

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

**Civil Action No. 140 of 2003**

**BETWEEN:**                    **EMPIRE AUTOPARTS LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Lot 1 Viria Road, Vatuwaqa Industrial Subdivision, Suva.

**PLAINTIFF**

**AND:**                         **B W HOLDINGS LIMITED** a limited liability company having its registered office at Vishnu Deo Road, Nakasi.

**DEFENDANT**

**Before:**                    **Hon. Chief Justice Kamal Kumar**

**Counsels:**                **Mr I. Fa for the Plaintiff**  
**Ms M. Rakai and Mr R. Singh for the Defendant**

**Date of Judgment: 8 December 2021**

**JUDGMENT**

**Introduction**

1. On 4 April 2003, Plaintiff caused Writ to be issued with Statement of Claim claiming for special and general damages with costs and interest arising out of Sale and Purchase Agreement dated 8 March 1999, between the parties.
2. On 28 April 2003, Defendant filed its Statement of Defence and Counterclaim.

3. On 11 June 2003, Plaintiff filed Reply to Statement of Defence and Defence to Counterclaim.
4. On 1 August 2003, Plaintiff filed Summons for Directions and on 20 August 2003, being the returnable date of the Summons, Order in terms of the Summons was made.
5. Both parties failed to comply with Orders by failing to file List of Documents and Affidavit Verifying List of Documents.
6. On 24 January 2006 (after a lapse of almost two and half years), Plaintiff filed Notice of Intention to Proceed.
7. On 8 August 2006, Plaintiff filed Notice Requesting Pre-Trial Conference (**“PTC”**).
8. This matter was called on 4 April 2007, before the then Master and adjourned on four (4) occasions for parties to convene PTC and file Minutes of PTC.
9. On 25 September 2007, Plaintiff filed Minutes of PTC.
10. On 1 October 2007, parties were directed to file Agreed Bundle of Documents and Plaintiff was directed to file Order 34 Summons which directions were extended twice by Court.
11. On 5 February 2008, Plaintiff filed Copy Pleadings and Order 34 Summons.
12. This matter was listed for trial on 24 October 2008, which date was vacated and trial date re-fixed for 17 November 2008.
13. For reasons unknown trial date was vacated and kept on being adjourned during the period 17 November 2008 to 24 November 2010.
14. On 22 January 2009, Plaintiff filed Affidavit Verifying List of Documents (**“AVLD”**) which should have been filed around September 2003.
15. For reasons unknown trial date before his Lordship Justice Hicki was vacated and re-listed for 28 May 2009.

16. This matter was called again on 24 November 2010, before his Lordship Justice Hettiarachchi (as he then was) and fixed for trial on 26, 27 and 30 May 2011.
17. On 26 May 2011, trial dates were vacated when both the parties informed Court that there is a possibility of settlement and this matter was re-listed for trial on 2 - 4 November 2011.
18. On 2 November 2011, Defendant's Counsel sought adjournment as Defendant's Director had passed away and the trial date was vacated and re-fixed for 20 - 22 February 2012.
19. On 20 February 2012, trial dates were vacated on the application of Plaintiff's Counsel and re-fixed for 11 - 13 April 2012.
20. On 4 April 2012, Defendant filed Further Supplementary AVLD.
21. On 11 April 2012, Defendant's Counsel informed Court that the Head Lessor's consent needs to be obtained which was conceded by Plaintiff's Counsel and trial dates were vacated and re-listed for 7, 10 and 11 September 2012.
22. On 23 August 2012, Defendant filed Further Additional Supplementary AVLD.
23. This matter was not called on 7 September 2012, and was re-listed for trial on 18, 19 February 2013, but was not called on those dates.
24. This matter was called before this Court on 22 November 2013, and adjourned to 29 - 31 January 2014, for trial which dates were vacated and on 7 November 2014, re-listed to 13, 14 October 2015, for trial.
25. On 13 October 2015, Counsel for Defendant requested that this matter be stood down to next day because she was suffering from flu, when the trial date was vacated due to chances of trial not being concluded in a day.
26. This matter was adjourned to 5 February 2016, to fix trial date when it was adjourned to 17 - 18 May 2016, for trial which trial date was vacated.
27. On 20 May 2016, this matter was adjourned to 18, 19 October 2016, for trial.

28. On 23 September 2016, trial dates were vacated for the reason that another trial already assigned for those dates were not entered in Court diary when above date was fixed.
29. On 14 October 2016, this matter was listed for trial on 15, 16 August 2017.
30. On 16 August 2017, trial dates were vacated on the ground that Defendant's Counsel was really sick and could not conduct the trial when the matter was adjourned to 10 and 11 April 2018, for trial.
31. Trial concluded on 11 April 2018, when parties were directed to file Submissions and this matter was adjourned for Judgment on Notice.

### **Issues for Determination**

32. Court acknowledges the issues for determination are those set out in Part 2 of Pre-Trial Conference Minutes which are as follows:-

- “1. Whether there is a breach of the agreement of the 8<sup>th</sup> of March 1999 by the Defendant?
2. If there has been a breach whether the Defendant is liable to pay damages to the Plaintiff?
3. Whether the Plaintiff has paid the Defendant a total sum of \$125,000.00 [One Hundred and Twenty Five Thousand Dollars]?
4. Whether the Plaintiff owes the Defendant the sum of \$35,000.00 and whether the Defendant is entitled to judgment for the same together with interest at the rate of 10% per annum from the 8<sup>th</sup> of March 2000 to the date of actual payment?
5. Who should pay for costs of this action and on what basis?”

### **Documentary Evidence**

33. By consent documents subject to Agreed Bundle of Documents dated 4 December 2007, were marked as Exhibits P1 to P26 and Plaintiff's Further

Bundle of Documents dated 17 February 2012, were marked as Exhibits P27 to P35.

34. In addition, following documents were tendered as Exhibits:-

P1	Memorandum of Agreement between Empire Autoparts Ltd & B W Holdings Ltd dated 08/03/99
P2	Receipt No. 41389 from Sherani & Co. received from Empire Autoparts Ltd. dated 08/03/99
P3	Empire Autoparts payment voucher to B W Holdings. Cheque No. 363954 dated 14/05/99
P4	Fiji revenue receipt no. 373233 from Empire Autoparts dated 09/07/99.
P5	Empire Autoparts payment voucher to B W Holdings. Cheque No. 363981 dated 05/08/99.
P6	Empire Autoparts payment voucher to B W Holdings. Cheque No. 304000 dated 01/09/99.
P7	Letter from B W Holdings to Empire Autoparts dated 31/01/00.
P8	Letter from Sherani & Co. to Empire Autoparts Ltd. dated 07/03/00.
P9	Letter from Engineering & Graphic Consultants to B W Holdings Ltd. dated 10/03/00.
P10	Tax Invoice No. 30 of Empire Autoparts dated 13/03/00.
P11	Letter from B W Holdings to Engineering & Graphic Consultants dated 15/03/00.
P12	Statement No. 2987 of B W Holdings to Empire Autoparts dated 15/03/00.
P13	Statement No. 2989 of B W Holdings to Empire Autoparts dated 15/03/00.
P14	B W Holdings receipt book no. 4690 received from Empire Autoparts dated 30/03/00.
P15	Empire Autoparts payment voucher to B W Holdings Cheque No. 412213 dated 30/03/00.
P16	Empire Autoparts Payment Voucher to B W Holdings. Cheque No. 333913 dated 19/04/00.
P17	Certificate of Completion from the Suva City Council dated 16/06/00.
P18	Letter from Sherani & Co. to Empire Autoparts dated 12/10/00.
P19	Letter from Engineering & Graphic Consultants to Sherani & Co. dated 16/10/00.
P20	Letter from R Patel & Co. to Sherani & Co. dated 25/10/00.
P21	Letter from Sherani & Co. to Empire Autoparts dated 15/11/00.
P22	Letter from Empire Autoparts Ltd. to Sherani & Co. dated 28/11/00.
P23	Letter from R Patel & Co. to Sherani & Co. dated 06/09/01.
P24	Letter from R Patel & Co. to Empire Autoparts dated 30/11/01.

