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

CIVIL APPEAL NO. ABU0047 OF 2020
[Suva Civil Action No: HBC 60 of 2016]

BETWEEN	:	**DOMINION FINANCE LIMITED** ***Appellant*** ***(Original Plaintiff)***
AND	:	**BENJAMIN OYAGAWA, MILITONI and DAVID BLAKELOCK (as the Trustees of UNITED IMPROVEMENT ASSOCIATION (United Club or UI)** ***1st Respondents*** ***(Original Defendants)***
AND	:	**KARL SMITH** ***2nd Respondent*** ***(Original Third Party)***
Coram	:	**Jitoko, P** **Qetaki, JA** **Clark, JA**
Counsel	:	**Mr D. Prasad for the Appellant** **Ms A. Singh for the 1st Respondent** **Ms N. Choo for the 2nd Respondent**
Date of Hearing	:	**9 November, 2023**
Date of Judgment	:	**30 November, 2023**

JUDGMENT

Jitoko, P

1. I have had the benefit of reading in draft the judgment of Clark, JA. I agree with it and for the reasons she gives, I too would dismiss the appeal.

Qetaki, JA

2. I have considered the judgment of Clark, JA in draft, and I agree with it, its reasoning, the result and proposed orders.

Clark, JA

Introduction

3. This is an appeal from the judgment of His Honour Amaratunga J who dismissed a claim by Dominion Finance Ltd to recover an outstanding debt arising from an unsecured 'revolving credit' facility granted to the United Club in 2014.[1]

Overview

4. The appellant, Dominion Finance Ltd (DFL), is a financial institution offering credit, including short term financing, under various terms and conditions. DFL advertises itself as "one of the most flexible lending facilities in the country".[2]

5. DFL provided a revolving credit facility to the United Club, a social club registered pursuant to the Registration of Clubs Act 1931. The Club is a private club. In order to become a member an annual subscription fee is charged and membership is approved by the Club's sitting Committee. The Club offers it members bar facilities, squash and snooker facilities and carries out social functions for its members. It is regarded as one of the prominent private clubs in Fiji.

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1 *Dominion Finance Ltd v Oygawa* [2020] FJHC 349; HBC60.2016 (27 May 2020).
2 Dominion Finance Ltd website "Dominionfinance.com.fiji"

6. Under its Constitution a Committee comprising the Club's President, Vice-President and six members is given full power to direct and manage all the affairs of the Club. The Committee also has specific powers to borrow or raise money. I will return to these powers as they are central to this litigation.

7. The General Manager of the Club had authority to approve loans up to $100,000.00. During 2014 and for part of 2015 Karl Smith, who the defendants joined as a third party to the High Court proceeding, was both the General Manager of DFL's Suva branch and the President of the Club.

The High Court Proceedings

Statement of claim

8. In March 2016, DFL issued proceedings for recovery of $63,031.61 plus post judgment interest at ten percent per annum. The pleaded basis of the claim is that:

8.1 In early February 2014 the Club applied for and was granted a revolving credit loan with a limit of $5000, interest at 10 per cent and instalment payments of $500 each month.

8.2 In February 2014 the Club had agreed to upgrade its facilities and to hire contractors to complete the renovations.

8.3 The Club utilised the revolving credit facility to pay for the upgrade and, as it had insufficient operating income "the Committee had no option but to seek" an increase in the loan limit so the renovation project could be completed.

8.4 Between March and November 2014 "the Club" continued to use the loan facility to pay for the contractors and upgrade. As at 30 November the loan stood at $56,857.57 but the Club continued to pay monthly instalments of only $500 and provided an assurance its Bank would provide a loan to pay off the debt.

8.5 The Club failed to make any payments after its 9 March 2015 instalment of $500 and failed to provide to DFL any timeframe within which its Bank would provide a loan to enable the debt to be cleared.

8.6 On 21 April 2015 "the Club" requested a further loan in order to pay its liquor licence fee. DFL agreed on the basis of an assurance that after payment of this fee the Club's "loan with its bank would be processed to pay off the debt in full".

