IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 17 of 2020

BETWEEN: **FIJI DEVELOPMENT BANK** a body corporate duly instituted under the Fiji Development Act and having its principal office at 360 Victoria Parade, Suva in Fiji

PLAINTIFF

AND: **MOHAMMED NAZIM a.k.a NAZIM MOHAMMED, MOHAMMED NAEEM KHAN, FARIDA BI, RIZWANA FARINA KHAN** all of Vunimoli, Labasa, Businessman and Guarantor and **MOHAMMED WASIF KHAN** of Mangere Road, Otahuhu, Auckland, New Zealand, Businessman and Guarantor

1st DEFENDANTS

AND: **VUNIMOLI HIRE SERVICES LIMITED** a limited liability Company having its registered office at Abdul Munaf Building, Nanuku Street, Labasa

2nd DEFENDANTS

For the Plaintiff: **Mr. R. Dayal**
For the Defendants: **Mr. S. Sharma**

Date of Trial: **26th April 2023**
Date of Judgment: **17th February 2026**

JUDGMENT

1. This is the judgment on an action instituted by Writ issued by the High Court in Labasa on the 4th of May 2020. The Plaintiff filed a Statement of Claim originally with the Writ and later filed an Amended Statement of Claim on the 19th of May 2021.

The Parties

2. The Plaintiff is a body corporate duly constituted under the Fiji Development Bank Act and having its principal office at 360 Victoria Parade, Suva, Fiji.

3. The 1st Defendants individually are the guarantors of Vunimoli Hire Services Limited, a customer of the Plaintiff.

4. The 2nd Defendant is a limited liability Company having its principal place of business at Abdul Munaf Building, Nanuku Street, Labasa.

The cause of action

5. On the 26th of March 2018, the Plaintiff at the request of the Company, Vunimoli Hire Services Ltd, approved the advancement of a loan under Account 451222 in the sum of $489, 191 (four hundred eighty-nine thousand one hundred ninety-one dollars) for the purpose of refinancing the Company's debt with Australia and New Zealand Bank, Merchant Finance and Home Finance Corporation.

6. Vunimoli Hire Services executed a Loan Offer letter dated 6th March 2018 thus agreeing to pledge the securities required by the Bank to secure the approved loan of $489. 191.

7. The interest of the said loan was fixed at 10.25% per annum with a default interest of 2% over and above the current interest rate.

8. The loan facility was secured by the following securities: -

   a) Bill of Sale registered over: -

      i. One only D6 Caterpillar Bulldozer registration number FY 067
      ii. One only D6 Caterpillar Bulldozer registration number HE 384
      iii. One only Komatsu Excavator registration number HK 435
      iv. One only Komatsu Excavator registration number HE 788
      v. One only Toyota Landcruiser registration number HV 551
      vi. One only Toyota Landcruiser registration number HV 829
      vii. One only Ford Dual Cab registration number IQ 013
      viii. One only Nissan 10-wheeler truck registration number DS 235
      ix. One only 10-wheeler Nissan truck registration number DC 969

x. One only D6 Caterpillar Bulldozer registration number HD 698
xi. One only Hitachi Excavator registration number HV 9531 D6 Caterpillar

b) Personal Guarantee by Directors for total liability
c) Assignment over contract proceedings to be received from Fiji Forest Industries Limited and Valebasoga Tropik Boards Limited; and
d) Adequate insurance cover over the vehicles with the Bank's interest noted thereon.

9. The Defendants executed a Guarantee on 16th April 2018, undertaking that in the event that the Company does not perform any obligation or pay money due to the Plaintiff as required under the loan agreement, the Defendants will perform the obligations required including paying the debt owed to the Plaintiff by the Company.

10. The Company, as agreed under the terms of the loan, is required to make a monthly payment of $10, 700 (ten thousand seven hundred dollars) over 5 years after the disbursement of the funds.

11. The Company has defaulted these monthly payments and were issued with arrears notices on the following dates – 4th April 2019; 25th April 2019; 3rd May 2019; 5th July 2019; 1st November 2019; 18th November 2019; and 4th March 2020.

12. The Plaintiff has opted to exercise its rights under the loan agreement by pursuing the Guarantors as well as attempting to repossess the vehicles listed as security under the Bill of Sale.

13. The Plaintiff pleads that, out of the 11 vehicles that were listed as security in the Bill of Sale, 1 D6 Caterpillar Bulldozer registration number FY 067 was burnt, details of incident known only to the company and Defendants. 2 Komatsu Excavators registration number HK 435 and HE 788 were sold by the company without the Plaintiff's consent and with the Plaintiff's charge intact.

