IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 70 of 2016

BETWEEN : **TONY TESSITORE** trading as **UNDERWATER WORLD ENTERPRISE FIJI** of Vuda Point Road, Vuda, Lautoka, Business Proprietor.

PLAINTIFF

A N D : **RUGGIERO INVESTMENTS LIMITED** a limited liability company having its registered office at Vuda Point, Vuda, Lautoka.

DEFENDANT

A N D : **ITAUKEI LAND TRUST BOARD** a body corporate duly constituted under the iTaukei Land Trust Act, Cap 134.

NOMINAL DEFENDANT

Appearances : **Mr Wasu Pillay for the plaintiff**
Mr Mohammed Shadaad Wally for the defendant

Hearing : **Monday, 09th March, 2020.**

Decision : **Friday, 26th June, 2020.**

D E C I S I O N

[A] INTRODUCTION

(01) By a Writ of Summons and Statement of Claim, dated 25th April, 2016 the plaintiff brought an action against the defendant seeking damages.

(02) After the close of the pleadings and on the date on which the action was set for trial, Counsel for the plaintiff and the defendant invited the court to determine a preliminary

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IN THE WESTERN DIVISION

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(01) By a Writ of Summons and Statement of Claim, dated 25th April, 2016 the plaintiff brought an action against the defendant seeking damages.

(02) After the close of the pleadings and on the date on which the action was set for trial, Counsel for the plaintiff and the defendant invited the court to determine a preliminary

issue and upon its determination and depending upon its determination agreed to prosecute or defend the action.

(03) The parties in this case invited the Court to determine the following issue under Order 33, rule 3 of the High Court Rules, 1988;

> *"Whether the plaintiff can recover all money paid to the defendant pursuant to the agreement on the grounds that there is a total failure of consideration from the defendant to the plaintiff."*

[B] THE FACTUAL BACKGROUND

(04) The statement of claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiff's point of view as well as the prayers sought by the plaintiff.

(1) The Plaintiff is a sole trader operating under the name and style of "Underwater World Enterprise Fiji" and is currently based at Vuda Point Road, Vuda, Lautoka.

(2) The Defendant is a limited liability company having its registered office at Vuda Point Road, Vuda, Lautoka.

(3) The Nominal Defendant is:

(a) A body corporate duly constituted under the iTaukei Land Trust Act Cap 134; and

(b) Pursuant to section 4(1) of the iTaukei Land Trust Act vested with and in control of all native land and all such land is administered by the Nominal Defendant for the benefit of the iTaukei owners; and

(c) Included in these proceedings as a Nominal Defendant.

The Lease

(4) The Defendant is the registered proprietor and/or lessee of iTaukei Lease number 20435 situated at Vuda Point Road, Vuda, Lautoka (hereinafter referred to as the "Lease").

The Contract

(5) On or about 10th January, 2015 the Plaintiff and the Defendant entered into a written agreement/contract titled "The Conditions of Management Right for the Mediterranean Dining Hall and Villas Premises" wherein

the Defendant agreed to sublease and/or alienate and/or deal with and/or part with possession of the Lease and/or a part thereof to the Plaintiff for monthly consideration (hereinafter referred to as the "Agreement").

Particulars of Agreement

WHEREAS:

A. *"The Owner" is the current Lessor of the land situated at Vuda Point Junction, together with all premises thereon commonly known as the Mediterranean Villas & Restaurant (herein called 'the Property").*

B. *"The Manager" is desirous of obtaining management rights of the Mediterranean Dining Hall including the 6 Villas and remodel and operate as a "Bed and Breakfast" style business* ***to cater Diving Guests of "Underwater World"*** *for the period of Five (5) years commencing from the date of the signing of this management transfer agreement.*

C. *The Owner has agreed for "the Manager" to operate and manage the Dining Hall and 6 Villas as a RESTAURANT & VILLAS on terms of this Management Condition Agreement excluding the loose assets properties of the Owner. (See Appendix attached)*

1. *1.1 The Manager will pay the Owner a security deposit of FJD$18,000.00 (Management Rights fee of $6,000.00 x 3 Months) at the commencement of the management period as the security of this 5 years term.*

This $18,000.00 is refundable upon returning of all the assets in satisfactory conditions after the period of 5 years agreement, otherwise those damages would be deducted from this amount accordingly.

