

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 40 OF 2024

BETWEEN : **VIVEKA NAND** **PLAINTIFF**

AND : **MANOJ KUMAR T/A "EKTA BUILDERS"** **DEFENDANT**

BEFORE : Mr. A.M. Mohamed Mackie-J
COUNSEL : Mr. S. Nand, with Mr. Kumar P.
 : Defendant absent and not represented.
DATE OF HEARING : 6th December 2024
SUBMISSIONS : By the Plaintiff filed on 7th January 2025.
DATE OF JUDGMENT : 20th February 2025.

JUDGMENT

A. INTRODUCTION:

1. The plaintiff on 29th February 2024 commenced this action by way of his writ of Summons, filed together with the Statement of Claim (SOC), against the defendant seeking the following relief:
 1. *AN ORDER for Special damages of \$92, 842.36 for the incomplete work.*
 2. *AN ORDER for General damages for negligent conduct on the part of the Defendant;*
 3. *AN ORDER for General damages for breach of Contract.*
 4. *AN ORDER for Special damages for breach of contract as per clause 30 of the agreement at \$100 per day for delay in work.*
 5. *Interest at 13.5% of the Judgment amount;*
 6. *Any other orders which this Honorable court may deem just and fair.*
 7. *Costs on a Solicitor/client indemnity basis.*

2. The plaintiff brought this action based on the defendant's alleged negligence and breach of the construction contract dated 16th May 2023 marked at trial as "VA-1", which he claims entering into between him and the defendant for the construction of a dwelling house by the defendant in the plaintiff's Land bearing Lot # 37, DP 5894, Musuniwai Street, Lautoka.
3. The Contract was for a total sum of \$1,18,000.00 (one Hundred Eighteen Thousand Fijian Dollars), with no variations in terms of material, labor and other related or incidental costs including the materials and cash. The payments were to be at 7 stages on progress of work, with the liberty for the defendant to apply for progress payments after each stage of construction is completed.
4. A sum of \$20,000.00 was to be the commencement deposit and 7% of the total sum was to be retained by the plaintiff, to be paid after 180 days from the date of the completion of the work, subject to deduction of any sum due to the plaintiff on account of any defects in the construction or shortcomings therein. In addition to this, there was a term to the effect that if any non-compliance is found, the owner (plaintiff) shall take over the property Lot No-773, DP 1097, Saru Block Road in Lautoka, which belongs to the defendant's "EKTA builders".
5. The construction of the house was to be carried out as per the specifications and the terms and conditions embodied in the contract. The construction was to be completed within 16 weeks' time commencing from 17th May 2023 and ending on 17th September 2023.
6. It was also a term therein that if the contractor leaves the job halfway through, the contractor (defendant) shall pay \$200,000.00 unto the owner (the plaintiff), and if any delay in completion occurred, the contractor is liable to pay the owner (plaintiff) \$100.00 for each day of such delay.
7. The plaintiff had paid the defendant a total sum of **\$80,270.55** as time-to-time payment as evidenced by the receipts marked at the trial as "VA-2" to "VA 5", "VA -,7 to "VA18" and "VA -20 to VA-22".
8. The defendant never returned for work after 25th September 2023 and the work remained partially done. The plaintiff on 10th November 2023 obtained report from a company called "Limited -Edition Design & Construction", which revealed their findings on the work that had been carried out by the defendant at the plaintiff's premises. This report reveals, inter alia, that the 50% of the works done needed to be redone as the defendant had done substandard and extremely poor works, particularly the plaster works that had been done is dummy and the work is incomplete. Vide –"VA-24"
9. On 20th December 2023, the plaintiff obtained a quantity surveying report from "Aman's Consultancy Quantity Surveying" which stated that the rectification work for un-acceptable and below quality works will cost \$12,318.20. Vide "VA-27"

10. The plaintiff also on 5th February 2024 received a letter from the Lautoka City Council (LCT), who upon the inspection of the building under construction on 20th November 2023, had found certain outstanding works needed to be completed. Vide "VA-25".
11. The plaintiff alleges Breach of Contract and Negligence on the part of the defendant, as averred in the relevant paragraphs of the Statement of Claim, and prays for reliefs as per the prayers to the SOC as stated in paragraph 1 above.

