistance to HFC by considering authorities and making a finding as to when Mr Nand had ceased trading. He also submitted that the Judge wrongly deemed that the transfers of the vehicles had been carried out "underhandedly" in order to insulate them from HFC's action.

[87] Mr Naidu submitted the Judge was precluded by the slip rule and the doctrines of *functus officio* and *res judicata* from providing additional reasons, unilaterally advancing new lines of argument and adding further case authorities and the Judge had violated the very doctrines he was meant to uphold.

[88] Mr Singh submitted that the grounds of appeal relating to the "Comments" were inconsequential, as the Judge had found he was *functus officio*, and noted the findings he had already made. He further submitted that the "Comments" were "within the jurisdiction of the Court due to the manner in which the application came before it and more specifically the orders sought" and that the Judge had not varied his decision in any way whatsoever.

[89] Mr Naidu's point is valid: the Judge had declared himself *functus officio*; properly so, as he had heard argument on the matters before him, considered them, and issued the first ruling. His authority on the issues he had determined was exhausted. The Judge should not have extended the reasoning in the first ruling, which stood or fell on the reasoning contained within it. Further, the Judge should not have made further findings of fact. Having said that, however, the grounds of appeal relating to the "Comments" do not add anything to the overall thrust of the appeal against the second ruling, as they were not concerned with the Judge's refusal to hear the appellants' Summons.

5. *Res judicata*

[90] The appellants' 29th ground of appeal was that the Judge erred "when he held that the issues were *res judicata* so that the slip in his orders could not be corrected". Their 42nd ground was that the Judge erred when he made the "Comments" because the issues were *res judicata*". These grounds can be dealt with briefly. First, the Judge did not hold in the second ruling that the issues were *res judicata* such that the slip (alleged by Mr Nand) could not be corrected. The Judge made no reference to the principle of *res judicata*. The 29th ground need not therefore be considered. Secondly, in light of the appellants' 43rd ground of appeal (that the Judge erred in adding the Comments because the Court was *functus officio*) the 42nd ground of appeal adds nothing to the appeal and need not be considered. Both grounds of appeal must fail.

6. Would the circumstances and the Judge's actions lead a fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased?

[91] Mr Naidu submitted that "from its commencement to its conclusion", the Judge "acted in a manner that was inconsistent with the principles of fairness and impartiality in this matter". In support of this submission he relied on the following:

(i) Granting of the Interlocutory Injunction based on the Initial Slip
(ii) Imputing terms into the General Lien and Demand Notice

(iii) *Erroneously holding the Appellants/Defendants in Contempt to Deny the Opportunity to be heard*

(iv) *Purposefully Misapplying the Slip Rule as well as the Doctrines of Functus Officio and Res Judicata to Deny Correcting his Slip*

(v) *Assisting Respondent/Plaintiff's Counsel through the Comments*

[92] Mr Naidu submitted that the Judge made a "concerted effort to reach a predetermined result irrespective of the rules of court and the evidence presented". He submitted that each of the Judge's decisions detracted from the public confidence in the judiciary. Mr Singh referred to his submissions on the issues on appeal and submitted that the Judge "made an appropriate decision".

[93] Item (i) was not the subject of an appeal to this Court so must be disregarded. The remainder are all matters which were raised as grounds of the present appeal. The grounds referred to in items (ii), (iv) and (v) have all failed so cannot support any adverse finding. The grounds referred to in items (iii) and (iv) had no impact on the appeal.

[94] An allegation of judicial bias is a serious matter and (as Mr Naidu acknowledged) is not made lightly, and it should not be accepted or rejected lightly.

[95] In *Chief Registrar v Khan*[41] the Supreme Court held that in Fiji the appropriate test to apply to an allegation of judicial bias is that stated by the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)*, that is:[42]

> *The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.*

The Supreme Court went on to note that while bias "plainly" arises where the Judge has an interest in the outcome of the case to be decided, no hard and fast rules can be laid down

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41 *Chief Registrar v Khan* [2016] FJSC 14; CBV0011.2014 (22 April 2016), at paragraph 41, per Keith J.