P25	Letter from Empire Autoparts to Patel Sharma Associates dated 21/11/02.
P26	Letter from Empire Autoparts to Lord Mayor - Suva City Council dated 28/10/02.
P27	Project Sales and Actual Sales for Empire Autoparts Limited for 2000 - 2004
P28	Employees Absenteeism List for Empire Autoparts Limited for 2000
P29	Employees Absenteeism List for Empire Autoparts Limited for 2001
P30	Employees Absenteeism List for Empire Autoparts Limited for 2002
P31	Employees Absenteeism List for Empire Autoparts Limited for 2003
P32	Employees Absenteeism List for Empire Autoparts Limited for 2004
P33	Stock Sheet for Empire Autoparts Limited for the year 2001/2002
P34	Stock Sheet for Empire Autoparts Limited for the year 2002/2003
P35	Stock Sheet for Empire Autoparts Limited for the year 2003/2004
P36	Company Return of Income 2000
P37	Company Return of Income 2001
P38	Company Return of Income 2002
P39	Company Return of Income 2003
P40	Company Return of Income 2004
P41	Empire Construction letter dated 19/08/02.
D1	Transfer dated 25 May 1999.
D2	Letter from NBF Asset Management Bank to B W Holdings Ltd dated 09/04/99
D3	Photocopy of Bank Cheque No. 127799 dated 16/04/99.
D4	Beginning of Maintenance Certificate (Water Reticulation) dated 30/09/05
D5	Beginning of Maintenance Certificate (Sewerage Reticulation) dated 30/09/05
D6	End of Maintenance Certificate (Water Reticulation) dated 07/06/07
D7	End of Maintenance Certificate (Sewer Reticulation) dated 07/06/07
D8	Letter from FEA to B W Holdings Ltd dated 20/09/07.
D9	Letter from B W Holdings Ltd to Telecom Fiji Ltd dated 21/07/99.
D10	Crown Lease No. 14013
D11	Letter from Suva City Council to Messrs. Wood & Jepsen Consultants dated 16/10/98.
D12	Letter from Suva City Council to Messrs. Quality Development Consultants Ltd. dated 21/07/08.

**Plaintiff's Case**

35. Plaintiff called three witnesses namely:-

- (i) Abdul Faiyaz of 2/507A Great South Road, Manukau, Auckland, New Zealand, Director ("**PW1**") who gave evidence via Skype.
- (ii) Abdul Zarik of Lot 7 Buksh Place, Nakasi, Accountant ("**PW2**").
- (iii) John Chandar Deo Sharma of 113 Church Street, Nadera, Builder ("**PW3**").

36. PW1 during examination in chief gave evidence that:-

- (i) He is the director of the Plaintiff Company and is authorized to give evidence on its behalf and in March 1998, the Plaintiff purchased a Lot from the Defendant Company out of crown land being developed by the Defendant.
- (ii) The Plaintiff purchased the Lot to develop its second hand spare parts/used car business and prior to that the Plaintiff operated its business from same industrial area.
- (iii) The Plaintiff entered into Sale and Purchase Agreement with the Defendant (Exhibit P1), paid deposit and as per Agreement lot of work was to be done.
- (iv) The Plaintiff constructed its building on the Lot which was completed in April 2000, and it began to shift to new building on 1 April 2000.
- (v) When they shifted on 1 April 2000, the building was completed and they had temporary water connection from other side of the road and electricity was not connected.
- (vi) The Plaintiff was getting electricity from an electric company and the Defendant was to install a substation for electricity which was not in place.
- (vii) They used telephone connection from their old premises which was behind the new building.

- (viii) When they moved into the new building, there was gravel road, with no drains/culverts and as per Agreement road was to be tarsealed.
- (ix) All this affected his business in that they had to wash cars in dry weather, staff were not coming to work after having breathing problem, customers turned down offers to buy the spare parts and road got muddy during wet weather.
- (x) They suffered because of that for almost six (6) years.
- (xi) The Defendant continued with the subdivision work and they purchased Lot 11 and 12 as shown in Page 3 of Exhibit P11 which lots were amalgamated.
- (xii) The conditions stated at paragraph 1 of Schedule of Conditions in the Agreement has not been completed when they moved.
- (xiii) They raised concern with the Defendant and the Defendant said they will do it but they did not do so.
- (xiv) Their engineer, Engineering and Graphic Consultant on 10 March 2000, wrote to the Defendant highlighting works not completed (Exhibit "P9").
- (xv) The Defendant responded to that letter by its letter dated 15 March 2000 (Exhibit P11).
- (xvi) In reference to the last paragraph of Exhibit P9 when asked what subdivision in stage 2, he stated that he is not aware.
- (xvii) Exhibit P17 is the Certificate of Completion from Suva City Council for the building and is not in relation to any services to be provided.
- (xviii) On 12 October 2000, Sherani & Co. wrote to the Plaintiff confirming receipt of \$5,000.00 and advising that the works have been completed, Lease has been registered and calling for payment of the balance purchase price (Exhibit P18).
- (xix) On 16 October 2000, the Plaintiff's Engineer responded to Sherani & Co.'s letter advising that the Plaintiff will settle water supply connection and road is completed (Exhibit P19).
- (xx) Various letters were exchanged between its Solicitor, Engineer and the Defendant's Solicitor (Exhibits P20 to P26).



