

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 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: **OFFICIAL RECEIVER** on behalf of **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

Before : Master U.L. Mohamed Azhar

Appearance: Mr. V. Sharma for the Plaintiff
The Defendant absent and unrepresented

Date of Decision: 28th July 2023

DECISION

01. The plaintiff and Denarau Waters Pte Limited (hereinafter called as the original defendant) on 26th May 2016 entered into a Conditional Sale and Purchase Agreement by which the original defendant agreed to develop and the plaintiff agreed to purchase a residential lot within the development. The proposed Lot was later registered as State Lease No. 21409 being Lot 29 on land known as "Denarau Island" (part of) situated in the District of Nadi, Province of Ba, and having an area of 1011m². The agreed consideration was \$ 799,000 plus Value Added Tax. The plaintiff on the same day provided a Bank Guarantee in the sum of \$ 79,900 being the 10% deposit of purchase price through the Bank of South Pacific.

02. The original defendant on or about 31.03.2018 informed the plaintiff that, it had provided all services and the parties could complete the transaction. However, the plaintiff upon inspection found that, there was no proper access to the development and the designated Lot and required the original defendant to provide the same. However, the original defendant allegedly breached the terms of the agreement and wanted to call on the Bank Guarantee. As a result of the alleged breach, the plaintiff terminated/rescinded the agreement on 29.08.2019 as pleaded in paragraph 12 of the Statement of Claim and sought the following reliefs from the court.
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.
03. The plaintiff also together with the Writ filed a summons supported by an affidavit and sought an injunction restraining the original defendant by itself and or any one acting on its behalf 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 26.05.2016 until final determination of this action or further order of this court. Accordingly, on the same day (03.12.2019) the interim injunction was granted. On the next date, the interim injunction was made permanent as the defendant was absent despite service interim injunction.

04. The original defendant neither filed the acknowledgment nor did it file the defence even though the writ was served. The plaintiff then by an Ex-Parte Summons moved for judgment against the defendant as follows:

- [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 favour 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 favour 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 favour of the Plaintiff on a full solicitor/client indemnity basis to be assessed before the Master of the High Court;
- [8] Such further or other relief as this Honorable Court deems fit, just and expedient.

05. However, the judge after hearing the summons granted only 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 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.
06. The matter was then listed before this court for assessment of general and special damages. At hearing two witnesses testified on behalf of the plaintiff. The first witness was the Registered Property Valuer and the second was the Accountant of the plaintiff company. Total of 15 Exhibits were tendered in evidence on behalf of the plaintiff. The original defendant was wound up after the hearing for assessment of damages and the plaintiff then joined the Official Receiver on behalf of the original defendant.
07. The plaintiff claims special damages in sum of 1,117.25, the general damages for loss of potential profit in sum of \$ 364,000.00 (approximate profit after deducting the purchase price of the Lot from the estimated market value), interest on special damages at the rate of 3%, interest on general damages at the rate of 6%, cost in sum of \$ 3,000.00 and post-judgment interest at the rate of 4% on total award.
08. It is settled that, the special damages have to be pleaded and proved (Lord Goddard in British Transport Commission v Gourley [1956] AC 185). The specific damages are accrued and ascertained financial loss which the plaintiff had incurred. Unless agreed by the parties, special damages should be expressly pleaded; they must be claimed specifically and proved strictly (per: Edmond David LJ in Cutler v Vauxhall Motors [1971] 1 QB 418).
09. The plaintiff specifically pleaded in paragraph 12 of the Statement Claim that, legal cost for conveyance and financing was \$ 1, 117.25. The second witness in her testimony stated that, Young & Associates acted as lawyers for the plaintiff in order to get Bank Guarantee and they facilitated with BSP. The witness stated that, they charged a total of \$ 1,117.25. The witness tendered Tax Invoice dated 20.02.2019 and issued by Young & Associates to the plaintiff company. It is marked as "PE15" and the amount is \$ 1,117.25 – exactly the same that was claimed in in paragraph 12 of the Statement Claim. However,

the court found at the time it was tendered that, the descriptions given by authors of that Invoice were not consistent with the oral evidence of the second witness who tendered to the court.

