Dr LISING PAGENSTECHER v ESTATE MANAGEMENT SERVICES LTD, MINAMI TAIHEIYO KAIHATSU KABUSHIKI KAISHA (HBC0123 of 2010S)

HIGH COURT — CIVIL JURISDICTION

AMARATUNGA M

13 October 2011, 20 January 2012

Practice and procedure — interest — plaintiff purchased land from defendant in 1974 — transfer of title not effected — plaintiff commence proceedings in 2010 to recover purchase price and compound interest — when should interest be calculated from — what was appropriate rate of interest — should award of compound interest be made — Law Reform (Miscellaneous Provisions) (Death and Interest) Act ss 3, 12(a)(i), 12(a)(iv), 128, 129, 130 — Law Reform Miscellaneous Provisions) Act 1934 (UK) — Land Clauses Consolidation Act 1845 (UK).

By sale and purchase agreements dated 6 July 1973, the defendant agreed to sell to the plaintiff two lots of freehold property at Pacific Harbour. The agreements provided that upon final payment under the agreement the defendant would have carried out various development works on the lots, effected a transfer of titles and given vacant possession to the plaintiff. The final payment was made in February 1974. Solicitors for the plaintiff communicated with the defendant in 1993, 1999, 2000, 2006 and 2010, concerning the agreement and the failure to carry out development works or effect a transfer of title. In 2010, the plaintiff commenced an action against the defendant for the recovery of money paid to the defendant and for compound interest as compensation for the delay of 37 years.

Held –

(1) The defendant was unable to provide title of the lots to the plaintiff and it also breached conditions contained in the agreement and the plaintiff was entitled to summary judgment.

(2) Interest should be calculated from the date of full payment of the sale price as the plaintiff became entitled to recover the money it paid not as damages but in quasi-contract as money paid for a consideration that had failed.

(3) The appropriate rate of interest to be applied was the annual commercial bank term deposit rate provided by the Reserve Bank of Fiji for each year since 1974.

(4) Compound interest should be awarded as to do otherwise would be to deviate from the economic realities of the commercial world. The defendant was not only providing estate management services. If compound interest is not awarded, this would provide a wind fall to the defendant who charged 7.5% from the purchaser for the remaining balance in the receipt of a part payment scheme.

Summary judgment entered for the plaintiff.

Cases referred to

Attorney General of Fiji v Broadbridge [2005] FJSC 4; CBV0005 of 2003S (8 April 2005); *Bank of America Canada v Mutual Trust* Co, [2002] 2 SCR 601, 2002 SCC 43; *Peter Gervaise Joseph Eyre v Estate Management Services Ltd and Ano* HBC 407 of 1992, considered.

Foran v Wright [1989] HCA 51; (1989) 168 CLR 385; *Ghim Li Fashion (Fiji) Ltd v Challenge Engineering* High Court at Fiji Latoko Civil Jurisdiction Civil Action 258 of 2008; *Riches v Westminister Bank Ltd* 1947 AC 390, followed.

Hanak v Green (1958) 2 QB 9, approved.

Mukta Ben and Anor v Suva City Council Civil Appeal No CBV001 of 2007S; *Sydney James Lee et al v Estate Management Services Ltd* the High Court of Fiji Civil Action No 70 of 2001, applied.

Wells v Wells [1999] 1 AC 345, cited.

N. Prasad for the Plaintiff.

Peter Knight for the Defendant.

Amaratunga M.