- (xxi) The Plaintiff paid \$125,000.00 to the Defendant with balance of \$15,000.00 left to be paid which they held because of works not being completed.
- (xxii) In reference to \$160,000.00 claim in Exhibit P26 he stated that when dust gets into engine, it gets ceased and customers do not buy engine with dust as they cannot water blast engines every week.
- (xxiii) The Plaintiff sold the building in 2018, and when they sold the building, the footpath was not completed.
- (xxiv) Exhibit P27 to P35 are documents prepared by the Plaintiff's financial controller showing actual and projected sale for the year 2000 to 2004 (Exhibit P27), list of employees, absenteeism from 2000 to 2004 (Exhibits P28 - 32) and stock sheets for the years 2001 to 2004 (Exhibits P33 to P35).
- (xxv) The Plaintiff's employees were absent from work due to the dust and they being sick which affected the sales.
- (xxvi) Stock list sheets show items lost for the particular days and year was due to dust and loss suffered by Plaintiff as a result of delay in subdivision works being completed.
- (xxvii) Exhibits P2 to P7 is the evidence for payment for purchases of land which are as follows:-
- Exhibit P2: \$100,000.00 deposit paid in terms of the Agreement
- Exhibit P3: Part payment for land - \$5,000.00
- Exhibit P4: Stamp duty - \$756.00
- Exhibit P5: Past payment for Land - \$10,000.00
- Exhibit P6: Part payment for Land - \$5,000.00
- Exhibit P7: Extra amount paid for additional 137 sqm of land after Lot 1 & Lot 2 were amalgamated as one Lot.
- (xxviii) Exhibit P10 relates to construction of driveway by John D. Sharma Builders and the driveway was to be constructed by the Defendant.

- (xxix) Exhibit P13 relates to forklift sold by Plaintiff for Defendant and proceeds of sale was given to the Defendant.
- (xxx) He is not sure what receipt marked as Exhibit P14 is and it may be for sale of forklift on its behalf.
- (xxxii) Exhibit P15 relates to sale of forklift.
- (xxxiii) Exhibit P16 is for extra piece of land
- (xxxiii) As stated in Exhibit P25, the Plaintiff paid \$125,000.00 towards the purchase price.
- (xxxiv) The Plaintiff did not pay \$15,000.00 because the Defendant failed to provide all the services as promised by Udit Narayan of the Defendant Company.
- (xxxv) Because of the dust coming to the building:
  - (a) They had to waterblast every time;
  - (b) Window seals got jammed.
  - (c) Had to re-paint building every year and half.
- (xxxvi) The Plaintiff had to engage Empire Construction to carry out repair works.
- (xxxvii) The Plaintiff is seeking special damages, general damages for breach of contract, interest and costs.

37. During cross-examination PW1:-

- (i) Stated that the Plaintiff filed Annual Returns with Companies Office and lodged its financial statement with Fiji Revenue and Customs Authority ("**FRCA**").
- (ii) Agreed that financial statements lodged with FRCA would represent actual sales to assist the Court.
- (iii) Stated that he does not have financial statements with him and it is with FRCA or Accountant.

- (iv) Stated that he can provide documents such as FNPF payment schedule to prove employees absenteeism which was not with him.
- (v) When it was put to him that there is no evidence except excel sheet to prove absenteeism he stated that he can provide them.
- (vi) Stated that except for typed papers by the Plaintiff's financial controller he does not have the financial statements to show actual loss.
- (vii) Confirmed that he saw the letter dated 19 August 2002, from Empire Contractors and has receipt to prove payment but overlooked to provide to the Court.
- (viii) Stated that the balance purchase price of \$40,000.00 was to be paid on full subdivision.
- (ix) Agreed that according to the Agreement the balance purchase price was to be paid within thirty (30) days of execution of the Transfer and that the Transfer was signed by Plaintiff on 25 May 1999.
- (x) Agreed that the Crown lease over subject land was issued to Plaintiff on 15 December 1999.
- (xi) Agreed that schedule plan was part of the Agreement (Exhibit P1).
- (xii) Stated that condition 1 in the Schedule of Conditions had not been complied with.
- (xiii) Agreed that the Defendant as Vendor had right to alter condition in respect to provisions of utilities as provided in conditions 1, 5 and 6(a)(i) (ii) (iii) of the Agreement.
- (xiv) When it was put to him that on 9 April 1999, the Plaintiff authorized Sherani & Co. to pay \$89,526.25 to FEA (now EFL) he stated that he is not aware about the payment and has seen the letter for the first time.
- (xv) When it was put to him that the letter was given to his lawyers he stated that he had seen the letter but was not aware about it.
- (xvi) Stated that he did not see the cheque for \$89,526.25 payable to FEA (Exhibit D3) before.

- (xvii) Agreed that Crown Lease No. 14013 was signed by him and another director of the Plaintiff and was registered on 15 December 1999 (Exhibit "D3").
- (xviii) When asked why the balance purchase price was not paid when Lease was issued to the Plaintiff, he stated that the Lot was not fully serviced.
- (xix) Agreed that in April 2000, the Plaintiff relocated to the subject land.
- (xx) When it was put to him that, in order to occupy the subject land, the Plaintiff had to have water/electricity he stated that they needed fully serviced lots.
- (xxi) When it was put to him that the subject land had water/electricity he stated that it was temporary.
- (xxii) When it was put to him that in clause 1 of the Schedule of Conditions it is clearly stated that the road work was subject to variation he stated that he did not agree.
- (xxiii) When it was put to him that according to his Engineers letter dated 16 October 2000 (Exhibit P19), water supply and the road was temporary until completion of subdivision he stated that it was not their concern and their concern was to get serviced lane.
- (xxiv) When it was put to him that his Engineer was aware that subdivision was continuing, he stated that the Engineer knows about reclamation and he knows about the spare parts.
- (xxv) When it was put to him that as far as maintenance works are concerned road/water works were completed in 2005, he stated neither Sherani & Co. nor the Defendant wrote to the Plaintiff and by that time the Plaintiff filed court action.
- (xxvi) Stated that he is not aware that water/sewerage reticulation certificate was issued in 2006.
- (xxvii) When shown the Water Reticulation and the Sewerage Reticulation Certificates dated 7 June 2007 (Exhibit D6 and D7) he stated he could see it now and that it was issued 6 years after they came on the property.

- (xxviii) Stated that in 2000, he did not make any enquiry with the Water Authority of Fiji (**WAF**) about supply of water because it was the Defendant's job.
- (xxix) Stated that Plaintiff had permanent supply of electricity after sub-station was built which took a lot of time.
- (xxx) Agreed that the End of Maintenance Water/Sewerage Reticulation Certificates were issued for Plaintiff's lot and other lots in the subdivision.
- (xxxi) When it was put to him that the electricity works was completed in 2007, and the Plaintiff was to have it connected to the subject land he stated that he was not aware.
- (xxxii) When he was shown the letter dated 20 September 2007, from FEA to Defendant (Exhibit D8) he stated that he was not aware about it and could not recall.
- (xxxiii) Stated that he was not really sure if in 2007, the Plaintiff made enquiries with FEA.
- (xxxiv) When it was put to him that as far as telephone ducting is concerned each lot owner had to deal with Telecom Fiji Ltd, he stated he could not remember and that a person came and connected Telephone from their previous premises.
- (xxxv) When the letter dated 21 July 1999 from the Defendant to Telecom (Exhibit "D9") was shown he stated that he could see the letter.
- (xxxvi) Agreed that the Suva City Council issued completion certificate for Plaintiff's building.
- (xxxvii) Stated that on 28 October 2002, the Plaintiff wrote to the Council about dust issue (Exhibit P26).
- (xxxviii) After that letter they have been liaising with Uday Narayan of the Defendant who kept on saying this month.
- (xxxix) Agreed that in 2012, the Plaintiff sold the subject land to Rolex Investment Limited for \$1.8million.

