IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 407 of 2000L

BETWEEN : **ROBERT YANG** and **ALFRED YANG** both of Lautoka.

FIRST PLAINTIFFS

A N D : **CROWN CORK (FIJI) LTD** a limited liability company incorporated in Fiji with its registered office at 7 Nagaga Street, Lautoka.

SECOND PLAINTIFF

A N D : **FIJI DEVELOPMENT BANK** incorporated under the Fiji Development Bank Act with its Head Office at Suva, Fiji.

FIRST DEFENDANT

A N D : **HASMUKH BHAI PATEL** f/n Punam Bhai Patel of Sigatoka, Director and **HD's GARMENT WORKSHOP LIMITED** a limited liability company having its registered office at Sigatoka.

SECOND DEFENDANTS

Appearances: Mr. Daveta for Nacolawa & Company for the Plaintiff
Mr. R. Charan on instructions of R. Patel Lawyers for the Defendants

Date of Ruling: 21 August 2023

RULING

INTRODUCTION

1. The background to this case is set out in a Ruling of Mr. Justice Inoke in **Yang v Fiji Development Bank** [2010] FJHC 447; HBC407.2000L (30 September 2010) and also in the decision of Ms. Justice D. Wickramasinghe in **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011).

2. I note here that the records tend to show that the Yangs have struggled one way or another to prosecute their claim. I note the following:

(a) on 15 October 2008, Master Udit made as a "guillotine order" against the Yangs[i].

(b) the background to this was noted by Mr. Justice Inoke in **Yang v Fiji Development Bank** [2010] FJHC 447; HBC407.2000L (30 September 2010)[ii].

(c) in the related case **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011), Wickramasinghe J entered judgment in favour of the Fiji Development Bank (**"FDB"**) when neither the Yangs nor their Company, Crown Cork (Fiji) Limited (**"CCFL"**), nor their solicitor appeared on the trial date of 21 September 2010. Notably, their solicitor had appeared in Court on the date when the trial fixture was set in Court.

3. Further to the above, I had set the case for mention on 15 February 2022 to fix a trial date and sent NOAH to the plaintiff.

4. However, there was no appearance by the plaintiff or his solicitors on the said date. I then adjourned the case to 09 March 2022.

5. Mr. Yang appeared on 09 March 2022 and advised that his lawyer, Mr. Nacolawa, was seeking twenty-one days to locate the file. I then adjourned the case to 28 March 2022 for mention to set the trial dates.

6. On 28 March 2022, Mr. Yang again appeared in person. However, there was no appearance by Mr. Nacolawa. I then adjourned the case to 31 May 2022 for mention to fix a trial date.

7. On 31 May 2022, Mr. Nacolawa finaly appeared. Mr. Singh appeared for R. Patel Lawyers for the defendant. Mr. Singh said his instructions were not to consent to any further adjournment and to ask that the matter be struck out. I then adjourned the case to twenty one days to enable the plaintiff's solicitors to reconstruct the file.

8. When the case was called on 22 June 2022, Mr. Daveta appeared for Mr. Nacolawa for the plaintiff and Ms. Vikash for R. Patel Lawyers for the defendant. I then adjourned the case to 08 and 09 June 2023 for trial at 10.30 a.m. I also set the review date of 03 November 2022 to see if Mr. Nacolawa has reconstructed the file.

9. On 03 November 2022, Mr. Nacolawa appeared and confirmed that he has managed to reconstruct the file. The matter was then adjourned to 08 and 09 June 2023 for trial.

10. On 09 June 2023, Mr. Nacolawa appeared for the plaintiff and Ms. A. Goundar for R. Patel Lawyers for the defendant. Both counsel advised the Court that they were exploring settlement. I then adjourned the case to 06 July 2023 for mention to see if they have settled.

11. On 06 July, Mr. Daveta appeared for the plaintiff and Ms. Goundar for R. Patel Lawyers for the defendant. I directed parties to file and serve agreed facts and submissions in 4 and 21 days

respectively and that I would rule on the agreed facts. I then adjourned the case to 14 August 2023 for mention to check on compliance.

12. On 14 August 2023, Mr. Daveta appeared for Mr. Nacolawa for the plaintiff and Mr. Charran for R. Patel Lawyers for the Defendant. The parties had not complied with the directions. Mr. Daveta said Mr. Nacolawa was before the Fiji Supreme Court on the day. I then adjourned the case to 21 August 2023 to review the case.

COMMENTS

13. It is now the twenty-three year since the writ of summons and statement of claim were filed.

14. There is enough material in the pleadings, in the affidavits filed, and in some related judgments between the same parties, for me to be able to reconstruct some background to really narrow down the issues between them. In saying that, I rely on the judgments and findings of Wikramasinghe J and the observations of Inoke J in cases which I note above.

