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

**CIVIL APPEAL NO. ABU 106 OF 2020**
**[Labasa Civil Action No. HBC 054 of 2018]**

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| **BETWEEN** | **:** | **DOANAR INVESTMENTS LTD** |
| | | ***Appellant*** |
| **AND** | **:** | **FIJI NATIONAL UNIVERSITY** |
| | | ***Respondent*** |
| **Coram** | **:** | **Jitoko, P** |
| | **:** | **Jameel, JA** |
| | **:** | **Clark, JA** |
| **Counsel** | **:** | **Mr A Ram for the Appellant** |
| | **:** | **Ms. M Rakai and Mr R Prasad for the Respondent** |
| **Date of Hearing** | **:** | **05 February 2024** |
| **Date of Judgment** | **:** | **29 February 2024** |

# JUDGMENT

**Jitoko, P**

1. I agree with the judgment of Clark, JA and the reasons and orders stated therein.

**Jameel, JA**

2. I have read the draft judgment of Clark, JA and am in agreement with the reasons, conclusions and proposed orders.

**Clark JA**

**Overview**

3. In January 2011 the appellant, Doanar Investments Limited, entered into a tenancy agreement with the respondent, Fiji National University. The tenancy was for a three-year period commencing on 18 November 2010. The respondent, however, terminated the tenancy almost 10 months early leaving the premises vacant and unoccupied for the balance of the tenancy — so the appellant has always maintained.

4. The appellant's efforts to achieve settlement of its claims for unpaid rent and alleged breaches of covenants were unsuccessful. In September 2018 the appellant filed a claim seeking damages for the loss and damage it alleged it had suffered as a result of breaches of the tenancy agreement.

5. The appellant's claim was struck out. In a judgment delivered 16 October 2020, His Honour Lyone Seneviratne concluded the respondent was at liberty to vacate the tenancy before the expiration of the three year period; the appellant was not therefore entitled to claim rent for the balance of the lease period and its other claims were not made out.[1]

6. In its appeal to this Court the appellant argues that the outcome in the High Court was against the weight of evidence especially as the respondent did not challenge the appellant's evidence and tendered no evidence of its own.

**Factual Background**

7. For the purposes of the High Court proceedings the parties signed an Agreed Facts. They are reproduced below. References in the document to "the plaintiff" should be

[1] *Donar Investment Ltd v Fiji National University* [2020] FJHC 852; HBC54.2018 (16 October 2020).

read as references to Doanar Investments Ltd, the appellant in this appeal. Likewise, references to "the defendant" are to Fiji National University, the respondent.

*AGREED FACTS*

1. *THE defendant entered into a tenancy agreement ("Agreement") with plaintiff on the 4th day of January, ,2011 for a period of three (3) years commencing on the 18th day of November, 2010 over the whole of the buildings and improvements erected on the land comprised in the Crown Lease No. 4343 ("the premises").*

2. *THE defendant agreed to pay rent for the premises as follows:*

   *(i) $866.67 plus VAT @ 12.5% being $975.00 for November, 2010;*

   *(ii) $2000.00 plus VAT @ 12.5% being $2250.00 for December, 2010;*

   *(iii) $2000.00 plus VAT @ 15% being $2300.00 till 31st October, 2012;*

   *(iv) $2200.00 plus VAT @ 15% being $2530.00 thereafter.*

3. *WITH the approval of the plaintiff the defendant carried out alterations to adapt the premises to its use pursuant to clause 4 of the Agreement.*

4. *THE defendant obtained the quote of $14979.06 from Jaduram Industries Limited for costs of painting the whole building.*

5. *THE defendant did not paint the exterior and interior of the said building prior to the defendant's occupation.*

6. *THE defendant did not paint the exterior and interior of the said building after vacation.*

7. *NOTICE to vacate was given to the plaintiff on 31st December 2012 effective from 31st January 2013.*

8. *THE defendant vacated the said premises on 31st January 2013. No early termination clause existed in the agreement.*

9. *FROM 31st January 2013 to 17th November 2013 the defendant did not pay any rent to the plaintiff.*