8.7 From 22 April 2015 the Club failed to pay any monies to DFL.

8.8 Between August 2015 and February 2016 DFL and the Club's President (who by now was no longer Karl Smith) corresponded about the debt, the new President denying liability for the debt.

Statement of defence

9. The defendants were trustees of the Club. Two of them had died but the Judge noted at [6] of his Judgment that "no appointment had been made in that regard". The remaining trustee was represented at the hearing. To avoid confusion and for consistency with the statement of defence in this part of the judgment I refer to "the defendants".

10. The defendants' case was that as far as they and the Committee were concerned no loan was ever authorised or approved; Karl Smith applied for the loans and assumed authority to repay.

11. The defendants pleaded they were wrongly sued as they had no knowledge of the DFL facility and neither they nor the Committee had given any approval for any loan application to be made to DFL; at the material time Karl Smith was the President of the Club and also the General Manager of DFL. Neither the trustees nor the Committee were aware of any transaction entered into by Karl Smith. There was no approval to upgrade the Club facilities or purchase new items and neither the defendants nor the Committee requested or authorised DFL to make direct payments to the contractors.

12. Any loan taken from, or approved by DFL was in relation to Karl Smith acting of his own volition without any authority or authorisation.

13. The remaining defendant (Mr David Blakelock) issued third party proceedings joining Karl Smith on the basis that the loan was taken by Karl Smith "acting on his

own volition" and without any authority. The defendant sought a declaration that the defendants were entitled to be indemnified by the third party to the extent of any judgment the plaintiff obtained against them.

Issues for trial

14. I note that in the pre-trial Minute the parties agreed on 16 issues. Five of the issues concerned the identity of the applicant for the loan and whether the application was made with the necessary authorisation. A related issue for determination was the Club's Constitution and whether the Committee had approved the application for the loan from DFL "and all related arrangements".

The Judgment

15. In the course of setting out the facts the Judge also recorded the evidence, or lack of evidence relating to key facts.

15.1 There was no direct or indirect evidence of any trustee being appraised of or knowing about the terms and conditions of the credit facility.

15.2 The plaintiff's first witness, Mr Nitesh Lal succeeded Karl Smith as Chief Executive Officer in 2015.[3] At that time he became aware of the credit facility granted to the Club.

15.3 Mr Nitesh's evidence was that the revolving credit facility was to enable the Club to use funds as and when needed. The loan was approved on behalf of DFL by Karl Smith in his capacity as General Manager of the Suva Branch.

15.4 Receipts of payments were produced, but not of any authorisation from the Club to the expenditures. In particular there were payments by the Club via instalments of $500 totalling over $16,000 but, again, no evidence was produced as to the authority for those payments.

15.5 The plaintiff had failed to produce any evidence of authorisation of credit and or borrowing of any nature by the Club through any resolution in terms of the

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3 This note explains the use in this judgment of the terms "General Manager" and "Chief Executive Officer". Karl Smith was the General Manager of DFL's Suva branch at the relevant time and that was an admitted fact. When Nitesh Lal succeeded him it was as Chief Executive Officer.

Constitution. The Judge said that was a prerequisite for the claim for recovery of the loan.

16. His Honour then formulate the "paramount consideration" arising from the claim:

> *[29] The claim is for recovery of debt arisen from credit facility provided to the Club in terms of a contract. This contract was not produced at hearing, and in my judgment preliminary issue of authority to obtain credit is paramount consideration for the claim.*
> *[30] So the main issue before court was not existence of written contract and or failure to produce the same, which can be overcome through production of secondary evidence.*

17. In recording that the parties had provided written submissions His Honour observed at that the plaintiff "had not addressed the preliminary issue of ultra vires".

18. The Judge made three further observations:

18.1 There was no claim in equity or for unjust enrichment. The claim was based on an asserted agreement between the plaintiff and the Club: at [32].

18.2. The defendants were trustees of the Club which was an unincorporated body. Liability of the trustees was imputed on the basis the credit facility was for the Club: at [33].

18.3 There was no evidence that trustees or any other member of the Committee *other than the third party* had signed or seen the said contract under which the revolving credit facility was provided to the Club —an unincorporated body: at [34].

18.4 The first issue was the liability of the unincorporated body. "If there is no proof of liability in law the claim of the plaintiff fails": at [35].