14. The Plaintiff has had trouble in repossessing and selling the remaining securities hence the Plaintiff is now pursuing the Defendants as Guarantors to clear the outstanding debt balance owed by the Company.

15. The Plaintiff now requires the Defendants as Guarantors to clear the remaining outstanding amounts still owing under the loan account.

16. Despite the demands made to the Defendants as Guarantors to clear the outstanding amount, the sum of $373, 754.90 (three hundred seventy-three thousand seven hundred fifty-four dollars ninety cents) remains outstanding and payable.

17. The Plaintiff therefore seeks judgment in the sum of $373, 754.90 (three hundred seventy-three thousand dollars, seven hundred and fifty-four dollars ninety cents) to be jointly and severally paid by the Defendants.

18. The Plaintiff also submits that the Defendants jointly and severally to pay interest on the judgment sum and to pay the costs of these proceedings.

19. The Writ was issued and served on the Defendants and the Defendants filed a Statement of Defence on the 4th of June 2020.

20. Later, the Defendants sought and were granted leave to amend their Statement of Defence on the 27th of November 2020 and they filed their Amended Statement of Defence on the 1st of December 2020.

<u>The Statement of Defence, as amended</u>

21. The Defendants admit that they were guarantors on behalf of Vunimoli Hire Services, although they deny that they were ever customers of the Plaintiff.

22. The Defendants further contend that they were not aware of the arrangement between Vunimoli Hire Services Limited and the Plaintiff.

23. The Defendants further submit that the Company, Vunimoli Hire Services was not named as a party, therefore it was improper and invalid to specifically plead matters in relation to companies without any valid resolution of the members. The pleadings are incorrectly pleaded, nonsensical as pleaded, incomplete and inaccurate. The offer letter was issued to the Company and it was accepted by the Company.

24. The Defendants state that if the Plaintiff has suffered losses or damages then it is solely due to the conduct of the Plaintiff who has either partially or wholly contributed to its losses and damages by not properly securing the loan.

25. The Defendants contend that the Plaintiff has been negligent as follows: -

    a) Failing to properly register the Bill of Sale within 21 days as provided under the Bill of Sale Act

    b) Consenting and approving the Agreement between Vunimoli Hire Services Limited and AR Quarry and Concrete Limited.

    c) Failing to execute fresh Bill of Sale documents with AR Quarry's and Concrete Limited before releasing the fleets and vehicles to AR Quarry.

    d) Failing to carry out the valuation for fleets and vehicle before handing over to AR Quarry and Concrete Limited.

    e) Failing to provide an opportunity to Vunimoli Hire Services Limited or the Defendants to redeem the mortgage.

26. The Defendants only admit executing some documents inside the Plaintiff's Office. They submit that they were not accorded with the right to seek independent legal advice before signing the documents.

Counterclaim

27. The Defendants plead that sometime early in 2020, Vunimoli Hire Services Limited entered into an agreement with AR Quarry & Concrete Limited whereby Vunimoli Hire Services agreed to sell the fleet in consideration for $401, 847.80 (four hundred and one thousand eight hundred and forty-seven dollars eighty cents.)

28. The agreement further provided that AR Quarry & Concrete Limited will pay the first payment to the Plaintiff in the sum of $35, 000 on or before March 2020 and another $35, 000 on or before April 2020 to the Plaintiff's account 45122.

29. In accordance with the Agreement AR Quarry & Concrete Limited paid the Plaintiff $35, 000.

30. On or about 25th February 2020 the Plaintiff acknowledged the dealing in writing and accepted the payment of $35, 000 from AR Quarry & Concrete.

31. The Defendant submits that the Plaintiff seized the goods and chattels secured by the Plaintiff under the Bill of Sale from the Defendant and released the keys to AR Quarry & Concrete Limited without properly consulting the Defendants.

32. On the 16th of April 2018 the Plaintiff and the 2nd Defendant executed the Bill of Sale instrument however the same was not registered in accordance with section 3, 7 and 8 of the Bill of Sale Act.

33. The Defendants state that the unregistered Bill of Sale was void and fraudulent thus rendered unenforceable in law.

34. On or about 21st day of February 2020 after the acceptance of the offer from the 2nd Defendant and AR Quarry's Limited the Plaintiff wrote to the 2nd Defendant and AR Quarry's Limited for the payment of $35, 000 due owing by AR Quarry & Concrete Limited.