Writ of Summons & SOC:

12. The writ of summons, with the SOC, was reportedly served on the defendant personally on 19th February 2024. The plaintiff has filed an affidavit of service by Mr. Uday Raj, of Naikabula, Lautoka, the registered bailiff, in proof of service. The defendant neither filed an acknowledgement of service nor did he file a statement of defence. As a result, the plaintiff filed a Summons on 30th April 2024, pursuant to Order 32 and Order 13 Rule 2 of the Rules of High Court and under inherent jurisdiction of this Court, moving to fix the matter for formal proof hearing, in order to obtain the reliefs sought in the prayer to SOC.
13. Order 32 Rule 2 of the High Court Rules 1988 states as follows.

Claim for unliquidated damages (O.13, r.2)

2. Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

14. When the Summons for formal proof was supported before me on 20th May 2024, on being asked by the Court about the requirement of service of it on the defendant, Counsel for the plaintiff made submissions, by relying on the Court of Appeal decision in ***Wearsmart Textiles Ltd v General Machinery Hire Ltd [1998] FJCA 26; ABU 0030 u.97's (29th May 1998)***, to the effect that no service of formal proof summons is required, though the Courts in Fiji had adopted the practice of serving of such summons on the defendant, who is already on default. Since this decision was convincing, this Court decided to dispense with the service of that summons and proceed with the formal proof hearing.
15. The matter was taken up for formal proof hearing on 06th December 2024. At the hearing in the absence of the defendant, the plaintiff, namely, VIVEKA NAND gave his oral evidence by confirming the averments in the Affidavit evidence instantly tendered in Court, together with annexures thereto marked as "VA-1" to "VA-24".

B. BACKGROUND:

16. **Viveka Nand**, being the owner of all that allotment of Land marked lot 37, DP 5894 Musiniwai Street Lautoka, engaged the defendant to commence, carry out and complete the construction of a residential house, with the amenities thereto as included in the contract. The defendant undertook to perform all works in accordance

with good trade practices and workmanlike manner by using the materials conforming to the acceptable grades and specifications as per Fiji building codes and standards.

17. Accordingly, the defendant Manoj Kumar, trading as "ECTA builders" entered into a written agreement dated 16th May 2023 with the plaintiff (hereinafter referred to as the "Agreement") marked as "VA-1". The construction job includes, among other things, necessary plumbing, the utility services, appropriate drainage, water proofing and through compaction to be approved by the plaintiff to the standard required for an Engineers Cyclone Certification at completion of the building. The construction work was to be completed by 17th September 2023. The defendant was to provide all materials needed for the construction and the plaintiff was to make progressive payment on completion of different stages of work.
18. The agreed total amount for the construction was \$118,000.00, and when the plaintiff had paid a total sum of \$80,270.55, the defendant did not turn up for work after 25th September 2025. Plaintiff alleges that the defendant left part of the work unattended and the works done by him were defective, incomplete and had used inferior materials for the same.

Allegation of Breach of Contract & Negligence:

Particulars of Breach of Contract:

19. The plaintiff alleges that the defendant had breached the agreement by failing to complete and perform the construction work as agreed and he was negligent. The particulars of the alleged breach include:
 - i. *The defendant breached the agreement dated 26th May 2023 by failing to carry out work to the required standard. The whole basis of this agreement was to construct a residential building that meets all required standards.*
 - ii. *The defendant failed to meet the required standard and carry out the work which is defective. One of the major defect was in the plasterwork. It had cracked and there were dummies in most places. He has to get the 70% of the plaster work redone. Other defects include the parapet wall not being glazed, the overhang on the side not being welded, bridging and rafters are incomplete, all window and door edging were incomplete, plasterworks on the floor, basement, back wall of the building, toilet, and bathroom not completed. He alleges that the toilets became narrow as a result of thick plaster works.*
 - iii. *Failed to adhere to and breached clause 11 of the agreement as he had failed to oversee and check that the work carried out by his employees was up to the required standard.*
 - iv. *Defendant asked for variation cost, which was not in the agreement. He left the works half way and therefore he is entitled to compensation under clause 27 of the agreement. His house was exposed to extreme weather conditions.*
 - v. *That the plaintiff has to hire another contractor at the added costs to complete the house.*

Particulars of Negligence:

- vi. *The defendant breached the duty of care towards the plaintiff by failing to carry out the works as per the required standard.*
- vii. *50% of the works done needed to be redone.*
- viii. *Defective works to be remedied by the plaintiff, he has to spend additional money, which resulted due to defendant's negligent conduct.*

20. The plaintiff brings this action against the defendant to recover the special damages, general damages for breach of contract and Negligence on the part of the defendant. He also claims for interest, charges for delay and costs.