- (xl) When it was put to him that Plaintiff enriched itself by \$1.8million he stated "No", they had Bank loan to be paid.
- (xli) When it was put to him that they owed money to the Defendant yet they mortgaged the subject land he stated that the case was going.
- (xlii) When it was put to him that the Defendant did not breach the Agreement but the Plaintiff breached by failing to pay balance purchase price within thirty (30) days of signing the Transfer he stated the Plaintiff did not breach.
- (xliii) When it was put to him for Council to give completion certificate for the building water and electricity supply should be there he stated that there was temporary supply.

38. During re-examination PW1:-

- (i) Stated that the Plaintiff's financial assessments are available and he would be able to have his office present them.
- (ii) Plaintiff's financial statements filed with FRCA has actual sale figures and not projected sale figures.
- (iii) Absenteeism records (Exhibit P28 to P32) are from the record book they have and he can say it is from there but it had been long time now.
- (iv) Stated that there was no request from the Defendant to verify absenteeism record or sales projection or stock received.
- (v) Stated that it was not part of the Agreement for the Defendant to supply water and electricity in 2006 to 2008.
- (vi) Agreed that as per the Agreement all the services were to be provided within twelve (12) months of the Agreement but came some seven (7) years later.
- (vii) Stated that Exhibit D9 was never made known to him and the Plaintiff was not able to get the benefit of letter by FEA to the Defendant.
- (viii) Stated that water from settlement across the road which was temporary whilst they asked FEA to give temporary power until substation was installed.

- (ix) Stated that as for dust problem from road no temporary relief was provided and the problem lasted for about five (5) to six (6) years.
39. During examination in chief PW2 gave evidence that:-
- (i) He was employed by the Plaintiff Company as Accounts Clerk and joined the Company in 2000.
  - (ii) Identified Exhibits P36 to P40 as the Returns lodged with FRCA by the Plaintiff and he was involved with preparing the Plaintiff's accounts from 2003.
40. During cross-examination PW2:-
- (i) Agreed that he does not know anything that is in the Return for the years 2000, 2001 and 2002 (Exhibit P36 to P38) and he can only talk about 2003 and 2004 Return (Exhibit P39 and P40).
  - (ii) Stated that in 2003, the Plaintiff Company was based at Viria Road, Vatuwaqa and he helped Accountant, Hemant Chand prepare the Accounts.
  - (iii) Stated that Hemant Chand is no longer with the Plaintiff Company.
  - (iv) Stated that he left Plaintiff Company in 2006.
  - (v) Stated that in 2003 and 2004, the Plaintiff Company made profit of \$259,141.00 and \$211,930.00 respectively.
41. During re-examination PW2:-
- (i) Stated that in 2003, the Plaintiff Company's Operating profit was \$103,950.00 with chargeable income being \$110,250.00 and that tax is paid on profit.
  - (ii) Stated that in 2004, the Plaintiff Company's Operating profit was \$120,424.00 with chargeable income being \$130,814.00 and Plaintiff paid \$41,882.88 as income tax.
42. PW3 during examination in chief gave evidence that:-

- (i) He knows the Plaintiff Company as he built the building the Plaintiff was renting prior to buying the subject property and he became friends with Abdul Samad, the Director.
- (ii) He built the building for the Plaintiff and name of his company is Empire Construction.
- (iii) He built the Plaintiff's building more than 15 years ago but could not remember exact time.
- (iv) When he built the building, there was no provision for water or electricity.
- (v) After the building was completed, the Plaintiff called him to do repair works sometimes in 2004 but he could not remember what works.
- (vi) When it was put to him that he did painting he confirmed that.
- (vii) He did painting because paint had peeled off from wall.
- (viii) At the time he completed the building it was gravel road and in bad condition which existed for a while and they did not do it for one year.
- (ix) He constructed the driveways at front and rear of the building for the containers with spare parts.
- (x) He did back fill because land was uneven.
- (xi) He was hired by Abdul Samad to do the works.
- (xii) The letter dated 19 August 2002, from Empire Construction was quotation for construction of the driveway (Exhibit P41).
- (xiii) When part of letter was read to him he confirmed it as correct that the work was as a result of damage to the building.
- (xiv) The payment was made through the transfer of Truck by the Plaintiff to him and he did the repair works with 9 boys.

43. During cross-examination PW3:-

- (i) Stated that he has been in the building business since 1999, which is more than 18 years.



- (ii) Stated that the quotation dated 19 August 2002 (Exhibit P4) was prepared by his son and he told him to do estimate-quote.
- (iii) Stated that he does not have Invoice Nos. 30, 31 and 32 and those could be in quotation book.
- (iv) Agreed that letter is just letter and not invoice.
- (v) When it was put to him that he has not shown as to what the amount in the letter is made up of and letter is not assisting proceedings he stated that it is not false and all is true.
- (vi) Stated that instead of paying for the works, the Plaintiff gave truck.
- (vii) Agreed that the Tax Invoice dated 30 March 2000 (Exhibit P10), was issued to him by the Plaintiff.
- (viii) Agreed that Exhibit P41 is the letter issued by him to the Plaintiff to do the works for the Plaintiff and stated that what is in the letter is true.
- (ix) Stated that he could not recall when the completion certificate was issued for the building.

44. During cross-examination PW3:-

- (i) Agreed that Exhibit P10 is his invoice.
- (ii) Agreed that his letter dated 19 August 2002 is for construction of the driveway being Invoice No. 30.
- (iii) Stated that another Invoice for \$8,800.00 is not with him today and he undertook the work in Item Nos. 3 and 4 for the Plaintiff.

### **Defendant's Case**

45. Defendant called Hitendra Pande of Lot 19, Painapiu Street, Nakasi, Project Manager (**DW**) as its only witness.

46. DW during examination in chief gave evidence that:-

- (i) He is employed by the Defendant and has been employed by it for twenty-three (23) years.

- (ii) He did not deal with the subject matter personally but was around when the subdivision work was being carried out.
- (iii) Late Uday Narayan dealt with the matter subject to this proceeding and he passed away in 2011.
- (iv) In 1999, he was employed as the Project Administrator and will give evidence on basis of his knowledge about the subdivision works and from documents held by the Defendant.
- (v) The Defendant is involved in the business of civil engineering, carrying out subdivision works, construction of road seawall protection wall and so on.
- (vi) This claim by the Plaintiff is arising out of the Sale & Purchase Agreement dated 8 March 1999, entered between the Plaintiff and the Defendant which Agreement has Schedule Plan for Stages I attached to it.
- (vii) The sale price was \$140,000.0 with \$100,000.00 paid on execution of the Agreement and the balance \$40,000.00 was to be paid on transfer.
- (viii) Lots 11 and 12 was being sold under the Agreement which lots were later amalgamated.
- (ix) In the Schedule Plan, Road 1 was for Stage 1 of the subdivision and Roads 2 to 5 were for further stages.
- (x) Clause 1 in the Schedule of Condition only says road.
- (xi) Clause 1(b) of the Agreement deals with time for the Transfer of land.
- (xii) The transfer document was signed by both parties on 25 May 1999 (Exhibit D1).
- (xiii) Crown Lease No. 14012 in respect to the subject land was issued in favour of the Plaintiff and was registered on 15 December 1999.
- (xiv) Agreed that Exhibit P2 is the receipt for deposit paid by the Plaintiff to the Defendant.

