

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

HBC NO.: 251 OF 2019

BETWEEN : **ARIA INVESTMENTS PTE LIMITED** a limited liability company
having its registered office at Unit C4, Port Denarau Retail Centre,
Denarau Island, Fiji.

PLAINTIFF

AND : **DENARAU WATERS PTE LIMITED** (formerly Gulf Investments
(Fiji) Pty Limited) a limited liability company having its registered office
at Unit 01 2A, Commercial Complex, Port Denarau, Nadi, Fiji.

DEFENDANT

Appearances: Mr Ashnil Kumar Narayan with (Ms) Shinaal Shayal Lata for the
plaintiff
No appearance for the defendant

Hearing : Wednesday, 06th November 2019.

Judgment : Friday, 24th January 2020.

JUDGMENT

[A] INTRODUCTION

(01) On 03rd October, 2019 the plaintiff caused a writ of summons, with the statement of claim indorsed, to be issued seeking the following orders;

1. *A declaration that the Defendant's call on the bank guarantee was unlawful and in breach of the agreement dated 26th May, 2016;*
2. *An injunction restraining the Defendant by itself and/or through their servants, agents, authorized officers, directors, partners or otherwise and howsoever from*

dealing with, withdrawing, collecting, assigning, utilizing, dissipating and/or calling the Bank Guarantee provided by the Bank of South Pacific on behalf of the Plaintiff under the agreement dated 26th May, 2016 until the final determination of this action or further order of this Honorable Court;

3. *Special damages in the sum of \$1,117.25 **[ONE THOUSAND ONE HUNDRED SEVENTEEN DOLLARS AND TWENTY FIVE CENTS];***
 4. *General Damages;*
 5. *Interest at the rate 13.5% per annum on the sum of \$1,117.25 **[ONE THOUSAND ONE HUNDRED SEVENTEEN DOLLARS AND TWENTY FIVE CENTS]** and other damages until satisfaction of the amount in full under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act;*
 6. *Aggravated and/or Exemplary damages for breach of contract;*
 7. *Costs of this action on a full Solicitor/Client indemnity basis; and*
 8. *Such further or other relief as the Honorable Court deems fit, just and expedient.*
- (02) On the same day, an application was made ex-parte for restraining orders and the orders were made on the ex-parte summons.
- (03) On 07th October, 2019 the defendant was served with the writ, the ex-parte summons, the affidavit which the director of the plaintiff company had sworn in support of it and the orders made on the ex-parte summons.
- (04) The defendant did not acknowledge service or take any steps to defend the action or in respect of the orders made ex-parte.
- (05) On 06th November, 2019 the plaintiff applied by ex-parte summons for Judgment;
1. *A declaration that the Defendant's call on the bank guarantee was unlawful and in breach of the agreement dated 26th May, 2016;*
 2. *A perpetual injunction restraining the Defendant by itself and/or through their servants, agents, authorized officers, directors, partners or otherwise and howsoever from dealing with, withdrawing, collecting, assigning, utilizing, dissipating and/or calling on the Bank Guarantee provided by the Bank of South Pacific on behalf of the Plaintiff under the agreement dated 26th May, 2016;*

3. *Judgment for Special damages in favor of the Plaintiff in the sum of \$1,117.25 [ONE THOUSAND ONE HUNDRED SEVENTEEN DOLLARS AND TWENTY FIVE CENTS];*
 4. *Judgment for General Damages in favor of the Plaintiff to be assessed before the Master of the High Court;*
 5. *Interest at the rate of 13.5% per annum on the sum of \$1,117.25 [ONE THOUSAND ONE HUNDRED SEVENTEEN DOLLARS AND TWENTY FIVE CENTS];*
 6. *Judgment for Aggravated and/or Exemplary Damages for breach of contract to be assessed before the Master of the High Court;*
 7. *Costs of this action in favor of the Plaintiff on a full solicitor/client indemnity basis to be assessed before the Master of the High Court; and*
 8. *Such further or other reliefs as this Honorable Court deems fit, just and expedient.*
- (06) The summons have been made pursuant to Order 19, rule 7 of the High Court Rules, 1988 and the inherent jurisdiction of the Court.
- (07) Order 13, rule 6(1) enables a plaintiff to proceed in an action such as this where the defendant has failed to give notice of intention to defend. Order 19, rule 7 provides for application for judgment to be made in such actions where no defence has been served. On the hearing of such an application the Court is required “to give such judgment as the plaintiff appears entitled to on his statement of claim”.
- (08) The plaintiff’s ex-parte summons for judgment was heard on 06th November, 2019. **I am not entitled to rely on affidavit evidence for the purpose of giving judgment on liability for the plaintiff but on the basis of what has been pleaded in the statement of claim.**