18.5 Two distinct issues arose from the defendants denying authorisation of the renovations and their denial they obtained any credit facility from DFL: at [36].

19. The Judge then set out the clauses in the Constitution relevant to those issues:

> *"19.11 The Committee may from time to time as it may think expedient, subject to Section 22.3 acquire land by purchase, lease or otherwise, and provide, purchase, construct or erect any buildings on any land belonging to or hereafter acquired for by*

the Club and may demise, underlet, exchange, sell or otherwise dispose of any such land or buildings or any thereof and may alter extend, add to, pull down, or replace any such buildings or any part thereof, provided however, that ***no power contained in this paragraph shall be exercised except pursuant to a Resolution of the Club passed by two - thirds majority in a General Meetings unless the expenditure or income involved is less than ten thousand dollars*** *($10,000)."*

19.12 The Committee shall in addition to any other powers vested in it have ***power to borrow or raise money from time to time*** *by issue of debentures, bonds, mortgages, bills, notes, receipts, or any of the property or rights of the Club* ***or without any such security*** *and* ***at such a rate*** *of interest and upon such terms as to priority and otherwise as the Committee shall think fit, but the* ***powers of so borrowing or raising money shall not be exercised except pursuant to a Resolution of the Club passed by a two- thirds majority in a General Meeting.*** *All members of the Club, whether voting on such resolution or not an all members becoming members of the Club after the passing of such resolution shall be deemed to have assented to and be bound by the same as if they have voted in favour of such resolution."(Judge's emphasis)*

20. The Judge continued his review of the evidence and concluded that the purpose for which the credit facility was obtained was for refurbishment of the premises which cost more than $10,000 hence under clause 19.11 of the Constitution the approval of members was required. The actions of the third party were ultra vires therefore the trustees were not liable. The plaintiff's claim was dismissed. Having reached that conclusion the Judge did not need to consider the defendant's third party claim. "Considering the circumstances of the case" the Judge decided not to award costs.

Grounds of appeal

21. The appellant's notice of appeal challenges the High Court decision on no less than 15 grounds. I discern within the grounds of appeal three principal contentions.

22. The first is that the Judge erred in holding there was no written contract in existence when the statements in evidence clearly show the terms on which the facility was granted.

23. Then the appellant contends the Judge held the unsecured credit facility was obtained without authority ("ultra vires") but he failed to hold that the third party was liable and also failed to consider the third party's conflict of interest was between the third

party and the first defendant and had nothing to do with DFL. Therefore "if any, the [third party] ought to be held liable.

24. The third contention is that the Judge erred in failing to consider that the debt of $55,527.87 recorded in the audit report was not a legally valid debt of the Club.

Discussion

25. The first contention can be dealt with briefly. The Judge was very clear that the main issue before the Court was not the existence of a written contract or failure to produce a written contract because proof of a contract could be achieved through the production of secondary evidence. And indeed the Judge described the several exhibits produced by Mr Lal, who succeeded Karl Smith as Chief Executive Officer. Included in evidence were copies of DFL's "revolving credit statements" as at January, August and November 2015 and February and April 2016. The following detail is recorded at the head of each statement:

    25.1 that the loan is a 'revolving credit' product;
    25.2 given by DFL's Suva branch;
    25.3 under (oddly) two contract dates 6 February 2014 and 5 February 2014;
    25.4 the applicant being "United Club (Primary)";
    25.5 credit limit $5,000.00;
    25.6 interest rate 10%; and
    25.7 minimum monthly instalments of $500.00 to be paid.

26. So the existence of the loan was not in dispute. Receipts of payments towards the loan were produced. The issue was whether the third party had the necessary authority to obtain credit — whether DFL could show it loaned to someone who had the authority to borrow.

27. The plaintiff failed to prove this fundamental plank of its case. As I have mentioned, the Judge made the point that the plaintiff's submissions had not addressed the preliminary issue of authority. Similarly, on appeal, DFL has skirted around this key issue.

28. The second of the main contentions discerned from the 15 grounds of appeal is the complaint that the auditor's financial report showed a debt of $55,527.87 owed to DFL as at March 2015 yet the Judge failed to hold it was a legally valid debt owed by the Club to DFL.