- (xv) He could not confirm if payments as per Payment Voucher/Receipts being Exhibits P3, P5 and P6 were received by the Defendant as there is no signature or receipt.
- (xvi) Exhibit P7 is the letter which states that after amalgamation of Lots 11 and 12 area sold increased by 137sqm and informed the Defendant about extra payment for that area.
- (xvii) Exhibit P8 is the letter dated 7 March 2000, from Sherani & Co. to the Plaintiff asking for payment of the balance purchase price.
- (xviii) Exhibit P9 is the letter dated 10 March 2000, from the Plaintiff's Engineer to Graphic Design, the Defendant's Consultant complaining about there being no water, power, telephone and road condition and by then Defendant practical completion certificate for the subdivision.
- (xix) At that time the Defendant's office was situated at Viria Road, opposite the Plaintiff's lot.
- (xx) The Defendant at that time had water, electricity and telecom services available to them.
- (xxi) He could not recall how many businesses were there on 10 March 2000, but there were other businesses there and recalled China Huashi and Fortech Construction being there.
- (xxii) There were twelve lots and the Defendant did not receive any complaints from other lot owners.
- (xxiii) Exhibit P11 is the letter dated 15 March 2000, signed by Gina Narayan in respect to letter sent by the Plaintiff's Consultant.
- (xxiv) He could not recognize Exhibit P12 (BW Holdings Statement dated 15/3/00).
- (xxv) Exhibit P13 is the Statement in respect to sale of forklift by the Defendant to the Plaintiff for \$6,500.00.
- (xxvi) Exhibit P14 is receipt for \$5,000.00 issued to the Plaintiff and he does not know what the payment is for.
- (xxvii) Exhibit P16 is the Plaintiff's Voucher and he is not sure if the payment as stated in the voucher was made.

- (xxviii) Exhibit P17 is the Completion certificate dated 16 June 2000, issued to the Plaintiff and as at that date the Defendant did not receive the balance purchase price.
- (xxix) Exhibit P18 is the letter dated 12 October 2000, from Sherani & Co. to the Plaintiff for payment of the balance purchase price.
- (xxx) Exhibit P19 is letter from the Plaintiff's consultant stating that the water work has not been completed and the road has not been tarsealed.
- (xxxi) It was the Plaintiff's responsibility to arrange water supply connection and the Defendant's responsibility to tarseal the road.
- (xxxii) Defendant was to tarseal the road upon completion of subdivision and at that time the Plaintiff's consultation had knowledge that subdivision work was ongoing.
- (xxxiii) Exhibit P20 is letter from R. Patel & Co. to Sherani & Co. Solicitor to the Defendant about loss of business suffered by their client.
- (xxxiv) Exhibit P21 is response to that letter by Sherani & Co. for the Plaintiff to pay the balance purchase price.
- (xxxv) Exhibit P22 is letter from the Plaintiff's consultant complaining about water supply services and road surface.
- (xxxvi) The water supply was connected as at 28 November 2000, but could not recall if other services such as drainage, driveway and footpath were completed.
- (xxxvii) As at 28 November 2000, the Defendant did not receive any complaints from other lot owners and the Defendant was operating its office and garage from there.
- (xxxviii) Exhibit P23 is the letter dated 6 September 2001, from R. Patel & Co. to Sherani & Co. for the Defendant to complete the works.
- (xxxix) He cannot say if copy of letter dated 28 October 2002 (Exhibit P26) from the Plaintiff to Suva City Council was sent to the Defendant.
- (xl) He had not seen the letter dated 20 November 2011, from R. Patel & Co. to the Plaintiff.

- (xli) He has been involved with almost ten subdivision works.
- (xlii) It is the contractor's responsibility to arrange for supply for services to the subdivision and then it is upto lot owners to have it connected to their lots.
- (xliii) Time for completion of sub-division will depend on the scope and size of the subdivision.
- (xliv) Agreed that in respect to the Sale & Purchase Agreement between the Plaintiff and the Defendant, the Plaintiff got Crown Lease very quickly.
- (xlv) He was not sure as to when other lot owners got their lease but thinks it to be in 2008.
- (xlvi) The Defendant hired FEA to carry out power reticulation works.
- (xlvii) Exhibit D2 is the letter dated 9 April 1999, from NBF Asset Management Bank to the Defendant approving payment of reticulation fee.
- (xlviii) Exhibit D3 is the ANZ Bank cheque dated 16 April 1999, for the sum \$89,526.29.
- (xlix) The water reticulation was also provided and Exhibit D4 is the Beginning of Maintenance Certificate for Water Reticulation by the Water and Sewerage Department dated 30 September 2005.
- (l) Procedures adopted by Water Authority is that they carry out beginning of maintenance check and a year after they carry out end of maintenance checks.
- (li) Exhibit D5 is the Beginning of Maintenance Certificate dated 30 April 2006, for Sewerage Reticulation by Water and Sewerage Department.
- (lii) As at 30 August 2006, they had water and sewerage services at whole of Stage 1 of subdivision.
- (liii) Exhibition D6 and D7 are the End of Maintenance Certificate for water and sewerage reticulation dated 7 June 2002, by Water and Sewerage Department.

- (liv) By 7 June 2002, the Defendant, the Plaintiff and China Huashi had Water and Sewerage Reticulation.
- (lv) From 2000 to 2007, the Defendant had water supply and electrical services at the site.
- (lvi) Exhibit D8 is the letter dated 20 September 2007, from FEA to the Defendant advising that electrical reticulation has been completed and prior to that date the Defendant and the Plaintiff had electricity supply from 2000 to 2007.
- (lvii) Exhibit D9 is the letter dated 21 July 1999, from the Defendant to Telecom Fiji Ltd and it was the lot owners responsibility to open account with Telecom.
- (lviii) In 2007, all the roads in the Schedule Plan attached to the Agreement was operational.
- (lix) From 2000 to 2007, the Defendant did not have any dust issue and to his knowledge they did not receive any complaints from other businesses on site.
- (lx) The Defendant had access to road, had water and electricity.
- (lxi) The Defendant was at particular site from 2000 to 2004.
- (lxii) As for the Plaintiffs claim for loss of business from 2000 to 2009, due to road condition, no electricity and water supply he stated the road was constructed with access granted to the Plaintiff and from 2000 to 2007, water and electricity services were available.
- (lxiii) When it was put to him that the Plaintiff is saying that electricity being used by them was temporary he stated he has no comments.
- (lxiv) From the start of the Viria Road Subdivision, all services were terminated for stage 1 of subdivision until roundabout and continued from there for stage 2 of the subdivision.
- (lxv) When services were terminated the lot owners still had water and electricity.
- (lxvi) They did not have any dust issues.