[B] FACTS

The plaintiff in its statement of claim pleads inter alia;

1. *The plaintiff is a limited liability company having its registered office at Unit C4, Port Denarau Retail Centre, Denarau Island, Fiji and is engaged, inter alia, in the business of property development and investments.*

2. *The Defendant is a limited liability company having its registered office at Unit 01 2A, Commercial Complex, Port Denarau, Nadi, Fiji.*
3. *The Defendant is the developer of an Integrated Tourism development located at the south of Denarau Island, Fiji and which development has been marketed as “Denarau Waters” (“the developments”).*
4. *By a conditional agreement in writing dated 26th May, 2016 (“the agreement”), the Defendant agreed to develop, and the Plaintiff agreed to purchase, a vacant residential lot within the development which was later registered as State Lease Number 21409 being Lot 29 on the land known as “Denarau Island” (part of) situated in the district of Nadi, province of Ba, and having an area of 1011m² (“the property”) for the sum of **FJ\$799,000.00 [SEVEN HUNDRED NINETY NINE THOUSAND FIJIAN DOLLARS]** plus Value Added Tax, if applicable.*
5. *On 26th May, 2016 and pursuant to the terms of the agreement, the Plaintiff provided a bank guarantee in the sum of **FJ\$79,900.00 [SEVENTY NINE THOUSAND NINE HUNDREDD FIJIAN DOLLARS]** through the Bank of South Pacific constituting the 10% deposit of the purchase price thereunder.*
6. *The agreement required, inter alia, the Defendant to supply certain services to the property to the transfer thereof.*
7. *The agreement expressly provided, inter alia, as follows:*
 2. *SUBDIVISION*
 - [2.2] *No set-off or compensation: Without prejudice to the provisions of clause 3.6 and 3.7, the Purchaser shall not:*
 - (a) *withhold the balance of the Purchase Price (or any part of it) or claim a set-off on Settlement by reason of any defect or fault in the Lot, the services to the Lot or the Subdivision or any other development or lack of development of the Project or the Land, as long as 2.3 is complied with.*
 - [2.3] *Services: Water, sewer, electricity, drainage and road will be supplied to the lot and will be to appropriate standards and in accordance with the Department of Town and Country Planning approvals.*
 - [2.4] *The sub-division will have direct access into northern Denarau as per approvals received from the Department of Town and Country Planning and the Director of Lands.*
 8. *DEFAULT*

[8.1] *Settlement notice: If the sale is not settled on the Settlement Date either party may at any time thereafter (unless the agreement) has first been cancelled or become void) serve on the other party notice in writing (“Settlement Notice”) to settle in accordance with this clause; but the Settlement Notice shall be effective only if the party serving it is at the time of service either in all material respects ready, able and willing to settle in accordance with the settlement notice or is not so ready, able and willing to settle only by reason of the default or omission of the other party to the agreement. If the Purchaser is in possession a settlement notice may incorporate or be given with a notice requiring the Purchaser to surrender vacant possession of the Lot to the Vendor.*

[8.3] *Vendor’s remedies: If the Purchaser does not comply with the terms of the settlement notice served by the Vendor then:*

(a) *without prejudice to any other rights or remedies available to the Vendor at law in equity the Vendor may:*

(i) *sue the Purchaser for specific performance; or*

(ii) *cancel the agreement and pursue either or both of the following remedies:*

(aa) *forfeit and retain for the Vendor’s own benefit the entire Deposit with any accrued interest paid by the Purchaser;*

(bb) *sue the purchaser for damages.*

8. *It was an express and/or an implied fundamental term of the agreement, and the Defendant covenanted with the Plaintiff, that the latter would provide a road access into the development and leading to the lot to the appropriate standards and in accordance with the Department of Town and Country Planning approvals.*

9. *The Defendant on or about 31st March, 2018 intimated to the Plaintiff that it had provided all services and the parties could move to the completion. The parties thereafter proceeded with formalities when following inspection, the Plaintiff brought to the attention of the Defendant that there was no proper access to the development and the Lot, and required the Defendant to provide this.*

10. *Without complying with the preceding requirement or notice to the Plaintiff in or around August, 2019, the Defendant unlawfully and in breach of the terms of the agreement, called on the bank guarantee.*