10. *THE plaintiff demurred against the early termination of the tenancy by the defendant for no cause whatsoever.*

*11. <u>DESPITE</u> the protests by the plaintiff the defendant insisted on vacating, vacated the same and left the keys to the premises at the office of Messrs. Gibson & Company, Labasa.*

**The High Court proceedings**

8. The appellant's claim in the High Court was for breach of the Tenancy Agreement. Specifically, the appellant claimed:

    8.1 the respondent had failed to paint the exterior and interior of the building on commencement of the Tenancy Agreement (in breach of cl 15(n) of the Agreement);

    8.2 the respondent wrongfully terminated the Agreement and vacated despite there being no early termination clause; and

    8.3 the respondent failed to paint the building when it vacated the premises (in breach of cl 15(n) of the Agreement); and

    8.4 the respondent failed to reinstate the building to its original condition (in breach of cl 4 of the Agreement).

9. Seneviratne J framed the main issue for determination as whether the respondent breached the Tenancy Agreement by vacating the premises before the expiry of the period of tenancy which was three years. In order to determine that question, His Honour said it was necessary to examine the entire agreement to ascertain the intention of the parties.

10. In its written submissions in the High Court the respondent accepted there was no early termination clause. That acceptance was entirely consistent with the Agreed Facts. The respondent's case in the High Court was that it had given notice under s 89(2) of the Property Law Act 1971. But as the learned Judge identified, s 89(2) applies to leases without a fixed duration. The parties' Tenancy Agreement was for a fixed term of three years. Therefore, the respondent could not rely on s 89(2).

11. His Honour then turned to the "Tenant's Covenants" in the Agreement, clause 15(n) of which provides:

> *The Tenant shall paint the exterior and interior of the said premises in its own colours on or before the commencement of this tenancy. The tenant shall continue to paint the said premises once every three (3) years during the tenant's occupation and upon vacation by the Tenant.* ***The Tenant shall at the expiration or sooner determination of its lease*** *remove at its own expense all lettering and other distinctive marks or signs put by it on any of the doors or other parts of the building and shall make good any damage or disfigurement caused by any such door or other part by reason of such removal. The Tenant shall further paint the building in its original colours before vacating the premises and handing over possession..*
> [The Judge's emphasis]

12. His Honour concluded "sooner determination" of the lease meant the tenant was free to vacate the premises before the expiration of the three-year lease period. Therefore, the appellant was not entitled to claim rent for the balance of the period.

13. The Judge held also that the respondent was not required to paint the building prior to occupation.

14. As for the remaining claims, the Judge was critical of the appellant's evidence that it had spent the amounts claimed.

> *[17] ... there is no evidence as to the nature of the improvement and details of the work done on the property. The plaintiff has failed to tender any evidence to show that it in fact spent the amounts of money claimed in the statement of claim.*
>
> *[18] ... the court needs evidence to ascertain whether the plaintiff spent the amount of money claimed to make orders sought against the defendant. A bare statement that a particular amount of money was spent for the repairs and painting is absolutely insufficient for the court to decide the quantum of damages.*

15. His Honour struck out the appellant's statement of claim.

**Appeal to the Court of Appeal**

16. The appellant advances its appeal to this Court on 14 grounds. I turn first to an important concession made by counsel for the respondent.

17. In written submissions filed for this appeal the respondent sought to uphold the High Court judgment in all respects. In relation to cl 15(n) which the Judge construed as giving a right to terminate before expiry of the three-year lease term. The

respondent's position was that the appellant's ground of challenge to the Judge's determination was "not made out and should be dismissed in its entirety".

18. In the course of the hearing the respondent adopted a different position in relation to the issue of breach. Ms Rakai, counsel for the respondent, conceded there had been a breach of the Tenancy Agreement: the respondent "does not dispute there was a violation of the contract". The respondent agreed to pay damages for the balance of the lease period but it disputed the schedule of claims. Counsel contended it was the appellant's case, the appellant had a responsibility to prove its case yet it could provide no evidence at trial, its witnesses were unhelpful and there was no evidence of the large amounts of money having been spent.