2. *The said refundable deposit of $18,000.00 (Eighteen thousand dollars) is to be paid to "the Owner" for the period of this 5 years Management Agreement. If the Manager rescind this agreement before this period, this deposit is not refunded except the case of Clause 5.*

3. *Upon signing of this contract; the rate of FJ$6,000.00 per month for the first 12 months is to be paid by "the Manager" to "the Owner" paid on the first day of each month. The rates will increase 5% for each 12 month duration thereafter for the term of this agreement.*

Defendant's Legal/Contractual Obligation

(6) *Upon the execution of the Agreement and prior to the performance and/or partial performance of the same it was the legal and/or contractual obligation of the Defendant to first apply for and to obtain the consent of the Nominal Defendant.*

Particulars of Legal and/or Contractual Obligation

a) *Section 12(1) of the iTaukei Land Trust Act Cap 134 states:*

12.(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29th September, 1948 to mortgage such lease.

Breach of Legal/Contractual Obligation

(7) *At all material times and prior and/or subsequent to the performance and/or partial performance of the Agreement the Defendant failed and/or breached and/or willfully defaulted/neglected Section 12(!) of the iTaukei Land Trust Act Cap 134 as the Defendant subleased and/or alienated and/or dealt with and/or parted with possession of the Lease and/or a part thereof to the Plaintiff without the consent of the Nominal Defendant first had and obtained.*

Effect of Breach of Legal/Contractual Obligation

(8) *The Defendants failure to apply for and obtain the consent of the Nominal Defendant prior to the performance and/or partial performance of the Agreement and/or prior to subleasing and/or alienating and/or dealing with and/or parting with possession of the Lease and/or a part thereof to the Plaintiff and the allegations as pleaded in paragraph 6 and 7 above renders the Agreement null and void ab initio.*

Unjust Enrichment

(9) *Notwithstanding the Defendant's action and/or omissions as pleaded in paragraph 6, 7 and 8 above the Defendant has unjustly enriched and/or benefitted from the parties performance of the Agreement which was void ab initio.*

(10) *The Defendant has at all material times and since 10th January, 2015 received substantial monies from the Plaintiff.*

(11) *At all material times and since 10th January, 2015 and pursuant to the Agreement the Plaintiff has incurred substantial costs/expense and/or spent its own money to upgrade the Defendant's premises situated on the Lease and the Defendant has directly and/or indirectly benefitted from the said upgrade works. The total costs to the Plaintiff is approximately FJD$66,997.62.*

Legal Notices

(12) *On or about 1st March, 2016 the Defendant's then Solicitors wrote to the Plaintiff alleging breach of Agreement and demanding the Plaintiff rectify the said breaches.*

(13) *On or about 9th March, 2016 the Plaintiff through its Solicitors wrote to the Defendant demanding:*

(a) *The return of all monies received from the Plaintiff by the Defendant – on account of deposit/bond and/or rent – forthwith. The total amount demanded was $88,443.57; and*

(b) *Reimbursement of the Plaintiffs monies used/expanded on and for the renovation of the Defendant's premises situated on the Lease. The total amount demanded was $72,100.68.*

(14) *On or about 16th March, 2016 the Defendant wrote to the Plaintiff seeking vacant possession of its premises situated on the Lease. The Plaintiff pleads that the notice to vacate is an admission that the Defendant subleased and/or alienated and/or dealt with and/or parted with possession of the Lease and/or a part thereof to the Plaintiff without the consent of the Nominal Defendant first had and obtained.*

Claim

(15) *The Plaintiff pleads that all and any money to the Defendant by the Plaintiff on account of and/or pursuant to the Agreement is money paid*

and received under and pursuant to an illegal Agreement, which must be returned by the Defendant to the Plaintiff.

(16) The Plaintiff pleads that all and any costs/expense and./or expenditure of the Plaintiff's money to upgrade the Defendant's premises situated on the Lease incurred and/or spent pursuant to the Agreement are costs/expense and/or expenditure incurred under and pursuant to an illegal Agreement and that the Defendant must account for the benefits received therein and reimburse the Plaintiff for the same.

(17) Despite the demand notice issued on the Defendant the Defendant has failed and/or willfully neglected to pay/reimburse the Plaintiff.