35. The Defendants entrusted the Plaintiff after the Plaintiff accepted the agreement and therein after the Defendant agreed to hand over the fleets and assets to AR Quarry Limited.

36. The Plaintiff as a bank was under a fiduciary duty to the Defendants to disclose all issues regarding the transfer of fleets and vehicle to AR Quarry & Concrete Limited and further the Plaintiff was under a duty to discharge the Defendants from any loan or guarantee or any form of legal obligation after the bank accepted the payment from AR Quarry Limited.

37. The Defendant further allege that the Plaintiff breached its fiduciary duty as follows: -

i. Failing to obtain written consent from the Defendants before handing over the keys and vehicles to AR Quarry & Concrete Limited.

ii. Failing to advise the Defendants to advice or to take over or hand over the fleets and vehicles that was seized from AR Quarry & Concrete Limited.

iii. Failing to advise the Defendants what the breaches were by AR Quarry & Concrete Limited.

iv. Failing to serve a seizure notice on the Defendant before seizing the fleets and vehicles before handing over to AR Quarry & Concrete Limited.

v. Failing to carry out a fair valuation of the fleets and vehicles before handing over to AR Quarry & Concrete Limited.

vi. Failing to carry out a fair valuation to obtain the true market value of the fleets and vehicles before it was said.

vii. Failing to give an opportunity to the 2nd Defendant to redeem the mortgage.

viii. That prior to the handing over the fleets and vehicles to AR Quarry & Concrete Limited, the 2nd Defendant was making a profit at minimum rate of $3, 000 per month and the Defendant is suffering loss of earnings at that date from the date of handing over of the fleet and vehicles to AR Quarry & Concrete Limited to date.

ix. Due to the actions of the Plaintiff the Defendants were greatly injured in their credit character and reputation and they suffered considerable mental stress and anguish, and they were put to considerable trouble inconvenience anxiety and expense, and they have been greatly injured of their reputation, and they have thereby suffered losses and damages.

x. Due to the conduct of the Plaintiff of filing premature and vexatious claim without disclosing material facts, the Defendants have suffered losses in the form of legal costs amounting to $30, 000.

xi. The 2nd Defendant also suffered emotional distress and trauma due to the conduct of the Plaintiff for the breach of the Plaintiff's fiduciary duty.

38. The Defendants therefore prays that the claim be struck out and dismissed with costs on solicitor client indemnity basis.

39. By way of counterclaim, the Defendants claim the following from the Plaintiff: -

i. General damages amounting to $1, 000, 000
ii. Special damages in the sum of $30, 000
iii. Exemplary damages
iv. Punitive damages
v. Interest

40. The Plaintiff then filed the Reply to Amended Statement of Defence and Defence to Counterclaim.

41. The Defendant then filed the Reply to Defence to Counterclaim.

42. The parties then attended to discovery and Pre Trial Conference.

43. The following facts are agreed by the parties: -

a) The Plaintiff is a body corporate duly constituted under the Fiji Development Bank Act and having its principal office at 360 Victoria Parade, Suva, Fiji.

b) The 2nd Defendant is a limited liability Company having its principal place of business at Abdul Munaf Building, Nanuku Street, Labasa.

c) On the 6th of March 2018 the Plaintiff, at the request of the Company approved the advance of a loan under account 451222 in the sum of $489, 191 for the purpose of refinancing the Company's debt with the ANZ Bank, Merchant Finance and Home Finance Corporation.

d) The Company executed a Loan Offer letter dated 6th March 2018, thus agreeing to pledge the securities required by the Bank to secure the approved loan of $489, 191.

e) The interest for the said loan was fixed at 10.25 % per annum with a default interest of 2% per annum over and above the current interest rate.

f) The Company as agreed under the terms of the loan was required to make a monthly payment of $10, 700 over 5 years after disbursement of loan funds.

g) AR Quarry & Concrete Limited paid $35, 000 on behalf of the Defendants after this case was instituted in Court.

44. The parties have identified 41 issues in dispute.

45. The matter was fixed for Trial on the 26th day of April 2023.

The Trial

46. At the Trial both parties called one witness each and they also tendered their bundles of documents.

The case for the Plaintiff

47. The Plaintiff called Niyaz Nazeel Shah, Senior Relationship and Sales Officer, Fiji Development Bank, residing in Covata Housing, Labasa.