- (lxvii) Driveway to the Plaintiff's lot was not part of construction phase and it was the lot owner's responsibility to construct driveway.
- (lxviii) The subject property has been sold by the Plaintiff but he is not aware when it was sold.
- (lxix) The Defendant is claiming for balance purchase price, legal costs and interest.

47. During cross-examination DW:-

- (i) Stated that he has been Project Manager for the Defendant since 2013, and his job is to ensure that projects are completed and clients are kept happy.
- (ii) Stated that he was not involved in the project subject to this proceedings.
- (iii) Stated that he has no professional qualification, he is not an engineer and the Defendant is not an engineering company.
- (iv) Stated that he has no knowledge of accounts and personnel responsible to handle accounts in Defendant Company is Rajneel Chand, the Accountant.
- (v) Stated the Accountant did not give any documents in relation to accounts or brief him about how much the Plaintiff owed the Defendant and he has no knowledge of the amount owed by the Plaintiff to the Defendant.
- (vi) Agreed that lots purchased by the Plaintiff and sold by the Defendant was for fully serviced lots and that is why they have special conditions.
- (vii) Stated that Exhibit D11 is the letter dated 16 October 1998, from Suva City Council to Wood & Jepsen, the Defendant's engineers, approving engineering plan for subdivision with conditions.
- (viii) Stated that Item 6 of Exhibit D11 has been done and certificate was issued on 7 June 2007 (Exhibit "D6"), and agreed that it was not completed until 2007.

- (ix) Stated that Item 7 of Exhibit D11 was completed for which letter was provided on 20 September 2007 (Exhibit D8) and agreed that the work was not completed until 20 September 2007.
- (x) Stated that letter dated 21 July 2008, is from Suva City Council to Quality Development Consultant, the Defendant's consultant and subject of the letter is "Viria Road Subdivision" (Exhibit D11).
- (xi) Agreed that roads were not approved by Suva City Council until 2008.
- (xii) In reference to Exhibit D9 being the letter dated 2 July 1999, from the Defendant to Telecom agreed that as at that date, no telephone service was available and stated that he does not know when such works were completed.
- (xiii) In reference to Exhibit D4 (Beginning of maintenance certificate - Water Reticulation dated 30 September 2005), stated that works were completed.
- (xiv) In reference to Exhibit D5 (Beginning of Maintenance Certificate dated 30 September 2005), stated that works were completed.
- (xv) Stated that before that Certificates (Exhibits D4 and D5), the Defendant as contractor laid pipes to the point where existing pipe line is as marked in the drawing when they informed WAF that they have connected and after that it became WAF's responsibility to come check and connect to existing water mains after checking water pressure ratings.
- (xvi) Stated that prior to issuance of the Certificate (Exhibits D4 and D5), the Plaintiff had access to water and sewerage facility.
- (xvii) In reference to Exhibit D3 stated that from 2002 to 2007, the Plaintiff, the Defendant and China Huashi had electricity.
- (xviii) Stated that Telephone service was also available.
- (xix) Agreed that it was unreasonable for the Plaintiff to not to pay the balance purchase price as they had the transfer.
- (xx) Stated that Exhibit D6 is the End of Maintenance Certificate for Water Reticulation dated 7 June 2008.



- (xxi) Stated that water could be accessed from the date Beginning of Maintenance Certificate was given.
- (xxii) In reference to Exhibit D7 (End of Maintenance Certificate - Sewerage Reticulation), he stated that they never received any complaints about the sewerage.
- (xxiii) In reference to Exhibit D8, he agreed that days after that letter the lot owners for that stage could get power supply.
- (xxiv) Agreed that at the time of signing the Agreement (Exhibit P1) the Defendant had not done infrastructure work.
- (xxv) Agreed that all services were connected after twelve (12) months from date of the Agreement.
- (xxvi) When asked how could the Plaintiff pay the balance purchase price when project was delayed he stated payment was to be made when the property had been transferred to the Plaintiff.
- (xxvii) When it was put to him that what is stated at second paragraph 2 of Exhibit P9 is factually correct he stated that they had all services at that time.
- (xxviii) When it was put to him in terms of his evidence, services were not completed until 2006, he stated that all services were provided.
- (xxix) Agreed that these services were not as per contract and that is why it was called temporary service.
- (xxx) When it was put to him that because the Defendant did not do work as per Agreement, the Plaintiff suffered damage he stated he has no comment on that.
- (xxxi) Denied that the Defendant breached the Agreement by not providing the services in a timely manner.
- (xxxii) When it was put to him that because the Defendant did not provide services in timely manner it could not claim he stated lease was issued in the Plaintiff's name and that subdivision was in 5 Stages and Council gave completion certificate for the building.

48. During re-examination DW:-

- (i) Agreed that issuance of the Water and Sewerage Reticulation Certificate (Exhibits D4 and D5) meant that those services were available from that time.
- (ii) Stated that the Defendant as contractor lay pipes as marked in the drawing; takes it to the point where existing pipeline and informed WAF, and then it becomes WAF's responsibility to check and connect to existing water mains.
- (iii) Stated that once WAF checks and is satisfied that the water pressure rating is okay they connect it to their system.
- (iv) Stated that prior to issuance of the Certificate by WAF, the Plaintiff had access to water and sewerage.
- (v) Stated that from 2000 to 2007, the Plaintiff, the Defendant and China Huashi had electricity.
- (vi) Stated that prior to the Defendant's letter to Telecom (Exhibit D9) telephone services were available to the Plaintiff.

**Whether the Defendant was in breach of Sale and Purchase Agreement dated 5 March 1999 (Exhibit P1)**

- 49. On 5 March 1999, Defendant as Vendor and Plaintiff as Purchaser entered into a Sale and Purchase Agreement for sale of Lots 11 and 12 shown on the Drawing No. 2005 prepared by Wood & Jepsen Consultants and attached to the Agreement.
- 50. Plaintiff at paragraphs 4 and 5 of the Statement of Claim pleads that the Defendant willfully refused and/or neglected to construct road, culverts and drains as provided for in the Schedule of Conditions despite several demands from the Plaintiff.
- 51. Condition 1 in the Schedule of Conditions provide as follows:-

“For the purpose of carrying into effect the conditions of approval by the proper authority of any scheme of subdivision which includes the land hereby agreed to be sold the Vendor will at the expense of the **Vendor in all things proceed without undue delay to take all necessary steps to construct all necessary roads, culverts and drains and cause the necessary survey plan of the said Lot to be prepared and deposited at the Titles Registry and dedicate the road or whether necessary grant by means of right of way road access (where shown on the subdivision plan) to the said Lot** PROVIDED that the Vendor reserves the right at all times to alter the width of position of any road or drainage or other reserve or easement shown on any plan of any such scheme of subdivision and to vary amend or alter any such scheme in any way whatsoever in respect of any land therein other than the said Lot and in respect of the said Lot to such extent and in such respects as it may be found necessary on survey to make any such variation, amendment or alteration of the necessity for which the Vendor’s surveyor shall be the sole judge.