(05) Wherefore, the plaintiff claims against the defendant;

(1) General Damages;

(2) Special Damages of $78,583.64;

(3) Special Damages of $66,997.62;

(4) Exemplary/Punitive Damages;

(5) Interest from date of termination of the Contract at the rate of 4 percent per annum under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act;

(6) Costs on an indemnity basis;

(7) Such further and other relief as this Court may deem just.

(06) The following facts were agreed at the Pre-Trial Conference, dated 18th October, 2018;

1. The Plaintiff, Tony Tessitore also known as Antonio Tessitore is a sole trader operating under the name and style "Underwater World Enterprise Fiji" and is currently based at Vuda Back Road, Vuda, Lautoka.

2. Ruggerio Investments Limited ("Defendant") is a limited liability company having its registered office at Vuda Point Road, Vuda, Lautoka.

3. The Nominal Defendant, iTaukei Land Trust Board ("TLTB" or "Nominal Defendant") is a body corporate duly constituted under the iTaukei Land Trust Cap 134.

4. *TLTB was set up in 1940 as the Native Land Trust Board under the iTaukei Land Trust Act known then as the Native Land Trust Act. Its initial purpose was to secure, protect and manage land ownership rights assigned to the iTaukei landowners and to facilitate the commercial transactions that revolve around its use.*

5. *Section 4 (1) of the iTaukei Land Trust Act vests with all native land with the Nominal Defendant to be administered for the benefit of the iTaukei owners.*

6. *The Defendant is the registered proprietor of all the property comprised and described in Native Lease No. 20435, Naqere Subdivision, Lot 18 (part of) as shown on Lot 2 on S.O. 241 situated at Vuda Back Road, Vuda, Lautoka (herein referred to as the "Lease").*

7. *The Plaintiff and the Defendant entered into a written contact/agreement titled "The Conditions of Management Right for the Mediterranean Dinning Hall and Villas Premises" for a 5 year term ("Agreement").*

8. *The Agreement is null and void because no consent was obtained from TLTB – and therefore the Plaintiff's occupation of the Restaurant (including a kitchen) and the 6 Villas on the Property is unlawful, null and void.*

9. *By letter dated 16 March 2016, the Defendant's solicitors Haniff Tuitoga called upon the Plaintiff to quit and deliver up vacant possession of the Property not later than 18 April 2016. That letter was also sent to the Plaintiff's solicitors, Gordon & Co. by covering letter dated 16 March 2016.*

10. *On 28 April 2016, the Defendant filed a section 169 summons [see Ruggiero Investments Limited v Antonio Tessitore trading as Underwater World Enterprise Fiji – High Court Civil Action No. 71 of 2016 (Lautoka) to evict the Plaintiff and his partner Kristy Dundon from the subject property.*

11. *The Plaintiff paid $18,000.00 to the Defendant on 10 January 2015 on account of bond for rent under the Agreement and the Defendant accepted the money.*

12. *It was agreed that no rent would be payable by the Plaintiff to the Defendant for the period 10 January 2015 to 9 February 2015.*

13. *The Plaintiff has not paid any rent from 10 December 2015 to 28 October, 2016.*

14. *In addition to the monthly rental, the Plaintiff agreed to pay the First Defendant $200.00 (VEP) per month for usage of an office and storage by the gate at the Property.*

15. *From August 2015, the Plaintiff agreed to pay the First Defendant from August*

2015, the Plaintiff agreed to pay the First Defendant $100.00 (VEP) per month for "use" of its Hotel Licence and Liquor Licence.

16. On or about 1st March 2016, the Defendant's then solicitors, Kevueli Tunidau Lawyers wrote to the Plaintiff alleging and/or making certain demands.

17. Taeko T. Ruggiero is not a party to these proceedings.

[C] CONSIDERATION AND THE DETERMINATION

(07) The defendant is the registered lessee of the land comprised and described in Native Lease No; 20435, Naqere Subdivision, Lot 18 (part of) situated at Vuda Back Road, Vuda, Lautoka. The premises are commonly known as **"Mediterranean Dining Hall and Villas"**.

(8) The plaintiff and the defendant entered into a written contract/agreement on 10th January, 2015 for subleasing of the business premises. The defendant sublet the Dining Hall including six villas to the plaintiff for a period of five years to operate and manage 'a bed and breakfast' style business to cater for diving guests of Underwater World Enterprises, the plaintiff.