48. He tendered the following documents into evidence: -

i. Exhibit 1 – FDB Loan Offer letter to Vunimoli Hire Services dated 6th of March 2018 for $489, 191

ii. Exhibit 2 – Bill of Sale executed on 16th April 2018 by Vunimoli Hire Services in favour of FDB.

iii. Exhibit 3 – Security Agreement between FDB and Vunimoli Hire Services executed on 2nd August 2019

iv. Exhibit 4 – Notice of Prior Transaction

v. Exhibit 5 – Account Statement for Account Number 451222 as at 24th August 2021.

vi. Exhibit 6 – LTA Registration

vii. Exhibit 7 – FDB Arrears Notice to Vunimoli Hire Services dated 5th July 2019

viii. Exhibit 8 – Demand Letter dated 2nd June 2020 from FDB to Vunimoli Hire Services

ix. Exhibit 9 – Demand letter dated 2nd June 2020 from FDB to the 1st Defendants

x. Exhibit 10 – FDB Letter of Instruction to the Bailiff dated 2nd June 2020

xi. Exhibit 11 – Seizure Report by bailiff dated 4th June 2020

xii. Exhibit 12 – Affidavit of service dated 8th June 2020

xiii. Exhibit 13 – Letter of Demand by FDB to AR Quarry Pte Limited dated 11th May 2020

xiv. Exhibit 14 – Letter of Demand by FDB to AR Quarry Pte Limited dated 25th May 2020

xv. Exhibit 15 – Letter of Demand by FDB to AR Quarry Pte Limited dated 17th August 2020

49. In his evidence, Mr. Niyaz Nazeel Shah testified that he has worked for the Plaintiff for 6 years and he joined the Bank as a Loans Officer and he has recently been promoted to Senior Relationship and Sales Officer.

50. He confirmed that the Company directors had made loan inquiry in early January and February 2018 to refinance their company loans. The loan application was approved in March 16 2018.

51. The principal borrower was the Company Vunimoli Hire Services Limited and the Bank sent the offer letter to the Company to refinance and consolidate their existing loan to three financial institutions namely Merchant Finance, Home Finance and

ANZ Bank. The Company, in total, owed these three financial institutions the total sum of $489. 191.

52. The Plaintiff offered the Company the principal sum of $489. 191 to be repaid in monthly instalments of $10, 700 with a term of 5 years. The Company provided a list of 11 vehicles that secured the loan and the Company was also responsible for insuring all of these securities. The first payment was due on the 30th of April 2018 and the interest levied was 10.25% per annum, variable at the discretion of the Bank

53. In addition to the securities offered by the Company, the Plaintiff Bank also required that the Company execute a Guarantee, and the Company offered the following guarantors Mohammed Nazim (Managing Director); Farida Bi (Director); Mohammed Naeem Khan (Director); Rizwana Farina Khan; and Mohammed Wasif Khan. These guarantors signed joint and separate guarantees for the loan.

54. The Plaintiffs also prepared a Bill of Sale for the sum of $489, 191 secured by the 11 vehicles set out as follows: -

    i. One only D6 Caterpillar Bulldozer registration number FY 067
    ii. One only D6 Caterpillar Bulldozer registration number HE 384
    iii. One only Komatsu Excavator registration number HK 435
    iv. One only Komatsu Excavator registration number HE 788
    v. One only Toyota Landcruiser registration number HV 551
    vi. One only Toyota Landcruiser registration number HV 829
    vii. One only Ford Dual Cab registration number IQ 013
    viii. One only Nissan 10-wheeler truck registration number DS 235
    ix. One only 10-wheeler Nissan truck registration number DC 969
    x. One only D6 Caterpillar Bulldozer registration number HD 698
    xi. One only Hitachi Excavator registration number HV 9531 D6 Caterpillar

55. The Bill of Sale was duly registered and the registration also meant that the Land Transport Authority could not transfer the secured vehicles without the Bank's permission.

56. The procedure with the Bank is that once all the security documents have been duly registered in the Personal Properties Securities Registry, then the funds are drawn down. In this instance the first payment was made on the 2nd of May 2018.

The Bank made separate payments to the three financial institutions that had lent monies to the Defendants. Under the terms of the refinancing, the Defendants' first installment was due in June 2018.

57. The Defendants made the initial instalment in May and despite missing the next installment in June, continued payments, even though at times they were not paying the full installment of $10, 700 and there were shortfalls. As soon as the account went into arrears, the Plaintiff sent Arrears Notices to the Company as the principal borrower, however the account soon fell into arrears.