FACTUAL MATRIX

15. The Yangs were directors and shareholders of a Company called Crown Cork (Fiji) Limited (**"CCFL"**). At all material times, CCFL was a customer of the Fiji Development Bank (**"FDB"**). The Yangs too were, customers of FDB during the same time.

16. In 1983, the FDB gave a housing loan to the Yangs personally. Out of this loan, the Yangs purchased some land. This land is all comprised in Lease No: 203460. This housing loan was secured by a first mortgage over the said lease.

17. At some point, the FDB also gave an industrial loan to CCFL. As Wickramasinghe found in **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011):

> [3] The aforesaid loan (to CCFL) was secured upon (i) a first debenture over all the company's assets; (ii) personal Guarantees of the Defendants with a limit of $150,000; and (iii) Comprehensive insurance cover over the machinery and stock. **[Vide (ABOD) Documents 242 Volume 2].** Thereafter, by Agreement dated 10th February 1994, the Second Defendant's liability was agreed to be unlimited. **[Vide (ABOD) Document 244 Volume 2]**. The Third Defendant's liability was not varied, thus it remained at $150,000. On 23rd August 1994, the Second Defendant also executed Mortgage Bond No 363955 and provided as collateral, the secondary mortgagee rights over leased property No.203460. **[Vide Exhibit 6]** The same property had been earlier pledged to the Plaintiff in 1983 by the 2nd Defendants to secure personal loan advances. [**Vide (ABOD) Document 73 Volume 1/ Exhibit 5**].

18. The Yangs and CCFL then sub-leased Lease No: 203460 to one Hasmukh Bhai Patel and H.D's Garment Workshop Limited. The rental received was assigned entirely to FDB to be applied towards servicing the Yangs' housing loan.

19. Meanwhile, out of the industrial loan from FDB, CCFL was able to set up a business of manufacturing corks, CCFL also purchased some plant and machinery for the business.

20. Notably, the Yangs and CCFL allege that FDB had merged the two loans without their consent. FDB however denied this in its defence. This is no longer an issue in light of the judgement of Wickramasinghe J in **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011).

21. As it happened, CCFL's business suffered a major setback. This affected the company's ability to service the loan. FDB then acted in exercise of its rights as debenture holder and appointed a Receiver.

22. The Receiver later sold CCFL's assets and undertakings. This included the plant and machineries in question which were sold for $18,000 after advertising. The Receiver applied the sale proceeds towards CCFL's loan account.

23. The Receiver also sold Lease No: 203460. As it turned out, the said Lease was sold to none other than Hasmukh Bhai Patel and H.D's Garment Workshop Limited who were the sitting tenants

24. Needless to say, the Yangs took issue with the sale as well as the manner in which the FDB had exercised its rights as mortgagee/debenture holder. All these are now *res judicata*. Wickramasinghe J had dealt with these in **Fiji Development Bank v Crown Cork (Fiji) Ltd and Others** [2011] FJHC 5; HBC96.2001L (24 January 2011).

WHAT ARE THE REMAINING ISSUES BETWEEN THE PARTIES?

25. The Yangs and CCFL allege that FDB owed them a duty of care which it breached. Below I summarise in my own words how I understand their grievance based on their pleadings.

26. The FDB is a statutory corporate body set up under the Fiji Development Bank Act. The main functions of FDB are set out in sections 5 and 8. Section 5 provides:

> **5.** The functions of the Bank shall be to facilitate and stimulate the promotion and development of natural resources, transportation and other industries and enterprises in Fiji and, in the discharge of these functions, the Bank shall give special consideration and priority to the economic development of the rural and agricultural sectors of the economy of Fiji.

27. Section 8 provides:

8. In carrying out its powers, duties and functions under the provisions of this Act, the Bank shall act in accordance with any general policy instructions given to it from time to time by the Minister:

Provided that if, in the opinion of the Board, any such policy instruction is likely to affect adversely the finances or securities of the Bank, the Chairman shall make a written report to that effect to the Minister in which case the Government shall assume responsibility for the results of such policy instructions.

28. The Yangs/CCFL allege that FDB and CCFL had entered into the loan arrangement of $150,000 on the principle that Government would provide "license to safeguard their venture". They seem to allege that the Government had given some "protection" and granted them a "license". These are not very clear to me at this time.

29. According to the Yangs, after three (3) years of operation of their business, the Government decided to "uplift the protection rendered" and/or "revoke the license". This caused CCFL to suffer that setback in its manufacturing business. This led to CFFL's inability to service its loan.

30. Flowing from the above, the Yangs/CCFL appear to plead, though rather poorly, that, because FDB was lending on Government funding and in accordance with Government policies, FDB ought to have foreseen that the Government would "revoke the license", and that if the Government were to do so, CCFL's venture would inevitably fail.