C. THE EVIDENCE & DISCUSSION:

21. As alluded to above, the Plaintiff has given clear and convincing evidence by confirming the contents of the averments in his Affidavit evidence and those of the annexures thereto. His evidence has remained unassailed and uncontested. Though, the defendant was served with the writ of Summons and the statement of claim, he has opted not to challenge the action and the evidence adduced by the plaintiff at the trial.
22. Apart from marking the relevant agreement and giving oral evidence, the plaintiff has also marked the relevant receipts in proof of the payments made in a sum of **\$80,270.55**. Plaintiff also gave evidence on the color photographs marked as "VA-23" to demonstrate the nature and the extent of the defects and substandard works performed by the defendant.
23. The Report marked as "VA-24" also depicts the nature of the defects and the substandard works carried out by the defendant. This shows the poor condition of the work done, particularly in plastering works. It says 50% of it has to be redone. The plaintiff has articulated about this in his evidence.
24. In my view, the plaintiff appeared to have told the truth in court and I have no reason to disbelieve or disregard his evidence, which was uncontested. His oral evidence, together with the documentary evidence, can be accepted and acted upon with no hesitation. The plaintiff seeks relief against the defendant for breach of the construction contract and negligence on the part of the defendant.
25. The parties entered into a building contract marked and tendered as "VA-1" by which the defendant agreed to carry out and complete the construction of the residential house for the plaintiff for a sum of \$118,000.00, which included the costs for materials, labor and related expenses.
26. The defendant was bound to complete the construction within 16 weeks commencing from 17th May 2023 and ending by 17th September 2023. The agreement dated 16th May 2023 , among other things states: -
 - a. That the contractor is at liberty to seek further time for the completion , if the situation prevailed at the time of intended completion so demands , and the owner, if in his deliberate judgment thinks that such an extension is justified.
 - b. The contractor shall have a full-time competent foreman on site and engage qualified workers and plumbers for all welding and plumbing works.
 - c. The contractor takes responsibility of checking and overseeing the works done by his employees to ensure that the work is being done properly and up to the required standard.
 - d. The defendant undertakes to pay \$100.00 for each day of delay in completion of contract.

27. In support of his claim, the plaintiff explained in his evidence how the defendant breached the construction agreement. The plaintiff's evidence remains unchallenged that I have no hesitation in accepting his evidence as credible.
28. The plaintiff, by marking in evidence the relevant payment receipts as stated above, has substantiated that a total sum of \$80,270.55 was paid to the defendant, but the defendant has not performed the work to the expected standard as per the agreement. The defects, short-comings and usage of inferior materials have been highlighted through the relevant documentary evidence adduced by the plaintiff.
29. There is evidence before this court that the defendant had breached the building agreement by not completing the work within the given time period, doing substandard/ inferior works, leaving the works in incomplete state and by not doing the job up to the standard expected of him as per the terms of the contract. The plaintiff also supplied some plumbing materials, though not provided for in the contract. On the uncontested oral and documentary evidence adduced by the plaintiff, I am satisfied the defendant as the executing party had breached the construction contract.
30. The plaintiff has also satisfied this Court that the defendant was negligent in performing his duties as per the contract in the manner expected of him. As such, I find that the plaintiff is entitled to damages for breach of the contract and negligence.

D. THE LAW:

1. In construction contract cases, three categories of damages may be claimed: 1) damages for defective workmanship 2) schedule related damages, and 3) damages for failure to perform.
2. Generally, in construction contract cases damages are awarded pursuant to traditional common law principles of contract law. At common law, a contract is simply a promise or set of promises that the law will enforce or at least recognize in some manner.
3. In Fiji, there is no specific law that deals with construction contracts. In the absence of the specific law, we need to seek the assistance of common law to deal with the issues arising from construction contracts.

E. ASSESSMENT OF DAMAGES:

31. I now proceed to assess the damages payable to the plaintiff by the defendant for his breach of the construction contract and being negligent in performing and completing the work in the manner expected of him as a contractor.