19. Against the backdrop of the appellant's important, if untimely, concession I turn to the grounds of appeal.

***Grounds 1 and 2***

20. The primary issue under the first ground concerns the breach of the Tenancy Agreement and whether cl 15(n) can be construed as giving a right to terminate prior to the expiry of the lease term. In light of the respondent's late concession it is not necessary to dwell on the point except to observe that the learned Judge's conclusion as to the effect of the clause was in error.

21. The phrase "or sooner determination of its lease" is to be understood in the context of other provisions in the Tenancy Agreement. Clause 9 for example provided a renewal option. If the respondent desired to have the lease extended or renewed for a further term then notice to that effect was to be given 90 days prior to the "initial term" ie the term of three years. The renewal term would be upon the same covenants, conditions and provisions as in the Tenancy Agreement. Accordingly, it was perfectly possibly under the Agreement to have an extended period of lease which the tenant could "sooner determine".

22. The lease might also come to an end in the event of non-payment of rent, or bankruptcy, or by mutual agreement. Regardless of whether the respondent vacated at the "expiration or sooner determination of its lease" it was required to perform the obligations it undertook to perform pursuant to its covenants in clause 15. In

particular, it was contractually bound by cl 15(n) to paint the exterior and interior on or before commencement of the tenancy, to continue to paint once every three years, and to further paint before vacating.

23. The respondent breached the Tenancy Agreement by giving notice of early vacation and then vacating some 9½ months before the expiry of the term of its lease.

24. The second ground of appeal concerned the appellant's entitlement to unpaid rent. There is evidence the appellant attempted to mitigate its loss by advertising for new tenants but was unsuccessful. The appellant is entitled to judgment in the sum of $19,203.67 being the rent owed to it from 1 February 2013 to 17 November 2013 at $2,530 per month less $5,000 deposit.

***Grounds 3 4 and 5***

25. The respondent accepted in the Agreed Facts that it did not paint the interior and exterior of the building prior to its occupation, or when it vacated the premises. The respondent was obliged by cl 15(n) to paint the building twice at least, once at the commencement of the tenancy and then on vacating. If the tenancy had been longer the respondent would have been contractually bound to also paint the building every three years. In any event, this aspect of the claim is for the respondent's two breaches of contract.

26. In November 2010 the respondent sought a quote for the cost of painting the interior and exterior of the building. Presumably that was done because the respondent had in mind its obligation to paint inside and out prior to or upon occupation. Jadura Industries Ltd submitted a quote for $14,979.06. That document was tendered in evidence in the High Court. His Honour rejected the evidence for a variety of reasons most particularly, it appears, because there was no evidence that the appellant had actually paid to have the work done.

27. With respect to the learned Judge, requiring evidence of loss in the form of receipts, in the face of the respondent's undisputed breaches of contract was not the correct

approach. The Court of Appeal discussed the approach to contract damages in *Manohan Aluminium & Glass (Fiji) Ltd v Fong Sun Development Ltd:*[2]

> *[19] Whereas in tort, the right to an award of damages would depend on the position of the claimant had the tort not been committed, in awarding damages for breach of contract, it would depend on the position that the claimant would have been in, had the contract not been broken.*
>
> *[20] This proposition reflects the principle of restitutio in integrum and has been followed as far back as 1848. The award of damages for breach of contract is compensatory rather than punitive, and as stated by Parke B is as follows:*
>
> > *"If the plaintiff has suffered damage that is not too remote, he must so far as money can do it, be restored to the position he would have been in had that particular damage not occurred:* ***Robinson v Harman*** *(1848) 1 Exch 850."*

28. The question of what exactly it is that the plaintiff has lost is often a subtle one. Following a breach of contract the innocent party may have a right to restoration of a valuable benefit, (the object being to prevent unjust enrichment); a "reliance interest", namely the right to compensation for loss due to steps being taken by the innocent party in reliance on the contract, and an "expectation interest" namely the right to compensation for the loss of the bargain "the object being to restore the innocent party to the position which he or she would have occupied had the contract been performed."[3]

29. Mr Ram addressed the loss the appellant had suffered: the purpose of requiring a tenant to paint the interior and exterior of the building was a maintenance mechanism. The respondent was in occupation so the appellant could not paint. Under the Tenancy Agreement it was the respondent's obligation to paint. The loss suffered was that the building had not been painted — at either end of the lease. As well, the cost of painting the building was loss suffered.