58. The last payment made by the Defendant Company was in March 2019, a sum of $3, 700. As the Defendant continued to default in payments, the Plaintiff issued a formal Demand Notice and a Seizure Notice to their bailiff, Mr. Jeremaia Nasau to repossess the vehicles offered as security.

59. Mr. Nasau, the bailiff was unable to seize all of the vehicles as two excavators, registration numbers HQ 435 and HE 788 had apparently been sold to another company based in Savusavu. When the bailiff attempted to seize these two excavators, the company, AR Quarry resisted attempts to seize the vehicles and these vehicles to date remain with this Company. The sale by the Defendant to AR Quarry was done without the Bank's knowledge or consent.

60. Another vehicle, a DC Caterpillar bulldozer registration number FY 067 had also burned down so these three items were unable to be repossessed. For the remaining 8 securities, they were seized and kept in their yard and they have been sold under mortgagee sale.

61. For the two excavators, it transpired that the Company, Vunimoli Hire Services had made an arrangement with AR Quarry to sell them the two excavators and AR Quarry would make the payments to the Plaintiff bank. AR Quarry made two payments – 25th March 2020 - $35, 000 and on the 26th March 2020 - $35, 000.

62. After accounting for the sale of the securities that had been repossessed and the two payments made by AR Quarry, the Defendant Company Vunimoli Hire Services owes the Plaintiff $373, 754.90 inclusive of interest and costs. This amount was

owed by Vunimoli Hire Services, and if they were unable to pay, then the Guarantors, the 1st Defendants were liable to pay the whole amount.

63. He also confirmed that the securities were sold for $49, 000 and this amount was credited to the Defendant's loan account.

64. In cross examination by counsel for the 1st defendants the Plaintiff's only witness advised that the Guarantee was not signed in front of bank officers and that the guarantee document was given to the Directors to get independent legal advice and sign the same and return it to the Bank.

65. With the Bill of Sale, the witness advised that he Registration of the same was now done online and it was now called Personal Property Security Registration (PPSR). The security document was executed by the Bank and the Directors.

66. Further under cross examination, the witness confirmed that their former Seaqaqa Branch Manager Josese Veisako was aware of the arrangement between AR Quarry and Vunimoli Hire Services. Although there was reference to a release letter, the witness could not provide the same in Court.

67. The witness also confirmed that the Bank accepted the payment from AR Quarry and the two payments made were credited to the loan account. The witness also confirmed that the guarantors were not informed of this arrangement.

68. Under cross examination, the witness admitted that 7 out of the 11 securities were seized by the Bank. The witness also confirmed that the Bank gave letters to the Defendant offering them the opportunity to redeem the mortgage, however he could not provide the letters in Court. He later clarified that the sale of these seized securities was credited to the loans Account and this is reflected in the Statement.

69. The witness also admitted in cross examination that even though the arrangement made between the Company and AR Quarry was made without the Bank's knowledge or consent, the Bank decided to accept the payments made by the company for the two excavators in their possession.

70.

71. Counsel in cross examination asked the witness why they did not take legal action against AR Quarry for interfering with its security and he answered that AR Quarry agreed to pay for the securities that they had in their possession. The witness also confirmed that he was not involved in these dealings between Vunimoli Hire and AR Quarry, instead it was Josese Veisako, the Seaqaqa Branch Manager.

72. In re-examination, the witness confirmed that he had not personally dealt with the parties in this case although he had the official documents related to this case. He also clarified that the Bank did not consent to the arrangement between AR Quarry and Vunimoli Hire Services.

73. The Defendant did not call any witnesses but tendered the following exhibits through the witness: -

    a) Exhibit D1 – Agreement between Vunimoli Hire Services and AR Quarry and Concrete Limited

    b) Exhibit D2 – Bundle of correspondences as follows:

        i. Email dated 24 February 2020 Rizwana Khan (Vunimoli Hire Services) to Josese Veisako (FDB Seaqaqa Branch Manager)

        ii. Email dated 25 February 2020 from Josese Veisako (FDB) to Rizwana Khan (Vunimoli Hire Services)

        iii. Email dated 26 February 2020 Josese Veisako to Rizwana Khan

        iv. Email dated 26 February 2020 from Rizwana Khan to Josese Veisako

74. The parties have subsequently filed submissions for which the Court is grateful, and the matter is adjourned for judgment.