Special Damages:

32. The common law remedies for breach of contract are substantial in nature, providing an award of many damages in substitution for the failure to perform the promise made through the contract.
33. The common law encourages reliance on promises by protecting the expectation that the aggrieved parties had, when contracting by placing them in as good a position as they would have been had the contract been performed.
34. The amount of damages that a party is entitled to recover is a question of fact. However, the proper measure of damages in a particular case is a question of law.
35. The Plaintiff, in the prayer to his SOC moves for a sum of \$ 92,842.36 as special damages on account of the alleged incomplete work and non-performance. The total price for the work, as per the contract, was \$118,000.00. The Plaintiff has paid, as per his evidence, only a sum of \$80,270.55. It is not clear on what basis the plaintiff is seeking \$92,842.36 as special damages.
36. This is not a case where the defendant had totally failed to perform his part, as per the contract, for the plaintiff to claim back the amount so paid. The defendant in fact has performed his job partly, but with defects and shortcomings and by utilizing substandard materials. The defendant left the premises while the work had been done partly. He had not been paid the full contractual amount of \$118,000.00. The work that had been done by the defendant has to be taken into consideration. Thus, the Plaintiff cannot claim such an amount in a sum of \$92,842.36, which is more than the total amount he had paid to the defendant. The plaintiff cannot enrich himself by claiming for more than what he is actually entitled to.
37. The issue here is performing only a part of the job, with defects, short comings in works done and substandard works using the inferior materials. The main defects are on the plastering of the walls, which is said to be dummy and with cracks. The Door & Window edges are left undone at all. Plastering is thick in some places, particularly in the wash-room making the space lesser. There are gaps in the concrete beams. (Vide the report marked as "VA-24". These defects are very conspicuous and these are the factors that should be considered in the process of assessments of damages for defects.
38. The "VA-24" report says that 50% of the building that has been completed with plaster-work is in extremely poor condition and it needs to be redone. However, the annexure marked as "VA-27" states that the total rectification cost for the un-acceptable works is only \$12,318.20. The Plaintiff has not substantiated the claim in a sum of \$92,842.36 as special damages. The Plaintiff can claim only what he has lost on which he has to spend again. It is only \$12,318.20, which was included in the total sum paid (\$80,270.55) by the plaintiff to the defendant, which only can be recovered from the defendant, and nothing more as special damages.
39. The defendant must have known that if part of the job completed by him was defective, substandard and used inferior materials for it, the Plaintiff would have to pay another builder to finish it, and that the Plaintiff would have to face various other expenses and inconveniences in this regard.
40. I don't find any evidence to substantiate the claim of \$92,842.36 as special damages. Thus, I decide to grant only the said sum of \$12,318.20, being special damages on account of defective works, which the plaintiff has to spent on remedial works as per the annexures marked as "VA -24" and "VA-27".

General Damages:

41. The plaintiff claims general damages for breach of contract and negligence on the part of the defendant.
42. Contract damages are limited by two fundamental principles: foreseeability and reasonableness. The famous English case of *Headly v Baxendale [1854] EWHC Exch J70, (1854) 9 Ex Ch 341; 156 ER 146*, which holds that the measure of damages for breach of contract are either those damages as may fairly and reasonably be considered as arising naturally from the breach or as may reasonably have been within the contemplation of the parties at the time the contract was made.
43. The plaintiff's evidence was that he has to engage other contractor and spend to rectify the defective works that the defendant has performed without adhering to the standards expected of him as per the contract. The defendant had agreed to complete the whole project by 17th September 2023, but he failed to do so and even the works done were defective, substandard and had used inferior materials. In breach of the contract, the defendant left the project without completion as agreed. The plaintiff had to engage another contractor to finish the project, particularly to attend the defects in the defendant's works done.
44. He appears to have spent in obtaining the reports marked as "VA-24" and "VA-27", which he was compelled to obtain due to the Defendant's breach and negligence. For the Plaintiff to attend to the remaining construction works, he may have to spend more than what he had estimated for earlier. The escalation of the prices for materials in the market and other related expenses may exceed the initial full contract price.
45. Having done defective works, the defendant stopped the project, may be demanding more money. The defendant had breached the contract by not performing the actual promise that he will complete the project by 17th September 2023. Generally, the measure of damages for breach of a construction contract is the reasonable cost of completion. The defendant had wrongfully refused to complete the performance under the contract, despite diverse requests by the plaintiff. I am satisfied that the plaintiff is entitled to claim a reasonable sum as general damages for breach of contract and negligence.
46. The recovery of contract price paid to the defendant on account of breach of the contract does not fall under the types of damages recoverable in a breach of the construction contract. The Plaintiff seems to have looked forward to recover the entire sum of \$80,270.00 he had paid for the work done. What the plaintiff has been allowed to recover as special damages here is the amount that he had to incur on account of attending the defective work as stated above and not the full amount he paid.
47. The payments in a sum of \$80,270.55 had been made for the work done by the defendant. Obviously, the defendant had done some works for the amount he paid, but with defects, shortcomings and by using substandard materials. The amount so paid cannot be recovered from the defendant, unless the plaintiff proves that the defendant has not done the work for the amount he paid. The plaintiff does not make any allegation in that regard and no evidence of under-performance by the defendant, except for the defects etc. Special damages in a sum of \$12,318.20 has been awarded as above for the defective works.