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2 *Manohan Aluminium & Glass (Fiji) Ltd v Fong Sun Development Ltd* [2018] FJCA 23; ABU00182015 (8 March 2018).

3 Burrows, Finn and Todd on the Law of Contract in New Zealand 7ed 2022, LexisNexis NZ Ltd

30. It is clear that once the breaches of contract were established, as they were on the Agreed Facts alone, the respondent established its entitlement to damages. The question then becomes "how much"? What is the value of the loss suffered because of the breach.

31. The appellant simply claims the cost of painting the building. In my view the claim is an entirely reasonable assessment of the loss suffered as a result of these two particular breaches of contract. There is no elevated claim for example, for damage to the building as a result of not having been painted. Equally reasonable is the monetary value placed on that loss namely the cost of painting the building quoted in 2010 for the respondent. The fact that the quote was for the respondent's purposes enhances the integrity of the claimed *value* of the loss. The appellant cannot be accused of obtaining an inflated quote for its personal benefit. Mr Jaduram, whose company provided the quote in November 2010, gave evidence. He regarded the quote as being "not bad" at that stage especially with the scaffolding. The Judge put the quotes to one side because they were not recent. Mr Jaduram confirmed such quotes would need to be re-priced but costs were more likely to rise not decrease.

32. The appellant has established its entitlement to damages for the two breaches of the contractual obligation to paint the building. I am satisfied the learned Judge erred in requiring proof of the appellant's actual expenditure on painting. A claim for $14,979.06 for each breach represents a fair assessment of the value of the loss in circumstances where the 13-year old quote was prepared for the respondent in the first place and the cost of painting is almost assured to have increased.

33. Damages for the loss of these breaches of the obligation to paint is awarded in the sum of $29,958.12.

***Grounds 5 and 6***

34. The same analysis and reasoning applies to the respondent's failure to reinstate. There is no dispute that the appellant carried out alterations for the purpose of adapting the premises to the respondent's proposed use. As well, the respondent undertook its own renovations creating classrooms and offices for tutors. Under cl 4 of the Tenancy Agreement, the respondent was required to return the premises to

their original state at the respondent's own cost. Clause 4 provides (the bold is mine):

> *[4] The Tenant may prior to the commencement of the said term, and from time to time during the said term, and at its discretion but with the prior written consent of the Landlord make erect or install altercations additions decorations improvements fixtures fitting and appliance within the demised premises for the purpose of its business, provided that such alterations additions decorations improvements fixtures fittings or appliances do not lessen the structural strength of the building and provided further that at the expiry of the tenancy and* ***the tenant shall*** *(unless agreed otherwise by the Landlord in writing)* ***reinstate at their own costs the demised premises to its ORIGINAL state and conditions as it was at the commencement of the Tenancy at their own expense****.*

35. The appellant claims (i) the cost of carrying out the original modifications to meet the respondent's requirements and (ii) the cost of rectifying the premises.

36. As to the cost of rectifying, in April 2018 Mr Jaduram had quoted $15,000 for work to:

> *1. Reinstate 1st floor partitions as previously was*
>
> *2. To make new kitchen to the same detail as was there.*
>
> *3. To repaint internal walls and ceilings.*

37. Mr Jaduram's evidence was that the cost would have increased since 2018 when the quote was prepared.

38. The learned Judge responded to Mr Jaduram's evidence, and the quote, in this way:

> *[18] There is no evidence whatsoever, to show that the plaintiff spent this amount of money for painting and to restore the building to its original condition. The court needs evidence to ascertain whether the plaintiff spent the amount claimed to make orders sought against the defendant.*

39. The damages the appellant claims for breaches of the contract are damages for the natural consequences of the breach. What were those consequences? Twice, the building was not painted when it should have been. As well, the premises were not

restored to their original state. Receipts are not necessary to prove such losses. The losses are apparent. They are the obvious and natural consequence of the respondent's breaches of contract. The appellant's approach to valuing the losses has been to obtain an estimate of the cost of completing what it was the appellant was obliged to complete. That approach in this case produced an entirely reasonable claim for breach of contract damages.