Analysis

75. The Plaintiff is seeking judgment in the sum of $373, 754.90 (three hundred seventy-three thousand dollars, seven hundred and fifty-four dollars ninety cents) to be jointly and severally paid by the Defendants.

76. The first Defendants are sued as Guarantors for the second Defendants who are the principal borrowers.

77. An issue that was raised in the pleadings and through cross examination is that the Bill of Sale was not registered in time therefore it is invalid and unenforceable.

78. The Bills of Sale Act, Cap 225 was repealed on 31st May 2019, and it was replaced by the Personal Property Securities Act 2017, which came into force on the 1st of August 2020.

79. Section 69 (1) of the Act establishes the Personal Property Securities Registry, which provides: -

> **"Personal Property Securities Registry**
>
> **69 (1)** A Personal Property Securities Registry is established to receive, index, store and retrieve notices by electronic means delivered by secured parties and execution creditors, and to collect authorised fees."

80. The Registry is kept at the Reserve Bank of Fiji by virtue of Regulation 3 of the Personal Property Securities Regulations 2019.

81. At the Trial the witness confirmed that the securities had indeed been registered and referred to the Personal Properties Securities Registry (PPSR) where the Bill of Sale was registered. Unlike the repealed Bill of Sales Act, there does not appear to be a time frame to register the security in the PPSR.

82. The Court therefore finds that the security is valid for the purposes of the loan.

83. From the evidence of the witness at the Trial and from the Statement of the Loan by Vunimoli Hire Services, the amount owed to the Bank is $373, 754.90.

84. The Defendants dispute his amount on the basis that the Bank has not seized all the secured vehicles and realised the value first before instituting this action (FDB vs Hauset Development Co Ltd [2022] FJHC 55.)

85. This position was enhanced somewhat at the Trial since the witness was not able to provide direct evidence on the repossession of the secured vehicles, the mortgagee sale process and the proceeds from the same. The witness only cited the Account Statement which recorded that the total proceeds from the sale of the securities was $49, 000 however he could not give details for the same.

86. In FDB vs Singh [2007] FJHC 137, the Defendants in this case had pleaded that the security was undervalued. In the analysis the Court stated: -

> "[22] Here, the defendants pleaded that the truck was sold at a grossly under-valued price. In addition, it is contended that they had a buyer, who was willing to pay a sum of $60,000-00. I have great difficulties with these for two reasons. Firstly, the value of truck when it was purchased was only $68,000-00, in August 1999. It was re-possessed and sold two years later. Was it really worth $60,000-00? Whether it was possible to receive any genuine offer for that sum considering the innate depreciation? Even if it was so, why did they allow the truck to be re-possessed? It could easily have been sold in consultation with Bank. Secondly, if there was an offer, why was it not communicated to the bank? Generally, the defendants kept all communication in writing. This could have even been communicated, even at the later stages leading up to but prior to the acceptance of the tenders. Until the tender was accepted the defendants' could still have redeemed by paying the money. But, there is no such evidence. No reference to this was made in any correspondence, even after the truck was sold. At least two letters *(annexure "Q" and "S")* were written to the bank by the defendant. From the letter of 27th August, 2002 a clear inference to the contrary may be drawn. In it, one of the defendants' stated that he was in the process of obtaining quotation from 10 different motor vehicle dealers to ascertain the real market value of the truck. At best, an inference which can be drawn is that this *ex-post facto* argument is the last attempt to evade their obligation.
>
> [23] In any event, the Bank received five tenders ranging from $22,000-00 to $28,000-00. Eventually, it was sold to the highest bidder for $28,000-00. From the evidence adduced, I am satisfied that the bank had done all that it could do at its disposal to obtain the best market price for the truck. In doing so it has not breached its duty as a mortgagee; ***Cuckmere Brick Co. Ltd. -v- Mutual Finance*** (1971) Ch. 949."