Particulars or Breach

1. *No development and/or access road was provided to the development leading to the property to the appropriate standards and in accordance with the Department of Town and Country Planning approvals;*
 2. *No Settlement Notice was issued prior to calling on the bank guarantee;*
 3. *Calling on the bank guarantee when it was not entitled to and as otherwise explained in Plaintiff's letter dated 29th August, 2019.*
11. *Subject to the Defendant's obligation to supply a road to the property by virtue of clause 2.3 of the agreement and the call on the bank guarantee (to which it was not entitled), the Plaintiff was ready, willing and able to take transfer of the property.*

[C] Breach of agreement

- (01) As stated, paragraph (10) of the statement of claim includes a list of particulars of breach. The defendant has failed to provide an access road to the property by virtue of clause 2.3 of the agreement which is in these terms:
- 2.3 *Services; water, sewer, electricity, drainage and road will be supplied to the lot and will be to appropriate standards and in accordance with the Department of Town and Country Planning approvals.*
- (02) Moreover, no settlement notice was issued by the defendant to the plaintiff and/or its solicitors at any time by virtue of clause 8.1 of the agreement. The defendant is entitled to the deposit only on settlement date and/or upon default of the purchaser.
- (03) The plaintiff asserted that it was ready, willing and able to take transfer of the property.
- (04) **It is clear enough in the context of the whole of the statement of claim that the defendant's call on the bank guarantee without complying with the preceding requirements amounted to a breach of the terms of the agreement.**
- (05) I therefore make a declaration that the defendant's call on the bank guarantee was unlawful and in breach of the agreement dated 26th May, 2016.

[D] Permanent injunction

- (01) If an injunction is not granted to the plaintiff, there will be irreparable harm as the defendant would have access to the plaintiff's funds.
- (02) I therefore grant a permanent injunction restraining the defendant by itself and/or through their servants, agents, authorized officers, directors, partners or otherwise and howsoever from dealing with, withdrawing, collecting, assigning, utilizing, dissipating and/or calling the Bank Guarantee provided by the Bank of South Pacific on behalf of the plaintiff under the agreement dated 26th May, 2016.

[E] Judgment for aggravated and/or exemplary damages for breach of contract to be assessed by the Master ?

- (01) The plaintiff seeks aggravating and/or exemplary damages on the following grounds;
- (a) The defendant has not responded to the plaintiff's query regarding the completion of the developer's obligations under the Contract.
 - (b) After remaining silent for about one and half years, out of the blue, the defendant has called on the bank guarantee without issuing a default notice to the plaintiff. The defendant is entitled to the deposit only on settlement date and/or upon default of the purchaser.

To found a claim for exemplary damages the conduct of the party liable must amount to conscious wrongdoing in contumelious disregard of another's rights....This formula was accepted by Knox C.J. in "Whilfield v De Lauret & Co. Ltd"¹. Issac J explained that exemplary damages are considered "to be punitive for **reprehensible conduct** and as a deterrent" at p81. In Australian Consolidated Press Ltd v Uren² the Privy Council confirmed that this expression correctly delineates the defendant's conduct for purposes of award for exemplary damages.

Indeed, as was set out in Carvill v HM Inspector of Taxes Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler) (Bailii: [2005] UKSPCSPC00468, <http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC005/SPC00468.HTML>), "**reprehensible conduct**" requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

¹ (1920) 29 CLR 71 at 77.

² (1967) 117, CLR 221,

(02) **The crucial question is whether the defendant's conduct has reached this threshold? The answer to this question is in the negative.** I am constrained to hold that the grounds adduced by the plaintiff does not warrant me to make an order for aggravated and/or exemplary damages for breach of contract to be assessed by the Master. **There has been no reprehensible conduct by the party liable.**


(F) **Costs on Indemnity basis?**

The plaintiff seeks costs on indemnity basis. I am constrained to hold that the grounds adduced above do not warrant me to depart from my normal rule and invoke my discretion to award indemnity costs. **As stated, there has been no reprehensible conduct by the party liable.**

ORDERS

1. A declaration that the defendant's call on the bank guarantee was unlawful and in breach of the agreement dated 26th May, 2016 is granted.
2. An injunction restraining the defendant by itself and/or through their servants, agents, authorized officers, directors, partners or otherwise and howsoever from dealing with, withdrawing, collecting, assigning, utilizing, dissipating and/or calling the Bank Guarantee provided by the Bank of South Pacific on behalf of the plaintiff under the agreement dated 26th May, 2016 is granted.
3. General and special damages to be assessed by the Master.
4. The defendant to pay costs of \$2000.00 (summarily assessed) to the plaintiff within seven days from the date of this judgment.




24/01/2020
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 24th January, 2020