48. For breach of contract and on account of negligence, the plaintiff can be awarded damages separately. The plaintiff had not paid the total contract price of \$118,000.00. He paid only \$80,270.55 being the payments for the partial work the defendant had done. If the plaintiff had paid more than what was due to the defendant for the work he had done, then it is the fault on the part of the plaintiff not following the payment scheme embodied in the contract. Therefore, in my view, the plaintiff is not entitled to recover the full amount he paid to the defendant.
49. Taking all the facts and circumstances, the law discussed above and the evidence adduced, I am of the view that awarding a sum of \$15,000.00 (Fifteen Thousand Fijian Dollars) as general damages would do justice to the plaintiff on account of breach of contract and negligence on the part of the defendant.
50. The question of the alleged delay does not warrant consideration. More than the alleged delay, the pivotal issue here was the defective works. The contract was not fully performed for the question of delay to be considered. Further, the plaintiff has not claimed for the material he claims to have contributed for the plumbing works. Accordingly, I will not grant any reliefs to the plaintiff on the alleged delay and for the material he claims to have provided.

Interest:

51. Generally, pre-judgment interest is recoverable in construction defect cases just as it is in contract cases. The award of pre-judgment interest is based on the rationale that there has been a deprivation of the plaintiff's use of money or its equivalent and that unless interest is added, the plaintiff cannot be fully compensated.
52. The court is empowered to make an order for interest on the whole or any part of the judgment sum given in respect of the recovery of any debt or damages at such rate as it thinks fit for the whole or any part of the period between the date when the cause of action and the date of the judgment (see section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935).
53. In exercising the power under s.3, I order that there shall be an interest at the rate of 3% per annum on the aforesaid sums to be calculated from date of filing the action (29th Feb 2024) till the date of this judgment, and thereafter at the rate of 4% from the date of judgment till the full amount is paid and settled fully.

Costs:

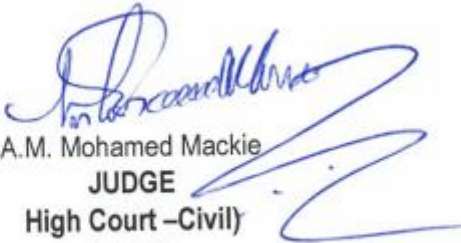
54. The plaintiff is entitled to costs of these proceedings, especially being the affected party due to the breach of contract and negligence on the part of the defendant. The plaintiff was represented by counsel. There was a formal proof hearing in respect of the claim, which lasted for around 2 hours. The plaintiff had filed helpful submission as well. I consider all these and summarily assess the costs at \$1,250.00 (One Thousand Two Hundred Fifty Fijian Dollars) which the plaintiff will be entitled to recover from the defendant.

F. FINAL ORDERS:

- i. The Plaintiff's action succeeds.
- ii. The plaintiff is awarded a sum of \$12,318.20 (Twelve Thousand Three Hundred Eighteen Fijian Dollars and 20 cents) as special damages.
- iii. The Plaintiff is also awarded a sum of \$15,000.00 (Fifteen Thousand Fijian Dollars) as general damages on account of the breach of contract and negligence on the part of the defendant.
- iv. The plaintiff is entitled for interest on the said amounts at the rate of 3% from the date of filing this action till the date of judgment, and thereafter at the rate of 4% till the full amount is paid and settled.
- v. The plaintiff is awarded summarily assessed cost in a sum of \$1,250.00 (One Thousand Two Hundred Fifty) to be paid by the defendant.
- vi. This judgment be sealed and served on the defendant.

On this 20th Day of February 2025 at the High Court of Lautoka.




A.M. Mohamed Mackie
JUDGE
High Court –Civil)
Lautoka

SOLICITORS : S. Nand Lawyers- Barristers & Solicitors for the Plaintiff.

: Defendant absent and unrepresented.