87. In Merchant Finance Ltd vs Daily Logistics & Freight (Fiji) Limited [2020] FJHC 688, HBC 190 of 2018 (21 August 2020) the High Court discussed the obligations

on a creditor repossessing securities pursuant to their rights as mortgagees as follows: -

"87. In a recent UK case *Close Brothers Ltd v AIS (Marine) 2 Ltd and another* [2018] EWHC 4061 (Admlty); [2018] All ER (D) 41 (Sep) the law relating to mortgagee's obligations towards assets taken in to possession was summarised as follows;

> "12. It is, I think, helpful to consider the relevant principles applying the relationship between a mortgagee and mortgagor with respect to the sale of property of which a mortgagee has taken possession in the exercise of its rights under the mortgage deed. At the hearing for summary judgment Mr. Rivalland submitted and I accepted that the relevant authorities demonstrate the following:
>
> a. The mortgagee of a ship owes the same duty of care in relation to the sale as any other mortgagee owes, see *Gulf and Fraser Fisherman's Union v Calm C Fish Ltd* [1975] I Lloyds Rep 188.
> b. The mortgagee owes a duty in equity to take reasonable care to obtain the best price reasonably obtainable at the time, see *Tse Kwong Lam v Wong Chit Sen* [1983] UKPC 28; [1983] 1 WLR 1349 at 1355 and others, which has been equated with the true market value *Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949.
> c. Although the timing and the manner of sale is a matter for the mortgagee, he will be liable to the mortgagor if he fails to act with reasonable care to obtain a proper price. The property must be fairly and properly exposed to the market, absent cases of real urgency, see *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409.
> d. The mortgagee will not be adjudged to be in default unless he is "plainly on the wrong side of the line". A true market value can have an acceptable margin of error, *Michael v Miller* [2004] EWCA Civ 282 where a bracket between £1.6 million and £1.9 million was permissible.
> e. The mortgagee must behave as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold, see *McHugh v Union Bank of Canada* [1913] UKLawRpAC 7; [1913] AC 299. (Cases predating McHugh are to be treated with caution for the reasons that appear in Cousins The Law of Mortgages 3rd ed. at 26-52ff).
> f. If the mortgagee breaches his duty, the remedy is not common law damages, but an order that the mortgagee account to the mortgagor, not for what he actually received, but what he should have received.
> g. The mortgagee must act fairly towards the mortgagor. He can protect his own interests but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. He must take reasonable care to maximise his return from the property, *Palk v Mortgage Services Funding plc* [1993] Ch 330.
> h. The mortgagee owes the same duty to a guarantor, *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410; *China and Southsea Bank Ltd v Tan* [1989] UKPC 38; [1990] 1 AC 536.
> i. The mortgagee's duty, to take care to sell for the best price reasonably obtainable, is not delegable. He does not perform his duty merely by appointing a reputable agent to conduct the sale, see *Raja v Austin Gray* [2002] EWCA Civ 1965 at [34].

j. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off the debt": Lightman J sitting in the Court of Appeal in *Silven Properties*.

k. A sale at just above the sum required to discharge the mortgage may be looked at carefully by the court, although there may well be occasions when that is the proper price or true market value, as suggested by Fisher and Lightwood's Law of Mortgage at 30.254.

l. The mortgagee cannot sell to himself, either alone or with others, or to a trustee for himself, nor to anyone employed by him to conduct the sale unless the sale is ordered by the court and he has obtained permission to bid, *Farrar v Farrars Ltd* [1888] UKLawRpCh 209; (1888) 40 ChD 395 at 409, and

m. Where the mortgagee sells to a "connected" person, the burden of proof is reversed and the mortgagee must prove that he took reasonable care to obtain the best price, *Saltri III Ltd v MD Mezzanine SA Sicar & ors* [2012] EWHC 3025.

n. The reason for considering whether the mortgagee and the purchaser are or may be "connected" is the need to guard against unconscious bias as well as the risk of other forms of skulduggery, Australia & New Zealand Banking Bangadilly [1978] HCA 21; (1978) 139 CLR 195, quoted with approval in *Alpstream AG & ors v PK AirFinance SARL & ors* [2013] EWHC 2370."(emphasis added)"

88. Under the above authority the Plaintiff has tendered evidence that the securities that were able to be repossessed were sold for $49, 000. Sales were made through tender and the proceeds were credited to the loan Account, reducing the balance.

89. The Defendant did not offer any evidence even though they had pleaded in the counterclaim that the Plaintiff did not get full value for the seized securities.

90. The Plaintiff's evidence is therefore unchallenged and the Court accepts that the repossessed securities that were sold were realised at the "best price reasonably available" at the time.

91. The Defendants also pleaded that the Guarantors (the first Defendants) have been discharged due to the arrangement between Vunimoli Hire Services and AR Quarry Limited. The evidence led at the Trial shows has established that not only did the Bank know of this arrangement but that the Seaqaqa Branch Manager did approve and facilitate the same.