A. INTRODUCTION

[1] The Plaintiff filed this action against the Defendant for the recovery of money paid to obtain title for two land parcels in Pacific Harbour. The money was paid fully as per sale and purchase agreement including an interest at 7.5% per annum as the payments were made through an installment payment basis in terms of the sale and purchase agreement. The **sale and purchase agreement was entered on 6th July, 1973. After the initial payments (Down Payment) the remaining balance was paid through monthly installments including an interest rate of 7.5% per annum** on the outstanding balance and full amount including the interest was paid to the Defendant in February, 1974. **The title has not been transferred to the purchaser** by the Plaintiff, instead the Defendant has transferred the area comprising the two land parcels in issue in this action to the third party. No compliance of the covenants contained in the sale and purchase agreement as to the supply of electricity and the construction of sewage reticulation system. The present action was filled for the recovery of money after repeated requests to fulfill the obligations of the vendor. This action is for the said paid amount of money for the two land parcels and for compounded interest for the period. Summons for the summary judgment was filled on the basis that there is no meritorious defence and no affidavit in opposition was filled for the said application for summary judgment. The Defendant admit the receipt of the money stated in the statement on said terms and conditions of the claim and also admit the failure to satisfy its obligations in terms of the said sale and purchase agreement. In a similar circumstance another party has filled an action against the Defendant and in that both the High Court and Court of Appeal held the Defendant has breached the conditions in the sale and purchase agreement. **The main issue is not the return of the fully paid amount to the Defendant, in 1974 as the money has diminished its value over the years.** The Defendant is ready and willing to enter judgment against the money it received 37 years ago, but the issue is how the time value of money is calculated as payment of what it received in 1974 without any interest would clearly unfair and unjust enrichment to the Defendant. It is clear that there is no fault on the part of the Plaintiff for non-fulfillment of the obligations of the vendor in terms of the sale and purchase agreement. The correspondence between the parties indicate that not only has the Defendant failed to provide electricity and sewage reticulation system, but the Defendant had transferred the title of the two lots of lands to a third party and the said third party was unwilling and or refusing to part with the title for the two land parcels to the purchaser who in fact contracted to purchase the land parcels, and fully paid in 1974, long before the third party came in to the picture. So, the Plaintiff cannot sought specific performance of its sale and purchase agreement and only option available is to obtain the money, but what is the interest rate and period that should be awarded for the said amount that was paid in 1974 considering the time value of money needs to be decided. The Plaintiff seeks to obtain the money paid and compound interest for that for the period. The Plaintiff is seeking the interest as damages and or as compensation. The interest is sought as the time value of the money had been depreciated over the past 37 years due

to inflationary and other factors that affect the time value of the money. It is grossly unfair to order the payment of money that the Defendant received in 1974 without any interest as the Defendant has also charged an annual interest of 7.5% on remaining balance, when it received money on installment basis from the purchaser. The Defendant has considered time value of the money, when it received money and has charged an interest over the remaining balance. When the Defendant is ordered to pay money it received solely due to its failure to fulfill its obligations it should also pay interest and that should be on compounded basis as it is the duty of the court to make necessary provisions to make any payment a realistic and prevent unjust enrichment to the parties. In personal injury claims for future damages court makes provisions and factor for the future payment made in present in order to arrive at a realistic value. So, compound interest should be applied in this case for the money paid in 1974 and the interest rates of one year term deposit rate for each year provided by the reserve bank of Fiji is also applied. The risk free gilt edged bond rate which is higher than the term deposit rate, is preferred, but this was not available for the past 37 years continuously to use as rates for past years and because of that the government bond rate is abandoned.

B. FACTS

[2] The amended summons for summary judgment comprises the following prayers1:

(a) Judgment in the sum of FJ$51,250.00 being the purchase price of Lots 1293 and 1294 on Provisional Plan of Subdivision approved by the Subdivision of Lands Board on 26th January 1972 and now the land comprised in Certificates of Title 16437 and 16438 purchased by Josef Severin Otto-Heinrich Ahlmann (now deceased) from the Defendant under sale and purchase agreement dated 6 July 1973.

(b) **i).** Compound interest as compensation and or damages on the sum of FJ$51,250.00 **at the rate Court deems just to be calculated from the period the Court deems fair and equitable on the facts and circumstances of this matter;**

ii). Or alternatively, simple interest on the sum of FJ$ 51,250 at any rate the Court deems just to be calculated from the period the Court deems fair and equitable in the facts and circumstances of this matter under the provisions of the Law Reform(Miscellaneous Provisions)(Death and Interest) Act, Cap 27;

(c) Post – judgment interest of 4% per annum from the date of final judgment to the date of final satisfaction of the judgment sum.