29. Again, the argument conflates the existence of the loan (which is not and cannot be disputed) with the existence of authority to obtain the loan.

30. For the purpose of preparing his report the auditor worked on a statement from DFL bearing handwritten notes setting out details of the drawings on the account. But the auditor had seen no actual agreements concerning the revolving credit facility.

31. The auditor saw no agreement between the Club and DFL because no agreement existed. Mr Lal's evidence was revealing:[4]

> *When I joined Dominion Finance and we were chasing up United Club debts, there was no formal agreement and he file for United Club was missing. Every loan we give, we create a customer file and it has copies of all the original documents. That file was not in the office.*

32. Mr Lal's further evidence in cross-examination on the issue of authority was that he *believed* that Mr Smith, as President of the Club has authority from the Committee to obtain the loan. But Mr Lal conceded he did not actually *know* that. When he took up his position with DFL he started looking for the file. It was not in the office with original documents and agreements.[5] Mr Lal emailed Mr Smith to ask about the file. Mr Smith replied on 26 October 2015:

> *We did have a file but I am afraid I have also been made aware by the staff that it can't be located. I can only assume I handed this to the Club in error together with all other Club records when I decided to resign from the Club.*

33. Mr Lal accepted that there was no signed authorisation from the Club to obtain the loan or to make the individual payments to contractors and that Mr Smith made the decisions to draw from the revolving credit and disperse the funds.

34. In light of the evidence on the issue of authorisation, it was available to the Judge to conclude that the auditor's report did not demonstrate legal authority to obtain the loan

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4 Transcript of Hearing p 13.

5 Transcript of Hearing p 37, 35, 41 and 42.

and that as no evidence was produced by DFL showing any authorisation of the payments to various payees the payments were ultra vires because they were made without the requisite authority.[6]

35. I turn now to the grounds of appeal that, in combination, contend error by the Judge in not holding Karl Smith liable in the face of His Honour that Karl Smith had a conflict of interest and his transactions with DFL were ultra vires.[7]

36. This theme of "fault" expanded at the hearing to embrace the failure of the Committee, after discovering the debt, to institute a complaint against Karl Smith. Under the Constitution, if any member wilfully infringes the Constitution or the Rules of the Club, they may be liable to suspension or expulsion.

37. The point may or may not be valid. What does seem apparent from the evidence is that things were in a state of confusion. A new Club President had been appointed, the Committee had a different membership, there was correspondence with DFL (also under a newly appointed Chief Executive Officer) which was vigorously pursuing repayment of a loan that the Club itself had no knowledge of and liability for which it disclaimed with equal vigour.

38. Adding to the confusion was the fact the Club had a credit facility with its bank (ANZ) so there was a lack of clarity about the source of the $500 monthly payments to DFL. The relationship between the credit facilities available to the Club from ANZ and DFL was touched on in an email from Karl Smith to Mr Lal on 21 September 2015:

> *I confirm that as President of the United Club I arranged funding through Dominion to assist the Club and all records of funds disbursed were handed to the Club when I exited the Club.*
>
> *The arrangements I agreed was a revolving facility to reduce at a minimum of $500 per month subject to the Club refinancing with its Bankers ANZ once the Audited Financial Statements were to hand. You will see that under my stewardship we were actually paying $500 per week.*

39. The fact is, the Club had a loan facility with ANZ and a cheque account the signatories to which included Karl Smith.

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6 Judgment at [49].
7 Grounds of Appeal 6, 8, 11, 12 and 15.

40. In cross examination Mr Lal said the $500 payments marked as coming from ANZ (subject to confirmation) would have come in the form of a cheque. And in answer to questioning from the Judge, the auditor confirmed that a $16,200 repayment to DFL had come from the Club's ANZ account.

41. Even if the Club is vulnerable to criticism for the manner of its handling of the issue once it was apprised of the facts, any frailty in that regard is distinct from and does not bear on the issue of legal liability *in the context of this claim* which, as the Judge highlighted, was not for any equitable relief.

42. Liability for a loan in this context, that is in the context of an unincorporated body, is to be determined by examining who had the necessary authority according to the body's rules or constitution. Karl Smith and no other obtained the credit facility from DFL. He did so without the necessary approval which the Constitution requires. Accordingly, he acted without authority and the defendant is not liable for the unauthorised actions of the third party.

43. The Judge relied on *Davies v Barnes Webster & Sons* Ltd, a decision of the England and Wales High Court (Chancery Division).[8] That case involved a substantial contract for works to a rugby club's premises. The contract sum was for £954,878. The work was done over a year or so. As well as the main sum the builders claimed to be entitled to an additional sum of £147,000 in respect of variations under the contract. There was no dispute that the sum was owed. The question was, by whom? Justice Mann observed in a passage set out in Amaratunga's judgment:[9]

> *16. It seems to me that the district judge was right in his conclusion, although my analysis would not quite be his. A mature reflection, which is often more available on an appeal, demonstrates that the focus of attention in this case should be shifted slightly. The basic position is that prima facie members of an unincorporated association such as this club are not personally made liable for the acts of those who enter into contracts in the course of the affairs of the club. Exactly who is liable depends on the constitution of the club and what acts of authority and ratification have occurred. It is possible for all the members to be liable if they give appropriate authority, either in terms of the general rules of the club or in respect of particular transactions. But the general starting point is of course that that is not their intention. A member of a club is prima facie not liable for more than his or her subscriptions or other regular dues.*

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8 *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch).

9 At [39].

44. There being no evidence that the Club, through its trustees or by others with authority, applied for or authorised the credit facility upon which DFL sues, the Club is not liable to DFL. I have no hesitation in agreeing with Amaratunga J in this regard.

45. DFL (through counsel) says "someone must pay". But the plea overlooks DFL's own failures in prudence and caution. There was a failure in due diligence by the company.

46. Mr Lal's evidence was that most loans would require security. If unsecured there would be a limit on the amount. Further if unsecured, DFL would take guarantees. There was no such arrangement with the revolving credit facility and there was no signed loan agreement. While the loan limit was $5000 it was significantly over at times. Under DFL's policies the CEO had authority to approve loans up to $100,000 and so it was within Karl Smith's authority to approve the lending to the Club. Mr Lal said under the revolving credit facilities the limit could be increased or the account could be overdrawn. "In this case the CEO chose to overdraw the accounts..."[10]

47. Mr Lal also acknowledged that in the case of a club DFL would be "bound" to look at the constitution and that DFL "would have to do all those due diligence before opening an account and giving a loan".[11]

48. In the circumstances of this case there was a want of reasonable care on the part of DFL and the want of care was causative of the loss suffered by DFL.[12]

49. Unfortunately, of course, the failures in due diligence were by the very person who authorised the credit facility to be granted to the Club (which the Club itself had not authorised). Putting it simply: Karl Smith was wearing two hats and therein lies the difficulty for DFL.

50. As to not finding Karl Smith liable, the Judge did not do so because DFL did not sue Karl Smith. He was not the plaintiff's defendant. He was only joined to the proceeding as the defendant's third party so that the defendant, if found liable, could

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10 Transcript of hearing pp 37-38.

11 Transcript of hearing pp 44.

12 By analogy see for example *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231, [1993] 2 EGLR 231 at p10.

claim indemnity from the third party. Not having found the defendant liable, there was no requirement for the Judge to address the third party claim.

Result

51. The appellant has not shown that Amaratunga J erred in any respect. The appeal to this Court will be dismissed.

52. In the circumstances before him Amaratunga J decided to make no award of costs. The circumstances in this Court are different. The evidence and merits of DFL's claim were fully canvassed in the High Court. DFL failed to show that when Karl Smith applied for the loan he had the necessary authority to do so.

53. On appeal DFL maintains its original arguments without facing squarely the issue of authority. The appeal was meritless. For that reason we award costs to the first defendant in the High Court who was the first respondent in this appeal.

Orders:

(i) The appeal is dismissed

(ii) The appellant must pay costs to the first respondent in the sum of $3,000.00.

Hon Mr Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Madam Justice Karen Clark
JUSTICE OF APPEAL