

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

**Civil Action No. HBC 300 of 2019**

**BETWEEN:** **SUREN CHAND** of 4 Seria Street, Tanah Merah, Queensland 4128, Australia, Retired and **RADHA KUMARI** of 49 Emerald Drive, Eagle Vale, Sydney 2558, Australia, Domestic Duties as the Administrators of the Estate of Ram Chandar, Deceased of Walia, Nausori, Intestate pursuant to Letters of Administration No. 19881.

**PLAINTIFF**

**AND:** **VENITA DEVI KUMARI** of Princess Road, Waila, Nausori, Businesswoman trading under the name and style of **GALAXY DISTRIBUTORS**

**DEFENDANT**

**Before:** Mr. Justice Deepthi Amaratunga

**Counsel:** Ms. R. Naidu for the Plaintiff  
Mr. V. Filipe for the Defendant

**Date of Hearing:** 27, 28 November, 2023

**Date of Judgment:** 01.3.2023

**JUDGMENT**

## **INTRODUCTION**

- [1] Plaintiffs are trustee the Estate of Ram Chandar and had entered sale and purchase Agreement (The Agreement) for Lot 5 on a proposed scheme of subdivision plan (the Land), with defendant.
- [2] Defendant admitted in evidence that she had not paid the deposit in terms of the Agreement so there is a fundamental breach of the Agreement.
- [3] The Agreement was entered on 21.12.2016 (paragraph 6(c) of statement of defence) and subdivision is yet to be completed but Defendant had entered the premises unlawfully and also sublet it without Plaintiffs' knowledge. (Agreed fact no. 19)
- [4] Plaintiffs through their solicitor had issued a notice terminating the Agreements on 23.11.2018. Thereafter on 4.03.2019 notice to vacate issued. Defendant had continued to occupy the land and use it for her business (Agreed fact no. 18)
- [5] A declaration is made that the Agreement for sale and purchase regarding Lots 5 on Proposed Scheme Plan of Rupeni Consultants dated 10.12.15 is revoked. Accordingly, Defendant or any other person (Defendant's licensees, agents, servants etc.) in possession to vacate the said land are covered under sale and purchase agreements on or before 8.3.2024).
- [6] A permanent injunction issued restring Defendant including (licensees agents, servants) from remaining or entering or using said land or drive way inside CT7585 in whatsoever , (i.e. from 9.3.2024)
- [7] Defendant to dismantle and remove from all the structures on the Land on or before 8.3.2024.
- [8] Defendant is ordered to pay the Plaintiff liquidated sum of \$10,000 for breach of the four Agreements in terms of clause 13(e).
- [9] Defendant is ordered to pay a general damage of \$10,000 trespass. Plaintiffs are also granted interest.

## **AGREED FACTS**

- [10] Most of the material facts went in by consent of both parties and is set out in the pre-trial conference minutes filed on 30.03.2023. The agreed facts are set out in part a paragraphs 1-19 of the pretrial conference minutes. It is convenient to set it out verbatim.

- "1. *The Plaintiffs are the Administrators of the Estate of the deceased Ram Chandar, of Walla, Nausori who died intestate. The Plaintiffs reside in Australia.*
2. *The Plaintiffs in their capacity as Administrators of the Estate of Ram Chandar are the registered proprietors of all that property comprised and described as Lots 1, 2, 3, 4 and 5 (part of balance of Certificate of Title No: 7585) situated along Princess Road, Walla, Nausori.*  
  
*The defendant is businesswoman engaged in the business of DVD shop, wholesale retail, General merchants, apartments, and amusement centre.*
4. *Sometime in 2015, the defendant entered discussions with the plaintiffs with an intention to purchase vacant lot number 5 (part of balance of Certificate of Title No: 7585) situated along Princess Road, Walla, Nausori ("the said property).*
5. *The Plaintiffs and the Defendant both engaged the same firm of solicitors Sherani & Co in Suva to draft the sale and purchase agreement and represent them in the conveyance.*
6. *By letter dated 25 June 2016 1<sup>st</sup> named Plaintiff authorized Mr Hemendra Nagin of Sherani & Co to act for him in the sale of the lots to the Defendant. It was agreed between the parties all outgoing cost in relation to the sale of the lots was to be paid by the Defendant including legal costs, subdivision costs, costs associated with the registration of the subdivision with the Department of lands and costs for the construction of a driveway.*
7. *By an Authority letter (undated) the 1st named Plaintiff and Ranjeshni Devi t/a Siris Distributors engaged and authorised Rupeni Consultants to carry out the survey and subdivision of the balance of Certificate of Title No: 7585 on DP 9801 and Ranjeshni Devi agreed to pay all costs.*
8. *On or about 14 September 2016 the 1st named Plaintiff made an application for development permission and approval of plan of subdivision of balance of Certificate of Title No: 7585.*
9. *The plaintiffs sometime in 2016 authorised the defendant to carry out the subdivision and road works in respect of the said property.*