31. Flowing from the above, the Yangs/CCFL appear to plead, again rather poorly, that the FDB was fully cognizant of Government's economic and development policies and priorities as such from the beginning. The pleading then appears to assert that - when the FDB decided to loan the monies in question to CCFL in a venture/industry which FDB knew or ought to have known was susceptible to a change in Government policies or priorities or support, FDB was thereby engaging in a negligent lending practice.

32. The alleged negligent lending practice exposed CCFL's business in a very vulnerable position.

33. FDB therefore had "misdirected Crown Cork to fail in its venture" when it ought to have known that if the license would be revoked. FDB should also have known there was "no likelihood of recovery of the loan principal".

34. Flowing from the above, in terms of FDB's corporate mandate and objective, FDB had a duty as mortgagee to protect itself and its customer. These it failed to do so in CCFL's/Yang's case.

35. FDB in effect failed and/or neglected and/or acted recklessly in failing to insure against consequential loss should the occasion so arise. However, as Wickramasinghe J had noted above, part of the security which the FDB took was a comprehensive insurance over the CCFL's plant machinery and stock.

36. In addition to the above, the Yangs/CCFL further plead that, after FDB took possession of Lease No. 203460 and all other secured assets, they (Yangs/CCFL) had tried to redeem the mortgage by applying for refinance with the National Bank of Fiji. They plead that the NBF was willing to "guarantee the regular $3000.00 per month in loan repayment" on the condition that NBF was given a first mortgage over Lease No. 203460. However, FDB refused to give a first mortgage in favour of NBF. NBF therefore withdrew its offer.

37. Later however, FDB changed its mind and agreed to give NBF a first mortgage. By that time, NBF had already withdrawn its offer.

38. FDB was also unwilling to advance any funds for operation or allow CCFL to loan any further operating capital.

THE LAW

39. The Yangs/CCFL's action against FDB is an action by a customer against its Banker. It appears to be based entirely on negligence and an alleged failure of the FDB to act prudently in its lending practice in the circumstances of this case.

40. Traditionally, the relationship between banks and their customers was said to be based purely on contract. Hence, in **N Joachimson v Swiss Bank Corporation** [1921] 3 KB 110,117, Bankes J said:

> ....the ordinary case of banker and customer, their relations depend entirely or mainly on implied contract.

41. The above position appears to have been based entirely in a situation where the Bank's service was purely as repository of a deposit of money paid in by the customer. Over the years however, the services provided by a Bank has expanded to other areas such as giving investment, commercial and/or transactional advice.

42. Certainly, in the case of the FDB, its functions include *inter alia* the facilitation and stimulation and the promotion of the development of natural resources, transportation and other industries and enterprises in Fiji (section 5). In carrying out these functions, FDB is required to act in accordance with any general policy instructions given to it from time to time by the Minister (section 8).

43. It would appear to be not too far-fetched a speculation that, in executing its functions, the FDB would be engaged to some extent in giving some investment advice to its customers. It is also conceivable that FDB's lending policies at any given time would be tailored in accordance with the government of the day's economic policies and priorities.

44. There is ample case authority that, where a Bank has given investment, commercial, and/or transactional advice to certain customers. and which advice was relied on by a trusting customer to their detriment, and where it was reasonable for the customer to have relied on the advice - the Bank may well find itself being exposed to a civil suit in tort for negligent advice, or for an action

in breach of contract depending of course on the contract. There are even cases where an action founded in equity for breach of fiduciary duty has been mounted successfully (see discussion in **Nambia v Fiji Development Bank** [2019] FJHC 808; HBA017.2017 (16 August 2019); **Finch & Anr v Lloyds TSB Bank plc & Ors** [2016] EWHC 1236 QB as per Judge Pelling QC).

45. The Banker may also be exposed to an action for breach of fiduciary duty by undue influence when giving such advice (**Commercial Bank of Australia Limited v Amadio** (1983) 151 CLR 447; **Woods v Martin's Bank Ltd** [1954] 1 QB 55; **Barclays Bank plc v O'Brien** [1994] 1 AC 180).

46. In **Woods v Martin's Bank Ltd** [1954] 1 QB 55, Salmon J had to consider the question as to whether or not the Bank owed its particular customer in question a duty of care to give sound investment advice. At paragraph 70, Salmon J said:

> In my judgement, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact.

47. In the above case, the Bank had counseled a particularly naïve customer to invest in one of the bank's other customers. Apparently, the "other" customer had problems which the Bank knew.