(d) Cost on an indemnity basis.

[3] In support of the application the Plaintiff has filed the Affidavit of Dr Lising Pagenstecher sworn on 5 May 2011. No affidavit in opposition filed on behalf of the Defendant, though more than one opportunity was granted. Even at the hearing Defendant did not sought to adduce additional materials and or evidence by way of an affidavit and the statement of defence filed on behalf of the Defendant has admitted all the averments numbered 1 to 9 (including the both 1and 9) contained in the amended statement of claim. The documents provided by the Plaintiff in this application are unopposed and there is no evidence to counter its contents or averments in the affidavit in support.

[4] By the sale and purchase agreements dated 6 July 1973 the Defendant as Vendor agreed to sell and the Plaintiff as Purchaser the following freehold property situated at Pacific Harbour:-

(a) Lot 1293 on Provisional Plan of Subdivision approved by the Subdivision of Land Board on 26 January 1972 being part of the land in Certificate if Title 10913 for the sum of FJ$24,500.00(which also included annual interest of 7.5% for the payments made in installment basis); and

(b) Lot 1294 on Provisional Plan of Subdivision approved by the Subdivision of Land Board on 26 January 1972 being part of the land in Certificate of Title 10913 for the sum of FJ$26,750.00 (which also included annual interest of 7.5% for the payments made in installment basis)

[5] The Plaintiff then proceeded to make the necessary payments for the said Lots as stipulated under the Sale and Purchase Agreements in installments **including an interest of 7.5% and the final payment was made in February 1974.**

[6] The Agreements provided that upon final payment the Defendant would have already carried out various development works on the said Lots and effected a transfer of titles and given vacant possession thereafter to the Plaintiff.

[7] Since payment of the full purchase price the Plaintiff through his solicitors written to the Defendant regarding the transfer of the two Lots to him. The following correspondence were exchanged between the Plaintiff and Defendant:-

(a) On 18 January 1993 the Plaintiff's solicitors wrote to the Defendant inquiring how "the transfer is to be effected to [him] in pursuance of the Sale and Purchase Agreement dated 6th of July 1973." This is nearly 20 years after the full payment of the purchase price including an annual interest of 7.5% was paid to the Defendant.

(b) On 4 May 1999 the Plaintiff's solicitors wrote to the Defendant inquiring when the utilities such as "drainage and sewerage reticulation system, treated water supply and electricity supply" will be provided on the Lots.

(c) On 20 July 1999 the Defendant wrote to the Plaintiff's solicitor advising that the "roading and drainage" had been completed **however "sewerage reticulation system, treated water supply and electricity supply' to the Lots had not been installed.** The Defendant further said that under a Deed of Settlement between the Miniami – Taiheiyo Kaihatsu Kaisha (Third Party) was responsible "for the provision and supply of these utilities."

(d) On 14 January 2000 the Defendant wrote to the Plaintiff's representative Derek Humphries that "it had no success with [the Third Party] to **obtain transfer of title". So, not only that the Defendant has failed to fulfill its obligation as to the supply of utilities, but it has failed to fulfill its main obligation as to provide the transfer of the title to the vendee** and it is not in a position to do so even now as it is in the hand of third party.

(e) On 2 May 2006 the Plaintiff's solicitors wrote to the Defendant giving it final notice **"in accordance with the provisions of clause 6 of the sale and purchase agreement [for the Defendant] forthwith with all reasonable speed having regard to all relevant factors carry out the installation works required to be carried out and to provide title to [the Plaintiff] for the lots."**

(f) On 8 May 2006 the Defendant wrote to the **Plaintiff's solicitors advising that it has received no response from the Third Party regarding the issuance of the titles.** In addition, the Defendant copied this letter to its solicitors Messrs Cromptons to **"request for their assistance in obtaining these titles."** The Defendant, however, still commit regarding the completion of **"sewerage and electrical"** works. The Defendant agreed to advise the Plaintiff's solicitors further.