10. *The Plaintiffs did not authorise the Defendant to build any type of structure, dwelling, Office whatsoever on the lot, develop or occupy the lot or use it in any manner or form.*

### **FIRST CAUSE OF ACTION**

#### **Agreement for Lot 5**

11. *By an agreement in writing made in or around September — November 2016 (exact date is not known) and made between the Plaintiffs of the one part and the Defendant of the other part ('the said agreement), the Plaintiffs agreed to sell and the defendant agreed to purchase Lot 5 (part of balance of Certificate of Title No: 7585) for a price of \$100,000.00 which land is wrongly described in the sale and purchase agreement as Certificate of Title Number 19039.*
  
12. *It was a condition of the sale that:*
  - (1) *the lot was sold on "as is where is" basis;*
  - (2) *the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement (this - sum had already been paid);*
  - (3) *the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;*
  - (4) *settlement was to take place within 90 days from the date of the agreement;*
  - (5) *vacant possession of the property was to be taken by the defendant on the date of settlement.*
  
13. *The defendant took possession of the property, built on it and has been using it for her business.*
  
14. *Clause 13 (b) of the said agreement for Lot 5 provides that if the defendant makes default in payment of any moneys when due or in performance or observance of any other conditions of the agreement and if such default continues for 14 days then the plaintiffs may*

*rescind the contract of sale and monies paid under the agreement shall be forfeited to the plaintiffs as liquidated damages.*

15. *There has been a substantial and unreasonable delay on the part of the defendant since 2015 in completing the subdivision work.*
16. *On 23 November 2018 the plaintiffs issued notice to the defendant demanding the defendant to give vacant possession of the said lot to the plaintiffs and the plaintiffs pursuant to the said notice also rescinded the said agreement in accordance with clause 13(b) of the said agreement.*
17. *On 04 March 2019 the plaintiffs issued notice against the defendant and the occupiers demanding the defendant to give to the plaintiff's vacant possession of Lot 5.*
18. *The defendant has failed and/or refused to comply with the said notice and continues to occupy Lot 5 and use the said land for her business.*
19. *The defendant has also sublet some parts of the said property without the plaintiff's knowledge and consent.*

## **ANALYSIS**

- [11] Defendant in her evidence admitted that though she had entered in to sale and purchase agreement to purchase Lot 5 of the proposed scheme of subdivision marked X 7 she did not pay the deposit.
- [12] Defendant had admitted that she was granted permission by Plaintiffs to subdivide (agreed fact no 9).
- [13] Defendant had also admitted that Plaintiff had not authorized Defendant to build any type of structure, dwelling, office whatsoever on the land of the Agreement, including development of or occupation in any manner. (see agreed fact no 10).
- [14] Defendant had agreed in agreed fact 13 in the following manner  
*“The Defendant took possession of the property, built on it and has been using it for her business”.*
- [15] In terms of Clause 5 of the Agreement and also admission number 10 of the Agreed Facts, Defendant had not granted permission to possess the

Land but from her own admission she had violated it by taking possession of the Land and using it for her business.

[16] Defendant had not paid deposit in terms of Clause 2(i) of the Agreement and had also occupied the land for her business in breach of Clauses 2(i), 5. These breaches are sufficient to terminate the Agreement.

[17] Defendant was issued with a notice of termination of the Agreement by solicitors for the Plaintiffs on 23.11.2019 and thereafter issued a notice to vacate on 4.3.2019.

[18] From the admitted facts Defendant had not only violated fundamental condition of the Agreement but illegally using the Land for her business even without payment of deposit.

[19] Halsbury's Laws of England (Vol 23)<sup>1</sup> (Conveyancing) "Deposit"

*Stated,*

*"Failure to pay the deposit specified by the contract terms will be a fundamental breach of contract by the defaulting buyer<sup>2</sup> ..."*

*At (Vol 88) in general regarding deposit stated further, 509. Deposits.<sup>3</sup>*

*Where the money is paid by way of deposit, it will generally not be recoverable by the party in breach. A deposit is generally paid as a security for performance and so is liable to be forfeited if the depositor in breach of contract fails to perform his side of the bargain. **A deposit which is due is forfeitable even in the case where it has not been paid.** However, the court has a statutory discretion to order the return of a deposit paid in relation to a contract for the disposition of an interest in land where the action is for specific performance or for the return of a deposit<sup>5</sup>. A deposit may also be recoverable in equity where the forfeiture is held to be penal and it is unconscionable for the innocent party to retain the sum paid by way of deposit<sup>6</sup>. Similarly, a court may order the recipient of a deposit to return it to the payer where the deposit paid is held to have been unreasonable. (Footnotes deleted)*