ANALYSIS

48. In this case, the Yangs'/CCFL's claim do not directly plead as to whether or not the FDB had given them any particular investment advice or whether or not they had relied on such advice. However, in reading between the lines, all this appears to be at the heart of what the Yangs/CCFL allege in their pleadings.

49. In theory, the Yang's/CCFL's case appears to be arguable – when one considers the case law applicable, and the statutory scheme which governs the FDB and the manner in which it carries out its functions. However, whether or not the Yangs/CCFL can produce the evidence to substantiate the claim – is another question.

50. One must also consider the possibility that CCFL's business may have failed for other reasons other than any change in the government's position. Certainly, it is arguable that, after three years of operation, CCFL should be self-sustaining and be generaling sufficient cash flow and operate independently of any government "support" – for want of a better term.

CONCLUSION

51. Both the plaintiffs and the defendant bear a fair share of risk in this case – at least in theory. However, this case has languished long enough in Court. The plaintiffs however, do not appear to be committed to seeing that the case is heard pronto. The defendant has applied in the past to strike out the claim. However, the Courts have preferred to give the plaintiff a chance to have their day in Court. The plaintiffs are simply not keen.

52. There is no date available this year to try this case. Recently, this Court has started booking dates in June and July 2024. This case is already fraught with difficulties as it is now. The only option I think open to me is to dismiss the case and order that the parties bear their own costs.

53. Having said that – it is of course still open to the parties to settle outside court.

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Anare Tuilevuka
JUDGE
Lautoka

21 August 2023

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[i] This is noted in **Yang v Fiji Development Bank** [2010] FJHC 447; HBC407.2000L (30 September 2010)

[ii] Inoke J had then reviewed the history of the case as follows:

> [5] The Summons for Directions was filed on 28 June 2001 and the Order was made on 26 September 2001. The matter lay dormant until 17 October 2006 when the solicitors for FDB filed a Notice of Intention to Proceed and served it on the Plaintiffs on 25 October 2006. The Plaintiffs engaged their current solicitors on 26 October 2006. The case did not progress any further until the Court issued an Order 25 rule 9 notice for 7 November 2007 for the parties to show cause why the action should not be struck out for want of prosecution or abuse of process. The parties appeared by counsel and the Master adjourned the matter to 28 February 2008 subject to the Plaintiffs taking further steps by 24 January 2008 failing which the matter would be struck out. On 16 November 2007, the Plaintiffs solicitors filed an application for leave to amend their statement of claim and to consolidate this action with two other actions **HBC 96 of 2001** and **HBC 68 of 2000** involving the same transactions and parties. The application was called on 11 December 2007 before Master Udit who adjourned it to 26 February 2008. The application was further adjourned for hearing on 13 March 2008. The hearing was adjourned to 10 April. The Plaintiffs filed their amended Statement of Claim on 3 April 2008. The new amendments were essentially further particulars of alleged fraud and bad faith on the part of the bank. On 10 April 2008, the Master gave leave for the Defendants to file their Defences to the Amended Claim. The First Defendant filed its Defence on 2 May 2008. The matter was further adjourned to 27 May 2008. Another adjournment to 12 June 2008 followed for the parties to appear before the Master for Pre-trial conference. The Master gave further directions on 12 June 2008 and adjourned the matter to the Deputy Registrar for mention on 2 July. The Deputy Registrar after hearing counsel for the Plaintiffs gave him more time to complete the Pre-trial steps and remitted the matter back to the Master for mention on 13 August 2008. On the Plaintiff's further summons for directions heard on 23 July 2008 further orders were made for completion of the Pre-trial steps and the matter adjourned to 7 October 2008 for review and directions by the Master. On 13 August 2008, the Master ordered the Defendants for file and serve their lists of documents and adjourned the matter to 10 September 2008. The Master then further adjourned the matter to 13 October 2008, then to 15 October on which date counsel for the Plaintiffs did not appear. The Master was not impressed by counsel's failure to appear and made the guillotine order that is the subject of this application.

[6] Master Udit's order of 15 October 2008 was:

1. The Plaintiffs do pay a sum of $1200.00 to the First Defendant as costs for today's wasted fixture and such payment is to be made by 30th October 2008.
2. The Plaintiffs Solicitor do file Pre-Trial Minutes by 3rd November 2008. However, the Plaintiffs Solicitor will not be entitled to file the Minutes unless the costs of $1200.00 as ordered above is paid by 30th October 2008. It is further ordered that unless the Plaintiffs Solicitor files the Pre-Trial Conference Minutes by 3rd November 2008 this case is to be struck out with further costs against the Plaintiff in the sum of $3000.00.
3. In the event that this case is struck out for non compliance by the Plaintiffs Solicitor of the orders made above the Registry is ordered not to accept any application for reinstatement unless the total costs have been paid by the Plaintiffs.