(g) On 12 May 2010 the Plaintiff's solicitors wrote to the Defendant demanding refund of the total deposit FJ$51,250 and interest at the rate of 13.5% compounded until the date of payment and costs.

On 14th January, 2000 annexed as LP-6 to the affidavit in support of this summons for summary judgment, the Defendant had requested the Plaintiff to proceed with a legal action and stated in paragraph 2

'Our Soliciotry, Munro Leys have had no success with the Japanese Co to obtain transfer of title. **I have suggested before and reiterate once again that the only cause open is for Mr Ahlamann to commence legal proceedings in this matter.** Mr Ahlamman will of course sue us and we will then join Japanese Co as a Third Party to the Action. You may wish to consult Mr George Keil in this regard.'

[8] The Plaintiff and the Defendant had agreed to particulars contained in paragraph 5 of the Claim. In essence it is the Plaintiff's contention that in breach of clause 6 of the Agreements the Defendant has failed and neglected with all "reasonable speed" to have the land containing the Lots, Inter alia, surveyed and to have the plans of the said survey deposited in the Titles Registry at Suva; and, in addition, in breach of clause 8 of the Agreements has failed and neglected to execute proper and register transfers of the Lots to the Plaintiff.

[9] The Defendant by its own admissions, is in breach of the Agreements by failing to fulfill its obligations contained in the sale and purchase agreement for over 37 years, due to no fault of the vendee.

[10] The Plaintiff's notice of default was sent on 2 May 2006. On 12 May 2010the Plaintiff demanded from the Defendant refund of its total deposit of FJ$51,250 and interest at the rate of 13.5% compounded until the date of payment and costs.

[11] The issues in this application to be determined are

a. Whether the Plaintiff is entitle for summary judgment.

b. Since the **time value of the money depreciate with time**, and considering the most unusual nature of the circumstance of the case and when the said payment to the Defendant was paid through installment basis (including an interest of 7.5%, for the two land parcels that were contracted in 1973 and fully paid in 1974), whether the same principle of time value of the money has to be considered when the Defendant is required to pay back the fully paid FJ $ 51,250.(in other wards does the Defendant required to pay an interest to the said amount that it kept with it for 37 years in breach of the conditions the contract) **and** the period of which the interest should be applied.

c. **If so what is the interest rate /rates that should be applied** to the said FJ$51,250 period.

d. Whether **the interest should be compounded** in the circumstances and on the issues argued in the case in the light of the Supreme Court of Fiji decision in *Mukta Ben and Anor v Suva City Council* Civil Appeal No CBV001 of 2007S deciden on 24th July, 2008 overturning the Court of Appeal's finding that simple interest rate.

C. THE LAW AND ANALYSIS

a. Summary Judgment

[12] This application is made pursuant to the O 14 of the *High Court Rules of 1988.* In judgment delivered on 29 April 2011 Master Tuilevuka in Ghim Li Fashion (Fiji) Ltd v Challenge Engineering High Court of Fiji at Latoka Civil Jurisdiction Civil Action 258 of 2008 applied the Court of Appeal case of *Carpenter Ltd v Joes Farm Produce Ltd* ABU 0019/2006 where their Lordship stated the principles of summary judgment as follows:-

"Here it is timely to state some of the well established principles relating to the entry of summary judgment:

(a) The purpose of O 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiffs claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) **It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiffs claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.**

(d) Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduce it *Hanak v Green* [1958] 2 QB 9 at 29 per Sellers LJ.

(e) Likewise where a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action, and connect with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be fore unconditional leave to defend, even if the defendant admits whole or part of the claim; Morgan and Son Ltd v S Martin Johnson Co."