10. According to the breakup of costs given in that Invoice, Young & Associates charged \$ 300 for receiving instructions and attending to preparing Notification of Change of Details of Charge etc. Again there is a charge of \$ 400 for Collateral Marking – Mortgage over **State Sub Lease No. 606659** which is not relevant to this case at all. Finally there is a charge of \$100 for Guarantee by Aria Investment. The disbursements amounting to \$ 225 and VAT in sum of \$ 92.25. The total is \$ 1,117.25. Conversely, the State Lease relating the Lot 29 that was assigned to the plaintiff under the Agreement is **State Lease No. 21409**. However, there is no reference about this Lease (**State Lease No. 21409**) at all in the said Invoice marked as “PE15”. The court inquired the witness about this and she replied that, the \$ 400 mentioned in the said Invoice was for another property and only \$ 300 mentioned in that Invoice was the legal fee for the Lot 29 which is the subject property in this matter. If this explanation is accepted, the cost incurred by the plaintiff would have been only \$ 300 and not \$ 1,117.25 as claimed by the plaintiff in statement of claim and testified by the second witness. In any event, there is no reference to Lot 29 either in the description given for the said \$ 300.
11. The Exhibit marked as “PE15” and tendered in evidence appears, on the face of it, to be proving the special damages \$ 1,117.25 claimed by the plaintiff in its statement of claim. However, close scrutiny reveals that, “PE15” not only contradicts the claim of special damage of \$ 1,117.25, but also discredits the oral evidence of the second witness. The reason being that, the second witness initially tendered it for the proof of \$ 1,117.25 as claimed in the statement of claim. However, the explanation came only after the court detected the discrepancy and inquired the second witness. Furthermore, the second witness stated that, this was for obtaining Bank Guarantee for the subject property. The plaintiff provided the Bank Guarantee on **26.05.2016**. The description for \$ 300 in that Exhibit “PE15” clearly states that, “Receiving instruction dated **24 May 2018**.....” If the Bank Guarantee was provided in 2016, the plaintiff could not have given instruction after two years in 2018 to obtain the same. This clearly discredits the oral evidence of the second witness.
12. It is obvious that, second witness knew that “PE15” contains charges relating to other property; however, she tried to use it in order to facilitate the plaintiff’s claim for \$ 1,117.25. Thus, I decided that, both the oral evidence of second witness and documentary evidence marked as “PE15” are not reliable and as a result I decline to award the special damages claimed \$ 1,117.25 by the plaintiff.

13. The second witness tendered the Exhibits "PE 13" and "PE14" and claimed the special damages for the cost incurred for advertisement of Lot 29. I am unable to accept the same for three reasons. Firstly, the plaintiff did not plead this special damages in the statement of claim. Secondly, both Exhibits are copies of Invoices prepared by Bayleys Real Estate (Fiji) Limited and the second witness did not provide proof of payment by the plaintiff at hearing. Thirdly, only evidence on payment of the amount claimed in those Exhibits is the oral evidence of the second witness. The second witness gave completely inconsistent evidence in relation to Exhibit "PE15" as discussed above. Therefore, I do not consider her evidence as reliable. For these reasons, I am not awarding damages for the same.
14. The first witness is a registered valuer and he testified in court about his valuation of the development area in general and the Lot 29 which was assigned to the plaintiff in special. This witness justified his finding on the value of the said Lot 29 and tendered the report marking as "PE 2". According to this witness, the market value of the said Lot 29 was \$ 1,163,000.00 (One Million One Hundred and Sixty Three Thousand dollars) as at 28.05.2018. This witness is an expert in assessing the market value of the properties and he gave his expert opinion on the value of Lot 29 based on his findings.
15. The second witness, looking at the purchase price (\$ 799,000.00) of the Lot 29 and the market value of Lot 29 (\$ 1,163,000.00) assessed by the first witness, further testified that, the plaintiff's loss was sum of \$ 364,000.00. This is the amount that is claimed by the plaintiff as loss of potential profit. In other words, the plaintiff's position, as demonstrated by the second witness, is that the plaintiff would have sold the said Lot 29 for the market value and profited in sum of \$ 364,000.00 after deducting the purchase price.
16. In fact, the plaintiff did not even pay the purchase price of the said Lot 29. The plaintiff only provided a Bank Guarantee in the sum of \$ 79,900 being the 10% deposit of purchase price through the Bank of South Pacific. The plaintiff later alleged that, the original defendant failed to provide road access as required and rescinded/terminated the agreement. Furthermore, the plaintiff was successful in obtaining a prohibitory injunction against the original defendant from dealing with, withdrawing, collecting, assigning, utilizing, dissipating and or calling on the said Bank Guarantee. It is in this background, the plaintiff claims damages in sum of \$ 364,000.00 the profit it would have gained had it sold the Lot 29 for the estimated market price. There is no issue on the purchase price of Lot 29 as agreed by the plaintiff and the original defendant and the market value as testified by the first witness. However, the pertinent question is whether the plaintiff is entitled to claim such amount (\$ 364,000.00) in this case after rescinding/terminating the agreement with the original defendant and obtaining an injunction as aforesaid without even paying the purchase price at all?