(9) **In this case, the parties admitted that the agreement was illegal because no consent had been obtained from the iTLTB, the nominal defendant, for subleasing of Native Lease.**

(10) Clause 1.1 of the agreement provides;

1.1 The Manager will pay the Owner a security deposit of FJ$18,000.00 (Management Rights fee of $6,000.00/month x 3 months) at the commencement of the management period as the security of this 5 years term.

(11) Clause 1.3 of the agreement provides;

1.3 Upon signing of this contract; the rate of FJU$6,000.00 per month for the first 12months is to be paid by "the manager" to "the owner" paid on the first day of each month. The rates will increase 5% for each 12 months' duration thereafter for the term of this agreement.

(12) Clause 2.1 of the agreement provides;

2.1 Utilities including Telephone, Electricity, Water and Gas shall be paid by "the Manager" according to the utility billings on or before the due date of every month. Further; "the manager" shall bear installation costs for any utility as required.

(13) Clause 3.2 of the agreement provides;

> 3.2 *All renovations shall be done with prior approval of "the owner" and at "the Manager's" expense, and shall conform to (local) Fiji Building Code. This is not limited to and includes certified builders, certified electricians and certified heating and air conditioning install personal.*

(14) The plaintiff's (the subtenant's) first claim of $78,583.64 is as follows:

Clause 10(a)	Bond	$18,000.00
Clause 10(b)	Rent paid between February and November 2015	$52,400.00
Clause 10(c)	Electricity Bills Paid	$8,083.63
Clause 10(d)	Water Bills Paid	$100.01
	Total	**$78,583.64**

(15) The plaintiff's (the subtenant's) second claim of $66,997.62 is as follows:

Clause 11(a)	Materials purchased	$31,027.52
Clause 11(b)	Wages to Employee – Sunia Raisua	$ 2,662.00
Clause 11(b)	Wages to Employee – Sakiusa Ravula	$ 3,881.50
Clause 11(b)	Wages to Employee – Yogendra Rajan Naidu	$11,369.10
Clause 11(b)	Wages to Employee – Josevata Qalomai	$ 3,057.50
Clause 11(b)	Wages to Employee – Antonio Tessitore	$15,000.00
	TOTAL	**$66,997.62**

Claim for monies spent for rent, electricity, water, wages and for renovation, on the basis of total failure of consideration

(16) It was common ground on the pleadings that the plaintiff (the subtenant) was in possession of the property from February 2015 to 28th October, 2016. The plaintiff submits that upon the execution of the agreement and prior to the performance, it was the legal and contractual obligation of the defendant (the sub lessor) to first apply and obtain the consent of the iTLTB for the subleasing. The plaintiff alleges that the defendant has failed to obtain the written consent of iTLTB to the sublease before letting plaintiff in. As a result, the agreement which constituted the transaction of subleasing was and remains null and void *ab initio* because no consent of iTLTB as lessor first had and obtained to the transaction as required under Section 12 of the Native Land Trust Act.

(17) The plaintiff says that it did not operate and manage the Dining Hall and six Villas as a Restaurant and Villas on terms of the Management Condition Agreement and claims (a) the rent paid (b) electricity bills paid (c) water bills paid (d) materials purchased and (e) wages paid to the employees, on the basis of total failure of consideration.

(18) The plaintiff's claim is vigorously opposed by the defendant. The defendant argued that "*this is not a situation where there was no consideration at all*". **The defendant submitted that the plaintiff had the benefit, use and occupation of the business premises from February 2015 to 28th October, 2016.** The defendant further submitted that the agreement was terminated upon the expiry of the notice to quit delivered to the plaintiff on 16-03-2016. The plaintiff has thereafter remained in occupation of the property as a trespasser until 28-10-2016. **The defendant says that when the plaintiff vacated the property on 28-10-2016, the property was in a state of disrepair.**

(19) The crucial question for this Court is whether the plaintiff is entitled to the return of (a) rent paid (b) electricity bills paid (c) water bills paid (d) materials purchased, upon a consideration which had wholly failed.