(emphasis is added)

[13] Once a claim is establishes, the evidential; and persuasive burden shifts to the Defendant and if the Defendant has not filed an affidavit in opposition, but a defence, the court must then direct its mind to the issues raised in the defence to see whether it has merits and is not just **a sham defence to delay judgment** or avoid the necessity of showing cause by affidavit. (*Magan Lal Brothers Ltd v LB Masters & Co* Civil Appeal No 31/84.) In the case before me not only that the Defendant has not filed an affidavit in opposition, but also it has admitted the averments from 1 to 11 in the amended statement of claim which comprised only 13 paragraphs. The major part of the claim is admitted by the Defendant and upon the said admissions and the documents filled by the Plaintiff in support of this application that the Defendant has breached the sale and purchase agreements that are annexed to the affidavit in support.

[14] Without prejudice to the reasoning in this judgment the breach of agreement by the Defendant was accepted by High Court of Fiji as well as in Court of Appeal in similar circumstances by the same defendant in an action filled by another frustrated purchaser in the same location in regard to different lots that were contracted to sell at that time. *Kaisha v Eyre* [1998] FJCA 31; Abu0026u.97s (14 August 1998) and *Eyre v Estate Management Services Ltd* [1997] FJHC 205; Hbc0407j.92s (30 April 1997). The said findings by the High Court Fiji were under similar circumstances and since the Defendant's breach was finally affirmed by the Fiji Court of Appeal in *Kaisha v Eyre* [1998] FJCA 31; Abu0026u.97s (14 August 1998) this can also be considered a fact that has been finally decided by the courts.

[15] In the present case the issue is about delay on the Defendant's part in discharging its obligation under the Agreements. The Agreements provide that the works agreed to be undertaken by the Defendant were to be undertaken "with all reasonable speed" in terms of clause 6(b) of the sale and purchase agreement. For the definition of reasonable time we refer the Court to the High Court case of Peter Gervaise Joseph Eyre v Estate Management Services Ltd and Ano HBC 407 of 1992 which case had same Defendant and Third Party and had similar issues before the Court. Pathik, J defined "reasonable time" and found that the Defendant was in breach of the agreements when it failed to finalise all utility works and transfer the titles for 24 years, though the decision was appealed the appeal dismissed and the fact of Defendant's breach was upheld. In present case it had taken 37 years. The reasonable time is when looking at the said project as

a whole what is reasonable. The Plaintiff has waited nearly a generation and the purchaser has even died and the action was filled on behalf of the estate by the Plaintiff.Now 37 years have lapsed and neither party intended such a long time and there is no fault on the part of the purchaser of the lots for the delay as it has fulfilled its promise as far back in 1974. At the same time if the Defendant is relying on third party it would have obtained necessary guarantee from any breach by the third party as the sale and purchase agreement was only between the vendor and vendee and there is no mentioning of any third party in the said agreement.

[16] The Court in Peter *Gervaise Joseph Eyre v Estate Management Services Ltd et al* High Court of Fiji HBC 407 of 1992 Justice Pathik, applied *Jones v Gardiner* [1902] 1 Ch 191 in which Byrne, J "decided that **where delay has been caused by default of the Vendor, not in consequence of want of or defect in title or Conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract, damages could be recovered."** His Lordship said:

> "There is no question in the present case of want of good faith, as evinced by any desire to repudiate the contract, or of fraud; but, having carefully considered all the proceedings and the correspondence and the evidence, I am of opinion that a very considerable part of the delay which has occurred in carrying out the contract (after making full allowance for the time which may fairly be considered to have been due to difficulties in making out title, and to a controversy as to the form of the conveyance) has arisen entirely from the default of the vendor – default, that is in doing what he could reasonably and fairly have done had he been duly careful to fulfill his contract. So far as the materials before me enable me to judge, the contract might certainly have been carried out, making a liberal allowance for delay in consequence of the difficulties and discussions I have referred to, three months earlier than the actual date of completion."