***(emphasis added)***

52. It is Plaintiff’s contention that the Defendant failed to construct the tarsealed road within the twelve (12) month period stated in clause 1(e) of the Agreement.
53. Clause 1(e) of the Agreement provides as follows:-
- “The parties agree that subject to the provisions of Clause 1(b) the completion of the transactions herein are to be completed no later than 12 months of the date of this Agreement.”
54. The “transaction” contemplated under this clause relates to:-
- (i) Transfer of Lots 11 and 12 which lots were subsequently amalgamated as one lot and known as Lot 1 on Plan SO 4177.
  - (ii) Issuance of Lease (Title Deed) by Registrar of Titles;
  - (iii) Payment of the balance purchase price.
55. It is these transactions which is provided for in clause 1(b) of the Agreement had to be completed within twelve months.

56. There is nothing in the Agreement either in the form either expressed or implied terms to suggest a tarsealed road had to be constructed within twelve months from the date of the Agreement.
57. This does not mean that the Defendant could relax and not construct the road within a reasonable time.
58. From DW's evidence, this Court takes note that the Defendant at the material time was engaged in large subdivision consisting of five stages with Lot sold to the Plaintiff being part of 1<sup>st</sup> Stage (Stage 1).
59. In response to the letter dated 10 March 2000, from the Plaintiff's Engineer (Exhibit P9) the Defendant in its letter dated 15 March 2010 (Exhibit P12) stated as follows:-

"There is a road, which gives your client access to his property, and which will be sealed upon the completion of stage 2 subdivision. (This is due to the damage, which maybe caused to the road with heavy plant and machinery).
60. It is undisputed that the Plaintiff's lot had 1 road access.
61. The only issue raised by the Plaintiff is that the access road was not tarsealed which resulted in the Plaintiff's building and stock being subject to dust.
62. Even though it is not specifically provided for in the Agreement, this Court holds that it was the Defendant's responsibility to provide fully constructed tarsealed road in front of the Plaintiff's lot within a reasonable time.
63. Evidence produced by the Plaintiff and the Defendant established that proper tarsealed road was constructed in 2008 which is almost nine (9) years after date of Agreement.
64. This Court therefore finds that the Defendant breached the Agreement by failing to provide fully constructed road within a reasonable time.

**Whether the Defendant is liable to pay damages to the Plaintiff and if so Whether the Plaintiff has suffered any damage**

65. At paragraph 7 of Statement of Claim, the Plaintiff claims as follows:-

“7. By reason of the matters hereof and due to the default of the Defendant, the Plaintiff has been put to considerable trouble, inconvenience and expense and thereby has suffered loss and damage.”

66. This Court having held that the Defendant has breached the Agreement has no hesitation in holding that the Defendant is liable to pay the Plaintiff any damages suffered by the Plaintiff.

67. The onus is on the Plaintiff to prove the loss and damage claimed in the Statement of Claim.

**Repainting of Premises**

68. The Plaintiff completed its building built on the subject lot in June 2000 as appears from the Certificate of Completion from Suva City Council (Exhibit P17).

69. When the Plaintiff built the building it knew or ought to have known that the road was not tarsealed and as such building will be exposed to dust and dirt.

70. Except for painting of the building by PW3, no evidence has been led to prove that the Plaintiff had to re-paint the building every year and half as stated in PW1’s evidence (paragraph 36(xxxv) of this Judgment refers).

71. This Court has gone through the Statement of Accounts of Plaintiff being Exhibits P37 - P40 and nowhere an expense such as repair or maintenance appears in Plaintiff’s Income and Expenditure Account for the years 2001 to 2004.

72. PW3, the builder who built the Plaintiff’s building during examination in chief

gave evidence that sometimes in 2004, he was called to carry out repair works to the building but could not remember what works he had to carry out.

73. When it was put to him that he did painting works he confirmed it and stated that **he did painting because it was peeled off.**
74. No evidence has been led by building engineer to establish that paint gets peeled off because of dust.
75. In view of no evidence being led:-
- (i) To show that the Plaintiff incurred expenses for re-painting of building at intervals of one and half years; and
  - (ii) Paints got peeled off because of dust and building required re-painting this Court finds that the Plaintiff has not suffered the damages claimed in its Statement of Claim.
76. Plaintiff has not claimed and particularized any claim for loss of business or stock as was claimed by PW1 in his evidence.
77. If the Plaintiff did claim for loss of business because of the dust (**which it did not**) this Court doubts if the Plaintiff in the absence of any evidence would have been awarded any damage or loss from stock being written off or staff being absent from work:-
- (i) No evidence has been led to show value of stock written off;
  - (ii) No loss of stock is claimed in the Plaintiff's Income and Expenditure Account and no amount of stock written off from years 2000 to 2004 is shown in the Accounts (Exhibits P36 to P40).
  - (iii) Table below shows that Plaintiff's net profit increased after the Plaintiff moved into the subject property.

<b>Year</b>	<b>Profit (\$) Loss</b>
1999	57,837
2000	8,164
2001	13,001
2002	24,522
2003	68,670
2004	78,541

- (iv) Table below shows total sales for years 1999 to 2004 (Exhibits P36 to P40).

<b>Year</b>	<b>Sales (\$)</b>
1999	1,522,237
2000	1,216,785
2001	1,179,130
2002	1,544,052
2003	1,900,987
2004	2,165,644

78. The above tables clearly show that after the Plaintiff moved into its building on the subject land its profit and sales figure improved from 2002 onwards.

**Whether Defendant owed Plaintiff \$35,000.00 towards the purchase price plus interest thereon at the rate of 10% per annum from 8 March 2000 to date of actual payment**

79. The sale price for Lots 11 and 12 as per the Agreement was \$140,000.00.
80. When Lots 11 and 12 were amalgamated as one lot, the size of the land got bigger by 137sqm which resulted in the Plaintiff paying additional sum of \$5,391.32 (Exhibits P7 and P16). The Plaintiff paid this amount to the Defendant and as such Court will not address this matter any further.
81. The sale price of \$140,000.00 was to be paid in terms of clause 1 of the Agreement which provides as follows:-

“1.(a) The sum of \$100,000.00 (ONE HUNDRED THOUSAND FIJI DOLLARS) shall be paid by the Purchaser to the Vendors as a deposit and in part payment of the said purchase price on signing hereof.