---

<sup>1</sup>

<sup>2</sup> Millichamp v Jones [1983] 1 All ER 267, [1982] 1 WLR 1422; Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein [1985] 1 All ER 475, [1985] 1 WLR 435, CA. See also Samarenko v Dawn Hill House Ltd [2011] EWCA Civ 1445, [2013] Ch 36, [2012] 2 All ER 476 (a failure to make a timely payment of a deposit amounted to a repudiatory breach of contract; in the ordinary case, the requirement to pay a deposit, including the time of payment, was a condition of the contract so that time was of the essence for the date of payment).

<sup>3</sup> Halsbury's Laws of England > Restitution and Unjust Enrichment (Volume 88 (2019)) > 6. Failure of Consideration: Money Cases > (5) Claim by the Party in Breach to Recover Money Paid

[20] The nonpayment of deposit in terms of the Agreement itself is a repudiatory breach of the Agreement. There is no dispute that in a breach of contract the innocent party is entitled to damages and in this instance both parties had agreed to a liquidated damages in a breach by the buyer to forfeit. Accordingly even if the deposit is not paid the court can order the unpaid deposit as liquidated damages.

[21] Plaintiff is granted \$10,000 as liquidated damages, for above reasons.

### Trespass to Land

[22] Halsbury's Laws of England states 'what constitutes trespass', as;

*"A **person's unlawful presence on land in the possession of another** is a trespass for which a claim may be brought, even though no actual damage is done. A person trespasses upon land if he **wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another.** He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires. (footnotes deleted) (emphasis added)*

[23] Defendant in agreed fact 13 which was quoted earlier in this judgment, had admitted that he had built on the Land and has been using it for her business.

[24] Halsbury's Laws of England<sup>4</sup> under 'Torts Affecting Land' described measure of damages for 'Trespass to Land' as follow,

*"420. Trespass to land.*

*A claimant is entitled to nominal damages for trespass to land even if no loss or damage is thereby caused.<sup>5</sup> Such damages will be given for largely innocuous invasions<sup>6</sup>, or in cases where the claimant has been fully compensated by some other remedy<sup>7</sup>. If the trespass is more serious, for example involving substantial interference with property or with privacy, **then substantial***

---

<sup>4</sup>Halsbury's Laws of England ; Damages (Volume 29 (2019)) ; 7. Measure of Damages in Tort ; (2) Torts other than Those Involving Personal Injury ; (ii) Torts Affecting Land

<sup>5</sup>3 Bl Com (19th Edn) 209–210; Entick v Carrington (1765) 19 State Tr 1029, 2 Wils KB 275 at 291 per Lord Camden CJ. For a more recent instance see Armstrong v Sheppard & Short Ltd [1959] 2 QB 384, [1959] 2 All ER 651, CA.

<sup>6</sup> See eg Twyman v Knowles (1853) 13 CB 222; Rust v Victoria Graving Dock Co (1887) 36 ChD 113 at 119, CA; Behrens v Richards [1905] 2 Ch 614.

<sup>7</sup> Eg where the claimant is only concerned to establish his right: see Cass v Hall (1960) 176 Estates Gazette 823

**damages may be recovered**<sup>8</sup>. Consequential losses may be claimed<sup>9</sup>, as can damage to the land itself or buildings or fixtures on it<sup>10</sup>.

*Aggravated and punitive damages are available in trespass where appropriate*<sup>11</sup>” (emphasis added)

[25] Accordingly, Plaintiff is entitled to substantial damages as opposed to nominal damages considering they type of trespass and benefit her and or her business had derived.

[26] The measure of damages for trespass according to Halsbury’s Laws of England it the benefit accrued. It states.

**“263. Measure of damages or compensation.**

*In such a case of trespass, damages will generally be **measured by the benefit received by the trespasser**; that will ordinarily be the price a reasonable person would pay for the relevant right of user. Thus, the measure of damages for the trespass on another’s land by the carriage of minerals is the value of the land for the purposes for which it is used; compensation is measured by way leave rent in respect of the minerals carried, and the rate, if any, used in the neighborhood is adopted as a convenient measure.”* (foot notes deleted) (emphasis added)

[27] There was no evidence to show how much derived as benefit from usage of the Land for business of Defendant. Considering the time period and also location of the land which was near to a main road a general damage of \$10,000 is granted as damages for trespass.

[28] Plaintiff had also sought damages for occupation of lot 5 which is invariably covered under damages for trespass as damage awarded was not confined to nominal damage. The assessment was limited due to lack of evidence at trial regarding probable benefit to Defendant from her use of the Land.