17. The plaintiff pleaded in paragraph 12 of the Statement of Claim that, it terminated/rescinded the contract for the breach pleaded in paragraph 9 of the Statement of Claim. The alleged breach was failure to provide proper access road. It therefore becomes essential to consider the nature of this termination/rescission to decide whether the plaintiff is entitled for the damages it claimed.
18. Generally termination of a contract makes it unenforceable from the date of termination. It stops the contract at the particular time so that the future obligations under the contract are terminated, but the past accrued rights arising under the contract are enforceable. On the other hand, rescission extinguishes the contract and restores the parties to their original position, as if there had never been a contract at all.
19. **Cheshire and Fifoot's, Law of Contract, Eighth Australian Edition** describes the difference between "rescission" and "termination" of contract at page 493 as follows:

The word 'rescission' is sometimes erroneously used to describe termination of a contract. The two are quite distinct. As just described, rescission brings about a 'winding back' of the contract as if it had never been. It is a prerequisite of rescission that this must be substantially possible. Termination, on the other hand, stops the contract at a particular time so that any future obligations under the contract are terminated (apart from the obligation to pay damages in the event of breach and some 'procedural' aspects of the contract such as arbitration clauses or exemption clauses), while past accrued rights arising under the contract are enforceable. It would be logically impossible to sue for damages for breach of a contract that has been rescinded; while it is a commonplace to sue for damages for breach of a contract that has been terminated.

20. On the other hand, termination for breach is often considered as "rescission". Accordingly, the right to terminate for breach is considered as the right to 'rescind' or 'discharge' of it. **Cheshire and Fifoot's Law of Contract, Eighth Australian Edition** again elaborated it at page 925 as follows:

The right to terminate a contract for breach is often referred to as the right to 'rescind' or 'discharge' it, and the exercise of this right, as the 'rescission' and 'discharge' of the contract. It has been argued that the word 'rescission' and 'rescind' should refer to the annulment of the contract from the outset (*ab initio*), for example, for misrepresentation, and not to its termination for breach, which is prospective and leaves

intact accrued rights and obligations. However, the High Court, while acknowledging the conceptual difference between these situations, has continued to use 'rescission' and 'rescind' in connection with the latter.

21. In this case, the plaintiff terminated the contract for breach. This termination is in fact rescission of it by the plaintiff – the innocent party for the breach of the defendant. That is why the plaintiff clearly pleaded as “terminated/rescinded” the agreement. Even if it is not pleaded by the plaintiff in such a way, termination for breach is considered as rescission. Accordingly, the plaintiff rescinded the agreement it entered into with the original defendant and decided not to go ahead with purchase of the said Lot 29 assigned to it under that agreement.
22. The remedy for rescission is to restore the parties to the status quo subject to the terms of the respective contract. The court has to make the orders necessary to achieve substantial restitution. Bowen LJ in Newbigging v Adam (1886) 34 Ch. D. 582 said at pages 592 and 593 that:

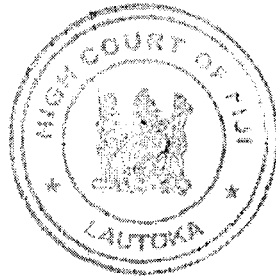
When you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in statu quo. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in statu quo with this limitation – that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in Redgrave v Hurd (20. Ch. D. 1).
23. In this case, the plaintiff provided the Bank Guarantee in the sum of \$ 79,900 being the 10% deposit of purchase price through the Bank of South Pacific. After rescinding the agreement, the plaintiff did not pay the purchase price and also was successful in obtaining injunction restraining the original defendant from calling on the said Bank Guarantee. None of the witnesses testified in court as to what had happened to the Bank Guarantee after the permanent injunction was granted. Not a single word was uttered by the witnesses, especially by the second witness, about this amount and the bank guarantee. It appears therefore that, the plaintiff would have used the said permanent injunction and recovered the said amount from the original defendant. If not the plaintiff would have claimed the same amount in this proceedings. Accordingly, the plaintiff had


been restored by the injunction granted by the judge to the status quo. Therefore, the plaintiff is not entitled to any other damages.

24. Accordingly, I make the following orders:

- a. The plaintiff is not entitled for any damages in this matter,
- b. The injunction granted by judge is dissolved as the matter is now concluded, and
- c. The plaintiff to bear all the costs.

At Lautoka
28/07/2023




U.L. Mohamed Azhar
Master of the High Court