40. The appellant has succeeded on these grounds and is entitled to damages in the sum of $15,000 for the respondent's failure to reinstate the premises.

41. The remaining head of damage does not arise from the appellant's breaches of the Tenancy Agreement. As mentioned at [35] above, the appellant claims for the cost of carrying out the original modifications to meet the respondent's requirements. Mr Lam described these "special works" and the costs incurred in completing them as "unnecessary and only done for the respondent". The basis for the claim is the appellant's expectation in 2011 that the respondent would stay for more than the three-year initial term.

42. Ironically, the claim for $6000, being the cost of improvements to the property for the respondent's benefit, is supported — somewhat — by receipts. I have some sympathy for the Judge at this point because the evidence tendered in support of this claim consists of very poorly photocopied cheque butts, many to a page, barely legible but with handwritten (unsurprisingly) notations that were frequently difficult to match to a typed schedule listing the date of the cheque and the purpose for which it was issued. It was not possible to achieve a perfect reconciliation but the Court was able to match 80 per cent (or thereabouts) of the butts to the description in the schedule. Importantly, all the of the expenditure was within 8 October 2010 and 26 November 2010. These weeks immediately preceded 18 November 2010, the date when the three-year lease term commenced.

43. This claim is not squarely founded on a breach of contract but on expectation damages arising from a breach (although Mr Lam did not characterise it as such). It is founded on the appellant's expectation that the respondent would stay for at least three years "or even longer". The appellant's description of it being "a *common intention* that the tenancy would extend beyond three years" is not made out

although there can be little doubt the appellant held a strong hope of such an extension of the lease. The appellant's dashed hope of such an eventuality is not the same, however, as an expectation legitimately arising from terms in a contract disappointment of which may led to expectation damages.

44. This head of claim is unsuccessful.

**Exemplary damages**

45. Prior to trial, appellant's counsel discovered a typographical error in the statement of claim. A claim for "punitive" damages was typed "pecuniary" damages. The Judge refused an application to amend.

46. Under O.20 rule 5(1) of the High Court Rules an amendment may be allowed "at any stage of the proceedings". The courts frequently allow amendments such as the appellant sought to make where there is no injustice or prejudice to another party. It seems the respondent relied on the fact there had been a two-year delay in making the application to amend rather than upon any prejudice from the amendment.

47. As Bowen LK famously observed in *Cropper v Smith:*[4]

> *… the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases.*
> *…*
>
> *It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.*

48. Even at the stage of an appeal to the Privy Council, proceedings have been permitted to undergo "metamorphoses", the Board and the parties recognising that all issues should be finally resolved in proceedings before the Board.[5]

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4 *Cropper v Smith* (1884) 26 Ch. D. 700 at pp 710-711.

5 *D.J. Butcher v. (1) Petrocorp Exploration Ltd. (2) Petrocorp Exploration (Taranaki) Ltd. (3) Payzone Exploration Ltd. (4) Southern Petroleum No Liability (5) Nomeco New Zealand Exploration Co. (6) Bligh Oil & Minerals (NZ) Ltd. And (7) Carpentaria Exploration Co. (NZ) Ltd. Co (New Zealand)* [1991] UKPC 10 (18 March 1991, p7.

49. It is appropriate that leave be granted to the appellant to amend its statement of claim so that the word "pecuniary" reads "punitive".

50. The appellant claims exemplary damages primarily on the basis of the respondent's conduct following its breach of the Tenancy Agreement. The appellant submits the respondent is "delinquent" with "no respect for its contractual obligations" and that it has engaged in "despicable behaviour".