---

<sup>8</sup> See eg *Simper v Metropolitan Police Comr* [1982] CLY 3124 (£300); *Cash v Lancashire Chief Constable* [2008] EWHC 396 (Ch), [2008] All ER (D) 52 (Feb) (£150 for 15-minute police trespass with press present); *Jolliffe v Willmet & Co* [1971] 1 All ER 478 (£250) (incursion by private detective); *Mehta v Royal Bank of Scotland plc* [1999] 3 EGLR 153 (trespass in course of wrongful eviction).

<sup>9</sup> *Huxley v Berg* (1815) 1 Stark 98 (illness of wife); *Bracegirdle v Orford* (1813) 2 M & S 77; *Davis v Bromley UDC* (1903) 67 JP 275, CA; *Pritchard v Long* (1842) 9 M & W 666; *Bisney v Swanston* (1972) 225 Estates Gazette 2299, CA (loss of profits). See also *Wormald v Cole* [1954] 1 QB 614 at 625, [1954] 1 All ER 683 at 688, HL, per Lord Goddard CJ (trespasser knocking over occupier on dark night). In a suitable case it seems there can be liability for mental distress: see *Mehta v Royal Bank of Scotland plc* [1999] 3 EGLR 153; and *Millington v Duffy* (1985) 17 HLR 232.

<sup>10</sup> The measure of such damages is the same as for any other injury to land or fixtures: see para 421 et seq

<sup>11</sup> See the following cases of aggravated damages: *Jolliffe v Willmet* [1971] 1 All ER 478; *Horsford v Bird* [2006] UKPC 3, [2006] 1 EGLR 75 (though not on the facts). See the following cases of punitive damages: *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA; *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985, [2012] 1 All E 903, [2011] 2 P & CR 351. As to aggravated damages see paras 322–324. As to punitive damages see paras 325–333.



[29] Plaintiff had also sought damages for the Land, but there was no evidence of permanent damage to Lot 5 in order to assess any damage under that. So that is refused.

[30] Plaintiff is also claiming for mesne profit as an alternate claim for general damages for possession. Damages for Trespass is granted so there is no need to grant damages for possession

[31] Halsbury's Laws of England states

“ 302. Mesne profits.

*Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises.*

[32] Plaintiff had not authorized Defendant to possess the land so mesne profit cannot be assessed or granted. Mesne profit is a type of damage granted for trespass when initial possession was lawful. Defendant's possession of the Land was unlawful from the beginning.

## **CONCLUSION**

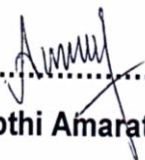
[33] Defendant had admittedly not paid the deposit which is fundamental breach. Apart from that she had unlawfully occupied and used the Land for her business. A declaration is made that Sale and Purchase agreement for Lot 5 is terminated forthwith and it no longer binds plaintiffs.

[34] Declaration is also made that Defendant and her agents, servants are not entitled to enter or use the undivided portion of CT 7585 contained in proposed subdivision of Rupeni Consultants made on 10.12.2015 from 9.3.2024.

[35] A permanent injunction is granted preventing Defendant and or her agent's servants entering or using above mentioned driveway from 9.3.2024. They are to remove any structures made on or before 8.03.2024.

**FINAL ORDERS:**

- i. A declaration is made that the Agreements for sale and purchase regarding Lots 5 on Proposed Scheme Plan of Rupeni Consultants dated 10.12.15 is revoked forthwith. Accordingly, Defendant or any other person (Defendant's licensees, agents, servants etc.) in possession to vacate the said land are covered under sale and purchase agreements on or before 8.3.2024).
- ii. A permanent injunction issued restraining Defendant including (licensees agents, servants) from remaining or entering or using said land or drive way inside CT7585 in whatsoever, (i.e. from 9.3.2024)
- iii. Defendant to dismantle and remove from all the structures on the said land on or before 8.3.2024.
- iv. Defendant is ordered to pay the Plaintiff liquidated sum of \$10,000 for breach of the four Agreements in terms of clause 13(e). Interest of 6% is applied to liquidated damages and 2,670 (approx.) is awarded.
- v. Defendant is ordered to pay Plaintiff a general damage of \$10, 000 for illegal/ unlawful occupation/ trespass. Interest 6% from the date of institution of this action to 4 years and 164 days \$2,670(approx.).
- vi. Cost of this action is summarily assessed at \$10,000.

  
.....  
**Deepthi Amaratunga**  
**Judge**



**At Suva** this 01<sup>st</sup> day of March, 2024.

**Solicitors:**

**Naidu Law**

**Redwood Law**