42 *Re Medicaments and Related Classes of Goods* [2001] 1 WLR 700, at [85] (approved in *Porter v Magill* [2002] 2 AC 357 (HL).

in cases where the Judge had no interest in the outcome, as "it all depends so much on the facts of the particular case".[43] There was no suggestion that in the present case, the Judge had any interest in the outcome. As recorded above, the allegation of bias was founded on the Judge's findings on the issues before him. That is the context in which the allegation of bias must be considered.

[96] In this case, the Judge heard and determined the case before him. He heard submissions from counsel for both parties and considered the evidence adduced. He was required to make findings both as to the facts and as to the law. The fact that the Judge's findings were adverse to the appellants hardly establishes bias and it is misconceived to suggest it does. Further, the appellants appealed against the Judge's findings. With the exception of this Court's findings on the issue of contempt and the "Comments" added to the second ruling (neither of which had any impact on the substantive findings) this Court has found that the appeal must fail. This Court's findings on the appeal have removed the foundation of the allegation of bias.

[97] Further, having stood back and reconsidered the Judge's rulings against the background facts of the proceeding, I am satisfied that a fair-minded and informed observer would not conclude that there was a real possibility that the Judge was biased. This ground of appeal must be dismissed.

Appeal against costs orders

[98] In the first ruling, the Judge ordered the appellants to pay costs on a higher scale, summarily assessed at $2,500. In the second ruling, he ordered the appellants to pay costs summarily assessed at $500. Mr Naidu submitted that the appellants were "again penalised" by the Judge when he ordered them to pay costs on a higher scale. He submitted that this Court should penalise HFC for its "malicious and greedy behavior". He urged this Court to follow the course taken in *Koya v Naicker*,[44] where contrary to a Court order as to

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[43] *Chief Registrar v Khan*, at paragraph 41-42.
[44] *Koya v Naicker* [2014] FJHC 63; HBC35.2011 (14 February 2014)

possession of part of a lot of land the plaintiff sealed an order for possession of the whole of the land. Correction of the sealed order was ordered pursuant to the slip rule. The High Court Judge found malice on the part of the plaintiff in defending the matter "out of greed only" and ordered the plaintiff to pay costs of $1,500.

[99] Mr Singh submitted that the Judge had properly ordered costs following the event: that is, that the proceeding was determined in favour of HFC.

[100] I am not persuaded that the circumstances of this case are analogous to those in *Koya v Naicker*. In the present case HFC applied to the Court on the basis of its security documents for recovery following default by Mr Nand in making repayments on the loan from HFC. HFC's claim was challenged on several fronts by the appellants. The application was heard and determined by the Judge. The finding was adverse to the appellants. I am not persuaded that there is any basis on which the normal course of costs following the event should not have been followed. Further, I am not persuaded that it was not open to the Judge to order costs at the higher scale. This ground of appeal must be dismissed.

Conclusion

[101] The appellants' appeal against both the first and second rulings is dismissed.

[102] I turn to the matter of costs on the present appeal. As noted earlier, this Court was presented with 46 grounds of appeal, which were prolix and in many instances overlapping. The Court was also presented with a High Court Record comprising four volumes (1492 pages). The submissions for the appellants comprised 90 pages and were accompanied by a bundle of 23 authorities. Counsel for HFC was required to prepare and respond to all of the grounds of appeal – as was this Court.

[103] In the circumstances, the appellants must pay costs on appeal to HFC in the sum of $2,500.

Clark, JA

[104] I have read and agree with the judgment of Andrews, JA and the orders made.

ORDERS

1. The appellants' appeal against the first and second rulings is dismissed.
2. The appellants must pay costs to the respondent (HFC) in the sum of $2,500.

Hon. Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL