

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 60 of 2016

BETWEEN : **DOMINION FINANCE LIMITED** a limited liability  
company having its registered office at Suva.

**PLAINTIFF**

AND : **BENJAMIN OYAGAWA, MILITONI LEWENIQILA** and  
**DAVID BLAKELOCK** as the Trustees of **UNITED**  
**IMPROVEMENT ASSOCIATION** (Commonly known as  
United Club or UI) a social club duly registered pursuant to  
Registration of Clubs Act Cap 194.

**DEFENDANTS**

AND : **KARL SMITH** of Savusavu, Fiji, Retired Bank Manager.

**THIRD PARTY**

Counsel : Plaintiff: Mr Diven Prasad  
: Defendant: Mr Singh. R.P  
: Third Party: Mr Sharma. D and Ms Choo. N  
Date of Hearing : 28 & 29 April, 2020  
Date of Judgment : 27 May, 2020

Catch words

*Unincorporated Body-Ultra vires acts- Credit /borrowing- not authorized in terms of constitution – liability of trustees for payment- purpose of payment not authorized- contents of audited financial statements- trustee unaware of credit – unauthorized expenditure.*

**JUDGMENT**

**INTRODUCTION**

1. This is an action filed by a financial institution to recover outstanding amount of a statement of account relating to credit facility. It was granted by way of an unsecured 'revolving credit' facility, to an unincorporated club (the Club). Defendants were its registered trustees at the material time. There were no evidence of trustees had authorized and or even seen the conditions of the said credit facility. There was no evidence of an application for such a facility. There was no written agreement

produced, and terms and conditions of said debt were not clear. The trustees of the said Club deny, authorization of the said credit facility in terms of the Constitution of the Club. The President of the Club and General Manager of Plaintiff at the time of granting credit facility was the same person and he was added as Third Party to this action. Plaintiff had not paid, through credit facility, for refurbishments to the Club premises, but the expenses of refurbishments, nor obtaining credit from Plaintiff had necessary approvals in terms of Constitution of the Club. Article 19.12 of the Constitution of the Club, requires any borrowing to be authorized by a resolution passed by two thirds majority by all members in a General Meeting. In *Wise v Perpetual Trustee Co* [1903] AC 139 PC held that liability of members of unincorporated body such as the Club, in general, not liable to pay other than subscription.<sup>1</sup> In *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch) (29 June 2011) held “**Exactly who is liable depends on the constitution of the club and what acts of authority and ratification have occurred**”. There was no resolution passed authorizing any credit or borrowing from Plaintiff. Since such an authority is prerequisite for the claim of the Plaintiff. The trustees of the club cannot be held liable for *ultra vires* actions of the Third Party. Plaintiff had failed to prove this vital component of authority hence the claim, / as pleaded fails *in limine*. There is no need to consider Defendant’s Third Party claim.

## FACTS

2. The Plaintiff is a financial institution and it is in the business of providing credit under various terms and conditions. Their term of repayment is shorter than seven years. So various kinds of short term finances are provided to the customers depending on requirements.
3. Plaintiff had provided ‘revolving credit’ facility to the Club, but exact terms of the said credit facility is not clear as the said agreement and or secondary evidence of such terms were not presented.
4. This action is a claim against the Defendant for recovery of loan. Writ of summons the claim as at 22.2. 2019 stood at \$63,031.61 with interest accruing at 10% p.a.
5. Claim is for recovery of loan or outstanding credit stated in credit statement.
6. Defendants are trustees of the Club and two of them had deceased but no appointments made in that regard. The remaining trustee of the Club is represented at hearing.
7. The Defendant was provided with credit facility, under credit revolving system on or about 6.2.2015. Revolving credit statement marked P2 indicate contract date as 6.2.2014 and the credit limit as \$5,000.

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<sup>1</sup> Paget’s Law of Banking (15<sup>th</sup> Edi) Butterworths LexisNexis edited by John Odgers QC 168p (Liability 6.26)

8. There is evidence that Plaintiff had granted credit to the Club above the said credit limit. In evidence it is proved that General Manager could authorise credit limit above this limit in terms of the practice of Plaintiff.
9. The Defendant who is a trustee of the Club, denied their involvement of any actions of third party who had failed to obtain necessary approvals in terms of the Constitution of the Club.
10. There is no direct or indirect evidence of any trustee being appraised and or knew about the terms and conditions of the credit facility.
11. In their statement of defence denied that he had any knowledge of this credit facility to the Club.
12. Third Party proceedings were instituted by Defendants against ex-President of the Club at the relevant time and also General Manager and CEO of Plaintiff at the same time.
13. The Plaintiff called two witnesses present CEO who succeeded third party, Nitesh Lal and Gardener Whiteside who was the auditor of the Club in financial year ended 31.3.2015.
14. The Defendant called 3 witnesses and marked the Constitution of the Club as D1 which is undisputed, and Third Party chose not to give evidence and or to call any witness, but filed written submissions.
15. The Plaintiff is claiming the loan repayment owed with interest at 10% p.a with post judgment interest and costs.
16. The Plaintiff's first witness Mr. Nitesh Lal tendered 38 exhibits (P1 to P38) which are contained in the Plaintiff's List of Exhibits Tab 1 to Tab 39 (except tab 5 at p 12) Page 1 to page 110). He succeeded as CEO of the Plaintiff from third Party to this action in 2015. After that he became aware of the credit facility granted to the Club.
17. From the Plaintiff exhibit P 1 to P 4 - Tab 1,2,3,4 and 5 he explained the revolving credit loan the Defendant had and as at 15<sup>th</sup> April 2020 (P4-page 15) the debt stood at \$102,866.86.
18. He explained that the revolving credit system was to have the Defendant use the funds as and when needed and this loan was approved on behalf of Plaintiff, by the Third Party who was the General Manager of the Plaintiff's Suva Branch.
19. The revolving credit statement indicated first transaction on 10.2.2014 a receipt of \$500 without any supporting document to that effect.
20. It is to be noted though receipts of the payments were produced in relation to the payments from revolving credit there was no authority from the Club for such expenditure.

21. There were payments by the Club, through instalments of \$500 and total of such payments were over \$16,000. Again there was no evidence was produced as regards to authorization of the same or the receipts relating those payments. Receipts regarding payments to contractors of the refurbishments, carried on behalf of the Club were produced.
22. The second witness for Plaintiff was a chartered Accountant and tendered P39 the audited financial report of the Defendant for the year ended 31.3.2015.
23. He said the balance sheet and under non-current assets he mentioned Plaintiff was paid in the sum of \$16,200.00 and referred to note 7 of his audited report. He said that even during audit, management of the Club had denied authorization of the credit facility with Plaintiff and had requested not to include as liability of the Club.
24. He said that the committee members of the Club, in 2015 disputed the debt but he felt important that he must mention it in his notes to audited financial statements of the Club.
25. Plaintiff had failed to produce any evidence authorization of credit and or borrowing of any nature by the Club through any resolution in terms of Constitution of the Club. This is prerequisite for the claim for recovery of loan granted in terms of the claim. According to the statement of claim is recovery of loan in terms of loan agreement and or credit statement and it was not based on equity and or unjust enrichment.
26. Plaintiff's evidence was that Third Party desired to refinance the credit facility of the Plaintiff with the bankers of the Club, but he could not do when he was the President of the Club.
27. Both parties have submitted written submissions. Plaintiff in the submissions had not addressed the preliminary issue of *ultra vires*.

## THE LAW AND ANALYSIS

28. Following facts are admitted between the parties at pre-trial conference attended by solicitors of the respective parties
  - a. Plaintiff is a limited liability company having its registered office at Suva and is engaged in financial lending.
  - b. Defendants are sued in their capacity as the Trustees of United Improvement Association (Commonly called the United Club or UI) which is social club (the Club) duly registered pursuant to Registration of Clubs Act 1932. The Club has its own Constitution which governs the operations of the Club's affairs and consists of 1 President, 2 Vice Presidents and Committee Members.
  - c. First and second named Defendants had deceased.

- d. The Club is a private club and in order to become a member, subscription fee is charged which is to be paid annually and membership is approved by the sitting Committee. The Club offers its members a bar which sells alcohol at a reasonable price, provides squash and snooker facilities and carries out other social functions for its members. The Club is regarded as one of the prominent private Clubs in Fiji.
  - e. On or about 6.8.2015 and 11.12.2015 the President of the Club wrote to the Plaintiff disputing the debts claimed by Plaintiff.
  - f. On or about 18.2.2016 the Plaintiff through its solicitors wrote to the President of the Club to clear the debt.
  - g. Third party was President of the Club during 2014 and part of 2015.
  - h. Third Party was also General Manager of Plaintiff's Suva branch during 2014 and part of 2015.
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.
31. In the 'Revolving Credit Statement' contract date is stated as 6.2.2014 and contract number is also stated.
32. There was no claim based on unjust enrichment and or for equity. The claim is based on the agreement between Plaintiff and the Club.
33. Defendants were trustees of the Club which was an unincorporated body. Liability of the trustees imputed on the basis that the credit facility was for the Club.
34. There was no evidence that trustees and or any other member of the Committee of the Club other than Third Party had signed and or seen the said contract which provided revolving credit facility the Club, which is unincorporated.
35. First issue is liability of unincorporated body, namely the Club. If there is no proof of liability in law the claim of the Plaintiff fails.
36. Statement of defence, denied authorization of the renovations to the club as well as obtaining any credit facility from Plaintiff. These are two distinct issues that are dealt in two separate provisions in the Constitution of the Club. The relevant Articles of the Constitution of the Club are as follow:

“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.”(emphasis added)

37. There was evidence that some work was done for refurbishments to the premises, and for that work payments were made from this revolving credit facility granted to the Club. There were some other payments such as liquor licence of the Club paid through Plaintiff's credit facility, but bulk of the payments were made for refurbishments.
38. The issue is legal position as to the liability of the trustees of the Club for actions which are *ultra vires* in terms of the Constitution. Of the Club. Obtaining credit facility without conforming to Article 19.12 is *ultra vires* in terms of the constitution of the Club (marked D1).
39. *Davies v Barnes Webster & Sons Ltd* [2011] EWHC 2560 (Ch) (29 June 2011) Justice Mann held in an appeal,(Chancery Div. UK)

*“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."*

40. So what is paramount consideration for determining liability of the Club is the authority in terms of the Constitution. There was no evidence that Third Party who was wearing two hats at material time intimated and or proposed and or sought concurrence even from the Committee of the Club as to credit facility and or its terms and conditions.
41. The Committee of the Club in terms of Article 19.2 of the Constitution of the Club had "full power to direct and manage all the affairs and business of the Club....."
42. There was undisputed evidence that the Bankers of the Club was not the Plaintiff and the Club had an overdraft facility with it. It was not fully utilized. So if another credit facility is to be obtained from Plaintiff its terms and conditions needed to be ascertained and discussed at least with Committee before seeking any credit from Plaintiff.
43. As the President Third Party derived powers under Constitution of the Club, hence any action that is outside constitution is *ultra vires*.
44. This is especially relevant as third party who was President of the Club as well as General Manager of the Plaintiff's Suva Branch as that time. These are some of the additional reasons that make actions of the Third Party *ultra vires*.
45. In the text Paget's Law of Banking<sup>2</sup> at p170 States;

*"6.28 The bank account of an unincorporated body having no legal status need cause the bank no difficulty if the account is kept in credit. Where the body is a club or similar association the committee or board of management merely administers moneys coming into their hands. Cheques are normally drawn on the account by authorized members of the committee or board and countersigned by the secretary.*

***But if the body wishes to borrow, the consequence of the above identified principles is that the personal liability of those who operate the account is necessary or the bank must obtain security from a third party, and the borrowing should be supported by resolution of the governing committee or board. I the body has assets which can be charged as cover for a borrowing further considerations arise, given that the association cannot sue or be sued in its own name."* (emphasis added).**

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<sup>2</sup> Paget's Law of Banking (15<sup>th</sup> Edi) Butterworths LexisNexis edited by John Odgers QC p 167 deals with Unincorporated Bodies and under (d) discusses the Operation of Bank accounts and borrowing

46. There is no evidence of any personal guarantee and or mortgage was obtained for the said revolving credit facility provided to the Club.
47. There is evidence in the audited financial stamen for the year ended 31.3.2015 marked as P39 that indicated a loan of amount outstanding to the value of \$55,527.87(see Note 7 under heading 'Dominion Finance' in document marked P 39).
48. An audited accounts are required for proper financial transparency of an entity. It can be used as evidence, but the contents of that cannot be considered as proof of a legally valid debt of the Club.
49. In the evidence the auditor never said that he saw any agreement as to revolving credit with the Plaintiff, but he acknowledged that there were payments amounting \$16,200. These payments were made through multiple payments of \$500. There is no evidence as to who authorized these payments.
50. By payments of \$500, an *ab initio ultra vires* act cannot get any legal authority. Once the credit of any nature needs approval in terms of Article 19.12 of the Constitution it remains unauthorized, irrespective of subsequent payments.
51. The duties of auditor does not expand to interpretation of the Constitution of the Club and to find out which of the acts were *ultra vires*. This is the task of court to determine.
52. There were some payments made on behalf of the Club to the revolving credit account but no evidence was produced as to authorization of these payments. Such payments are *ultra vires* without approval of the credit facility.
53. It should also be noted that accumulated expenses of the refurbishments to the Club exceeded \$10,000 hence such a venture should also be authorized as an expenditure of the Club in terms of Article 19.11, through a resolution by Members with special majority in terms of the Constitution. In the absence of such prior approval, all expenditure relating to refurbishment is *ultra vires*.
54. Plaintiff cannot enforce repayment of the said unsecured credit facility granted to the Club in *ultra vires* of the Constitution of the Club.
55. It is clear from the quoted passage of Paget's Law of Banking (supra) even if the actions of an unincorporated body is not *ultra vires* it is mandatory to obtain personal guarantee of the person authorized to operate accounts of the unincorporated body or another security for any credit given. There is no such personal guarantee and or collaterals and or any form of security was obtained by Plaintiff.



56. There was a conflict of interest by the actions of Third Party, but the pleadings were not based on that.
57. In terms of clause 19.12 of the Constitution of the Club any borrowing irrespective of the value of the amount borrow, needs two thirds majority in a General Meeting.
58. There was no evidence of any General Meeting held during the period in which credit facility was granted to the Club or repayments done in this regard hence credit facility provided by Plaintiff was in violation of the Constitution of the Club. So any request and or grant of credit facility that binds the Club and its members made in *ultra vires* cannot be legally enforced to members and or trustees and or the properties of the Club.
59. Without considering preliminary issue of authority Plaintiff in the written submission had dealt with absence of written contract for their claim.

### CONCLUSION

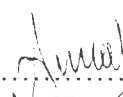
60. Plaintiff's claim against Defendant was based on loan agreement between Plaintiff and the Club. In terms of the Constitution of the Club no credit can be obtained without obtaining a resolution through two thirds majority of members in a General Meeting. There was no such resolution and the actions of the third party who was the president of the Club was *ultra vires*. Without prejudice to that the purpose for which credit facility mainly utilized was for refurbishment of the premises of the Club which costs more than \$10,000 hence required sanction of members under Article 19.11 of the Constitution of the Club. The actions of Third Party was *ultra vires* hence trustees are not liable for loan. Plaintiff's claim is dismissed and struck off. There is no need to consider claim of the Defendants against third Party. Considering circumstances of the case no costs are awarded.

### FINAL ORDERS

- a. The claim of the Plaintiff is dismissed.
- b. No costs awarded considering circumstances of this case.



Dated at Suva this 27<sup>th</sup> day of May, 2020.

  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**