92. Guarantees are dealt with in the Indemnity Guarantee and Bailment Act 1881 and for the purposes of these submissions, the relevant sections are 11, 12 and 13, which provide as follows: -

> **"Discharge of surety by variance in terms of contract**
>
> **11** Any variance made without the surety's consent in the terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance."
>
> **Discharge of surety by release or discharge of principal debtor**
>
> **12** The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor.
>
> **Discharge of surety when creditor compounds with principal debtor etc**
>
> **13** A contract between the creditor and the principal debtor by which the creditor makes a composition with or promises to give time to or not to sue the principal debtor discharges the surety unless the surety assents to such contract."

93. In the case of Carpenters Fiji Ltd vs Singh [2007] FJHC 30, the High Court discussed the above provisions as follows: -

> "[8] It is an established principle that any substantial departure made by a creditor without the surety's consent from the terms of the principal contract will discharge the surety because it makes an alteration in the surety's obligations: ***Holme v. Brunskill*** [1877] UKLawRpKQB 74; 1878 3 QBD 495 at 505. This principle was approved by the Privy Council in Egbert v. ***National Crown Bank*** (1918) AC 903 at 908. Volume 20 of Halsbury's Laws of England 4th edition paragraph 253 states that
>
> > *"Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed".*
>
> [9] This principle of law has been given statutory effect in Section 11 of the Indemnity Guarantee and Bailment Act. The discharge of surety by variance in terms of the contract is provided for by Section 11. The section provides
>
> > *"Any variance made without the surety's consent in the terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance." (underlining is mine for emphasis)*
>
> The rationale behind this principle is that a guarantor is responsible only for the obligations which he has guaranteed. Therefore if the principal debtor and the creditor

without the guarantor's consent agree between themselves to alter the nature of the obligation the guarantor is discharged because the obligation in its altered form is not what he guaranteed: Hancock v. Williams (1942) SR (NSW) 252, 255."

94. The evidence led at the Trial establishes that the Company (second Defendant) entered into a separate arrangement with AR Quarry Ltd, a third party to the loan, over 2 vehicles which were initially offered as securities for the loan with the Bank.

95. There is evidence that the Bank was aware of this agreement and facilitated the same in writing and also by releasing keys to the second Defendant.

96. The Defendants have lodged a counterclaim on two limbs as follows: -

    i. That the Bill of Sale is not registered in time therefore it is void and unenforceable.

    ii. The Defendants had entered into an agreement with AR Quarry Ltd and the Bank facilitated this going to the extent of releasing keys to a third Party – AR Quarry and in doing so breached their fiduciary duty.

97. The above issues have been decided above – the PSPR records have the details of this security therefore the security document have been duly registered and are enforceable.

98. With respect to the arrangements between the Defendants and the third-party AR Quarries, the evidence established that the Defendants and at least 3 out of the 4 guarantors (who are Directors of the 2nd Defendant) were aware of the arrangements and by their words and actions, consented to the same but there is nothing in the evidence that this arrangement between the Company and AR Quarry was consented to by all the Guarantors. This agreement by the Directors of the Company with a Third Party endorsed by the Plaintiff constitutes a "variance" as contemplated by the above Act and discharges the guarantors from any further liability.

99. The counterclaim therefore succeeds in part – in that the Guarantors are all discharged from liability for the loan entered into by Vunimoli Hire Services.

100. The claim before this Court is very clear, the amount claimed is $373, 754.90. The Court finds that the Plaintiff has established that the sum is due and payable by the 2nd Defendant Vunimoli Hire Services Ltd.

101. The 1st Defendants – are discharged from any liability and are not liable for the sum of $373, 754.90 owed by the Principal Debtor – Vunimoli Hire Services Ltd.

102. The parties have incurred costs in this litigation and as costs follow the cause I find that the Defendants are entitled to costs, summarily assessed at $1, 000.

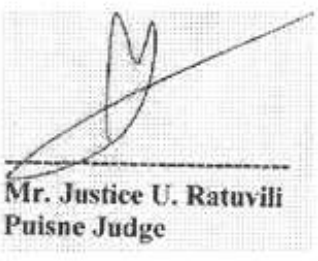
<u>This is the Judgment of the Court</u>

1. **The claim for the payment of $373, 754.90 by the Guarantors, the 1st Defendants, is refused. The debt is owed by the principal debtor Vunimoli Hire Services Ltd**

2. **The counterclaim is refused.**

3. **The Plaintiff will pay the Defendants' costs summarily assessed at $1, 000, one month to pay.**

There is a right of appeal



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