(20) **What is critical to note is that the plaintiff had been in occupation of the premises from February 2015 to 28th October 2016.** The defendant argued that the plaintiff had received some benefit under the contract (such as use and occupation of the business premises from February 2015 to October 2016). **Is this part of the essential benefit expected or bargained for ? Then the failure of consideration was partial rather than total such as to exclude the availability of restitution.** It follows that the restitution will not be available on the basis that there had been no total failure of consideration. It is difficult for the court to decide, on the state of the pleadings as it stands, whether there had been a total failure of consideration or partial failure of consideration for the (a) rent paid (b) electricity bills paid (c) water bills paid. Therefore, I reserve them for substantive trial. The requirement of proof of total failure of consideration as a necessary condition for an award of restitution lies in the plaintiff.

I fail to understand the rationale behind the plaintiff's claim for the wages paid to the plaintiff's employees because the plaintiff says that it did not operate and manage the

Dining Hall and six Villas as a Restaurant and Villas on terms of the Management Condition Agreement.

What is the defendant's obligation to make restitution for the wages paid by the plaintiff to the plaintiff's employees? What is the gain acquired by the defendant? What is the ill-gotten gain or profit made by the defendant by the alleged breach of contract? As I understand the pleadings, the plaintiff's claim is based on restitution on the ground of total lack of consideration rather than seeking compensation. A party to a contract is entitled to restitution if there has been a total failure of consideration. The orthodox view suggests that there is only one principle on which the law of restitution is dependent, namely the principle of unjust enrichment. Restitution is the remedy rather than cause of action. It is important to remember that the law of restitution concerns actions in which one person claims an entitlement in respect of a *gain* acquired by another, rather than compensation for a *loss*. The law of restitution is the law of gains –based recovery. It is to be contrasted with the law of compensation, which is the law of loss-based recovery. When a court orders restitution it orders the defendant to give up his/her gains to the claimant.

(21) Next, the plaintiff claims the expenditure incurred on renovation or refurbishment works carried out on the business premises. The defendant opposes the claim and says that there was consideration because the plaintiff benefited from the renovation or refurbishment works carried out on the business premises. **Is this merely incidental or collateral benefit received under the contract? Besides, the defendant says that when the plaintiff vacated the property on 28-10-2016, the property was in a state of disrepair.**

It is difficult to decide on the state of the pleadings as it stands, whether there had been a total failure of consideration or partial failure of consideration for the expenditure incurred on renovation or refurbishment works carried out on the business premises.

Therefore, I reserve it for substantive trial.

(22) On the hearing of this matter, counsel for the plaintiff heavily relied on the decision of this court in **Inspired Destinations (Inc) Limited V Bayleys Real Estate (Fiji) Limited and Others, Civil action No: 180 of 2013.**

The facts of Inspired Destinations are very different from the present case. In that case, the plaintiff brought an action against the defendants claiming for return of the deposit (earnest money) (under the law of restitution) paid by the plaintiff pursuant to a contract for the sale and purchase of a leasehold interest in Native Land.

That is not the situation here.

Claim for Security deposit on the basis of total failure of consideration

(23) The plaintiff has paid $18,000.00 to the defendant on 10/01/2015 as a security deposit under the agreement and the defendant had accepted the security deposit.

(24) The clause 1.1 of the agreement provides;

> *1.1 The Manager will pay the Owner a security deposit of FJD$18,000.00 (management Rights fee of $6,000.00/month x 3 months) at the commencement of the management period as the security of this 5 years term.*
> *This $18,000.00 is refundable upon returning of all the assets in satisfactory conditions after the period of 5 years agreement, otherwise those damages would be deducted from this amount accordingly.*

(25) It is money paid on a consideration which has wholly failed because the contract which constituted the transaction is void as being illegal from the start. The plaintiff's action was to recover the money he had paid as money received by the defendant to the use of the plaintiff, being money paid on a consideration which has wholly failed. **There is a total failure of consideration because no legally binding sublease document was executed.** Therefore, the doctrine of 'failure of consideration' applies. The application of an old established principle of common law does enable a man who has paid money and received nothing for it to recover the money so expended.

The plaintiff's claim for repayment is not based on the contract which is void as being illegal from the start, but on the fact that the defendant had received the money and has in the events which have supervened (illegality) no right to keep it. The payment was conditional. The security deposit money is paid for a consideration which is to be performed after the payment. The condition of retaining money is eventual performance of the consideration.

The consideration was not performed (*viz*, no legally binding sublease document was executed) and the consideration totally failed because the contract is void as being illegal from the start. When the condition and consideration fails, the defendant's right to retain the money also simultaneously fails.