(b) The balance of the said purchase price namely the sum of \$40,000.0 (FORTY THOUSAND FIJI DOLLARS) shall be paid to the Vendor within 30 days of the Vendor advising, in writing, the Purchaser that the Vendor is in a position to execute a registrable

Instrument of Transfer for the said Lot with the Registrar of Titles and hand over against payment the Title Deed issued by the Registrar of Titles for the said Lot (“Written Notice”). In the event the Purchaser does not pay the said balance sum to the Vendor within the said 30 days as herebefore provided interest at the rate of 10 per centum per annum shall be payable by the Purchaser to the Vendor (but without prejudice to any other rights of the Vendor herein and as the Vendor may have in law) on the said balance sum or so much thereof as may remain unpaid. Interest at the said rate shall be charged from the date of expiry of the Written Notice given by the Vendor to the Purchaser as aforesaid and interest shall be computed on a monthly basis with monthly rests for computation of interest from time to time. All moneys paid by the Purchaser shall be applied first in payment of interest then accrued and secondly in reduction of the balance purchase money owing;

- (c) All payments in respect of this agreement shall be made to the Vendor at the office of Messrs. Sherani & Co, Solicitors of Suva or at such other place as it shall from time to time direct in writing.
- (d) After signing hereof by both Vendor and the Purchaser, the Purchaser shall at its expense have this agreement stamped with ad valorem duty and forward a stamped counterpart to the Vendor.
- (e) The parties agree that subject to the provisions of Clause 1(b) the completion of the transactions herein are to be completed no later than 12 months of the date of this Agreement.”

- 82. The sum of \$100,000.00 has been paid by the Plaintiff and received by the Defendant on 8 March 1999 (Exhibit P2).
- 83. This Court fails to understand how the Plaintiff could deny the counter-claim absolutely when it filed Defence to Counter-claim.
- 84. PW1’s evidence is that Plaintiff paid \$25,000.00 towards the balance purchase price as follows:-



14 May 1999 (Exhibit P3)	\$5,000.00
5 August 1999 (Exhibit P5)	\$10,000.00
1 September 1999 (Exhibit P6)	\$5,000.00
12 October 2000 (Exhibit P18)	\$5,000.00

85. In terms of clause 1(c) of the Agreement the purchase price was to be paid to the Defendant as Vendor at the office of Messrs. Sherani & Co. or at such other place as the Defendant shall time to time direct in writing.
86. There is no evidence before this Court that the Plaintiff was directed to pay the purchase price elsewhere instead of Sherani & Co.
87. This Court takes note of the following:-
- (i) Messrs. Sherani & Co. issued its receipt for the sum of \$100,000.00 paid on 8 March 1999, by the Plaintiff (Exhibit P2).
  - (ii) On 12 October 2000, Sherani & Co. issued letter to the Plaintiff acknowledging receipt of \$5,000.00 from the Plaintiff.
  - (iii) When the Plaintiff paid \$5,391.32 for additional 137sqm for land in case it got acknowledgement with receipt of that sum issued (Exhibit P7).
  - (iv) The Defendant sold Forklift to the Plaintiff and did some work for the Plaintiff for which the Defendant charged the Plaintiff \$5,000.00. The Plaintiff paid this amount to the Defendant for which Defendant issued receipt.
88. From the preceding paragraph it becomes quite apparent that the Plaintiff would receive some sort of receipt or acknowledgement of receipt from the Defendant or its Solicitor when any payment was made by the Plaintiff to the Defendant.
89. No such receipt or acknowledgement was produced in evidence for payments allegedly made by the Plaintiff on account of balance purchase price on 14 May 1999 (Exhibit P3), 5 August 1999 (Exhibit P5) and 1 September 1999 (Exhibit P6).

90. Although the vouchers issued by the Plaintiff has a place for the receiver of Cheque to acknowledge receipt, that space is left blank.

91. This Court also takes note of the following:-

(i) On 21 November 2002, the Plaintiff wrote to Patel Sharma & Associates (Exhibit P25).

(ii) At paragraph 3 of the said letter, the Plaintiff states as follows:-

“Payments to B.W. Holdings as follows:-

Chq #:	HBL 363951	08-03-1999	\$100,000.00
	HBL 363954	14-05-1999	5,000.00
	HBL 363981	05-08-1999	10,000.00
	HBL 364000	01-09-1999	5,000.00
	BOH 1111	02-10-2000	<u>5,000.00</u>
Total amount paid to date:			<u>\$125,000.00</u>

(iii) At paragraph 4 of the said letter, the Plaintiff states as follows:-

“4. The total amount outstanding as at today - \$5,000 (\$15,000).

92. The question one needs to ask is that after putting \$125,000.00 as total amount paid, then why the Plaintiff would initially put \$35,000.00 as amount owing as at date of the letter (21/11/2002) and then cross out 1 over 3 and write \$15,000.00) in brackets (exhibit P25).

93. This Court after analyzing the oral and documentary evidence holds that the balance purchase price owing by the Plaintiff to the Defendant is \$35,000.00, which the Plaintiff is liable to pay to the Defendant.

**Whether the Plaintiff is liable to pay interest at the rate of 10% per annum on the sum of \$35,000.00 being the balance purchase price**

94. It is the Plaintiff's contention and evidence that they held the balance purchase

because the road was not tarsealed, water sewerage reticulation, electricity and telephone services were not connected and provided.

95. DW's evidence is that from the time the Plaintiff moved into the subject lot in 2000, water, sewerage, electricity and telephone services were provided even though they were temporary.
96. DW's evidence is supported by the Plaintiff's oral evidence in the form of its Statement of Finance Accounts (Exhibit P35 to P40).
97. The Income and Expenditure Accounts of the Plaintiff clearly shows that the Plaintiff had been paying for water, electricity and telephone charges from the time it moved into the building constructed on the subject lot.
98. There is nothing in the Agreement to state the payment of the balance purchase price and the Plaintiff obtaining Lease over the subject lot in its name is conditional upon the Defendant having electricity substation, water/sewerage reticulation and telephone service connected permanently.
99. From the manner in which the Agreement is drafted and the obtaining of Lease over the subject lot by the Plaintiff is evidence that clause 1(b) and Schedule of Condition were independent clauses.
100. This Court holds that the Plaintiff is liable to pay interest as provided for in Clause 1(c) of the Agreement.
101. The balance purchase price was to be paid against the Lease to be issued by the Registrar of Titles.
102. Registrar of Titles issued the Lease on 15 December 1999, which means that balance purchase price of \$40,000.00 was to be paid on this date and failing which interest was to be paid at the rate of 10% per annum.
103. This Court takes note that Defendant claims interest from 8 March 2000, which is just and fair.

104. This Court therefore holds that Plaintiff is liable to pay interest on the sum of \$35,000.00 at the rate of 10% per annum from 8 March 2000, to date of judgment.

### **Costs**

105. This Court takes into consideration that trial lasted for two days and both parties filed submissions.

### **Orders**

106. This Court makes following Orders:-

- (i) Plaintiff's claim is dismissed and struck out.
- (ii) Plaintiff do pay Defendant the sum of \$35,000.00 plus interest on the said sum of \$35,000.00 at the rate of 10% per annum from 8 March 2000, to date of this judgment.
- (iii) Plaintiff do pay Defendant's cost of this action assessed in the sum of \$3,000.00.



  
**K. Kumar**  
**Chief Justice**

At Suva  
8 December 2021

### **Solicitors:**

**FA & CO. for the Plaintiff**

**SHERANI & CO. for the Defendant**