51. The orthodox view is that punitive or exemplary damages will not be awarded for a breach of contract unless the conduct complained of also amounts to a tort such as deceit, which could of itself justify an award of damages.[6] The policy rationale for the approach is frequently revisited in appellate jurisdictions in Canada, Australia and New Zealand. It is safe to say that currently, awards of exemplary damages are open to serious objection and continue to be discouraged as unnecessary and likely to create uncertainty.[7]

52. Nevertheless, in this case the respondent approached its contractual obligations with a high degree of indifference. Its nonchalant indifference to the breaches that the appellant brought to its attention merits comment.

53. In the Agreed Facts the respondent accepts:

> *The plaintiff demurred against the early termination of the tenancy by the defendant for no cause whatsoever.*
>
> *Despite the protests by the Plaintiff the Defendant insisted on vacating, vacated the same and left the keys to the premises at the office of Messrs Gibson & Company, Labasa.*

54. The respondent gave notice to vacate (prematurely) by way of a simple letter dated 28 December 2012 advising "we would wish to vacate the premises we are renting from your company…As such we hereby give you one-month notice to vacate this premise".

55. The appellant responded in a lengthy letter dated 31 December 2012 pointing out the lack of a termination clause, "categorically" advising that it did not accept the notice

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6 *Addis v Gramophone Ltd* (1909) AC 488; *Ruxley Electronics Ltd v Forsyth* [1996] AC 344.

7 Burrows, Finn and Todd on the Law of Contract in New Zealand 7ed 2022, LexisNexis NZ Ltd, p 850.

of termination and to "make matters worse, upon your request and insistence we have just completed $6,000 worth of renovations/repairs which your Labasa staff are happy with". The letter also reminded the respondent of its several breaches of the Tenancy Agreement to that point.

56. The respondent did not bother to reply.

57. On 31 January 2013 the appellant wrote to the Vice Chancellor of FNU referring to the respondent's attempt to return keys.

> *Before returning keys please advise why you are not complying with the agreement.*
>
> *Also please reply to our letter dated 31 December 2012 before you take any action because your reckless actions may lead to court proceedings.*

58. In July 2015 the appellant wrote to the respondent confirming its willingness to negotiate and settle its outstanding claim and to re-lease the property to the respondent subject to agreeing a suitable new lease. The appellant restated the breaches of the Tenancy Agreement to that point. The appellant set out its detailed claim for $75,000 impressing upon the respondent that "a substantial claim is about to be made on you. It is in your best interests to negotiate a settlement and re-lease the property if need be". If no resolution was forthcoming the appellant advised it would take the matter to court.

59. These types of communications are not uncommon between parties whose contractual relationship has broken down. As to the respondent's conduct, from the documents comprising the court record, the respondent manifested complete indifference to its breaches, the consequence of the breaches for the appellant and the prospect of court proceedings. But that conduct of itself does not attract exemplary damages. Where the appellant appears to have been inexcusably high-handed is in relation to the court proceedings. The concession it finally made in February 2023 as to its breaches should have been made much earlier. Yet again, parties engaged in litigation make strategic choices which can be met with court costs where that is appropriate.

60. After this close review of the respondent's conduct, high-handed and indifferent as it was, I am not satisfied that it reaches the necessary threshold for an award of exemplary damages.

**Result**

61. The appellant's appeal is allowed.

62. The respondent is to pay the appellant the following damages plus interest at 6 percent per annum from 1 February 2013 until the date of this judgment.

63. $19,203.67 for rent owed under the Tenancy Agreement;

64. $29,958.12 damages for the respondent's breaches of its obligations to paint the leased premises;

65. $15,000 damages for the breach of respondent's obligation to restore the premises to their original condition.

66. The following orders are made.

***Orders***

*(i) The appeal is allowed.*

*(ii) The Judgment of the High Court delivered 16 October 2020 is set aside.*

*(iii) The respondent is to pay the appellant damages in the sum of $64,161.79 plus interest at 6 per cent per annum from 1 February 2013 until the date of this judgment.*

*(iv) Costs in the sum of $6,000.00*

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

COURT OF APPEAL FIJI

**Hon. Madam Justice Farzana Jameel**
JUSTICE OF APPEAL

**Hon. Madam Justice Karen Clark**
JUSTICE OF APPEAL