It is the failure of consideration (*viz*, no legally binding sublease document was executed) and not the illegality of the contract which enables money paid as security deposit to be recovered.

(26) Lord Mansfield rationalized the action for money had and received in **Moses v Macferlan (1760) 2 Burr 1005, 1 Wrn BI 219, 12 Digest 539, 4478 at page 1012** as follows:

> *"It lies for money paid by mistake; or **upon a consideration which happens to fail**; or for money got through imposition (express, or*

implied); or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

(Emphasis added)

(27) **The gist of the claim for security deposit is an action for money had and received. The action for money had and received is an action outside the contract. The action for money had and received is not based on the contract. The action is not dependent on the illegal contract but solely on the unjustifiable detention by the defendant of claimant's money. There is no *turpis causa* in the matter. The restitution is regarded as a separate principle of law independent of contract. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. A remedy in unjust enrichment is not claim of damages. Nor is it a contractual remedy.**

See; (1) **Restitution, Present and Future, Essays in Honour of Gareth Jones**[1]

(2) **Andrew Burrows, *The Law of Restitution***[2]

(3) **Jacques Du Plessis, *"Towards a Rational Structure of Liability for Unjust Enrichment: Thoughts from two mixed Jurisdiction"***[3]

(4) The work by Sir William Evans entitled "**An Essay on the Action for Money Had and Received**". It was published in 1802 and dedicated to Sir Edward Law (later Lord Ellenborough). It is reprinted in (1998) RLR3. In its opening paragraphs, Sir William Evans identified the subject-matter of his study as "*the action for money had and received, as enforcing an obligation to refund money which ought not to be retained.*" Sir Evans quoted as "proper introduction" to the subject the famous passage from the judgment of Lord Mansfield CJ in **Moses v Macferlan (1760) 2 BUR 1005** (at p 102);

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the Defendant ought to refund; it does not lie for money paid by the Plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the

[1] **(1998), Misnomer, p1, Professor Birks**
[2] **2nd Edition (2002)**
[3] **122 South African Law Journal 143.**

extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the Defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or ***upon a consideration which happens to fail****; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.* ***In one word, the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.****"*

(Emphasis added)

For the reasons which I have endeavored to explain in this paragraph, I come to the conclusion that the plaintiff succeeds on his claim for security deposit.

(28) I take comfort in the oft-quoted words of Lord Roche from the decision of '**Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd'**[4]**;**

> *"It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the (defendant company) in affording some security that the (Plaintiff) would implement their contract and take up (the transfer) and pay the balance of the price, and it may be that it had other advantages ..... but if no .....document of title were delivered to (the plaintiff)...(or, as in this case, the contract is declared illegal ab initio) then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable.*

(29) In the face of the dicta of **Lord Roche in Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd**[5] **and Lord Mansfield CJ in Moses v Macferlan**[6]**,** I hold that the plaintiff is entitled to the return of the FJ$ 18,000.00 paid as security deposit upon a consideration which had wholly failed. I am satisfied that no rule of law, and no considerations of public policy, compel the Court to dismiss the plaintiffs' claim in the case before me, and to do so would be, in my opinion, a manifest injustice.

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[4] **(1943) AC 32**
[5] **(1943) AC 32**
[6] **(1760) 2 BUR 1005**

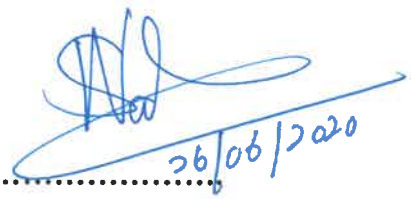
[D] CONCLUSION

(1) The plaintiff is entitled to the return of the FJ$ 18,000.00 paid as security deposit upon a consideration which had wholly failed.

(2) The requirement of proof of total failure of consideration as a necessary condition for an award of restitution lies in the plaintiff. It is difficult for the court to decide **on the state of the pleadings as it stands,** whether there had been a total failure of consideration or partial failure of consideration for the (a) rent paid (b) electricity bills paid (c) water bills paid (d) the money spent on renovations.

Therefore, I reserve them for substantive trial.

(3) I make no order as to costs.



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Jude Nanayakkara
[Judge]

At Lautoka
Friday, 26th June, 2020