[17] The following passage from Byrne, J's judgment in *Jones v Gardiner* [1902] 1 Ch 191 sums up the situation as to circumstances in which damages can be claimed when it was held as follows

> "…which was considered in Bain v Fothergill, so far as it determines that where the breach of contract arises, not from inability to make a good title, but from refusal to take necessary steps to give the purchaser possession pursuant to the contract, further damages may be recovered, appears to remain good law. Jaques v Miller is a distinct authority for giving damages against a vendor, in addition to specific performance, in respect of delay caused by willful refusal to carry out a contract, and for the measure to be applied in ascertaining the damages, namely, such damages as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract. This case was followed in Royal Bristol Permanent Building Society v Bomash."

[18] In the circumstance it is clear that the Defendant is unable to provide title for the Plaintiff and it has also breach conditions contained in the title and the Plaintiff is entitled for the summary judgment.

b. What is the reasonable interest rate that should be applied and the time period for the interest.

[19] The Law Reform (Miscellaneous Provisions)(Death and interest)Act, Section 3 states as follows

Power of Supreme Court to award interest on debts and damages

3. In any proceedings tried in the SupremeCourt for the **recovery of any debt or damages the court may**, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section-

(a) shall authorise the giving of interest upon interest; or

(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[20] The above provision is applied only to the debt and damages. The statement of claim seeks compound interest as compensation for the delay of 37 years. The claim for compensation can be an alternate to the time value of the money can be calculated without resorting to the said provision. Even, as a compensation for the 37 years the interest it cannot be included in the above provision in the Law Reform (Miscellaneous Provisions) (Death and interest) Act, Section 3, hence the said provision is not a bar to award compensatory interest on the money paid 37 years ago. The Defendant never refused to transfer the title and or refused to fulfill its obligations and the delay in filling this action when the Defendant makes an assurances as in this case is understandable as the purchaser always preferred the two lots to money and this again is understandable as the said purchase of land seems to be an investment rather than for occupation. If the reason for purchase was for occupation this claim would have made much earlier.

[21] If the interest is not paid, obviously it would he make the provision in the law a great mischief and a grossly undervalue claim would be ordered, favouring heavily to the Defendant who is the Defaulting party.

[22] Even in claims for damages courts in Fiji adopt the multiplier multiplicand method considering the inflation and other factors to arrive at a reasonably fair and just value in the future loss and in *Attorney General of Fiji v Broadbridge* [2005] FJSC 4; CBV0005 of 2003S (8 April 2005) it was held that it was only one method to arrive at a fair value considering all the factors including inflation in the grant of an award of compensation for the future loss. The same principle should be applicable to an award of money paid 37 years ago as the present value of the money has changed substantially. In *Attorney General of Fiji v Broadbridge* [2005] FJSC 4; CBV0005 of 2003S (8 April 2005) it was held that;

"It is necessary to appreciate just what he means when he refers to **"the multiplicand/multiplier**" approach. As indicated above, that expression has a long history in Fiji. It is based upon a traditional method of calculating future economic loss that developed in England over many years. It assumes that the method by which lost future earnings are converted into a lump sum is to multiply the net annual loss (the multiplicand) by a figure, based upon the number of years of duration of the lost earning power, **that is discounted so as to take into account the fact that the lump sum is being paid immediately**, rather than being spread over a number of years, as would have been the case had the accident not occurred (the multiplier). The object of this exercise is to provide a lump sum which, when invested, will equal the income lost during the working life of the claimant, assuming a combination of interest payments and gradual withdrawal of capital, leaving nothing in the fund at the end of the period"

It further held,

"48 In determining the appropriate multiplier, courts that apply this method have tended to significantly **discount the initial figure arrived at to take account of two particular factors.** The first of these is, as the award of damages takes the form of a

lump sum, the fact that the plaintiff would but for the discount, be receiving immediately the earnings that would otherwise have been spread over a number of years. The **plaintiff thereby benefits from the interest accruing during that time.**

49 In *Wells v Wells* [1999] 1 AC 345, Lord Lloyd observed at 364, in the context of an example of an annual average cost of care of £;10,000 on a life expectancy of twenty years:

> **"The purpose of the discount is to eliminate this element of over compensation.** The objective is to arrive at a lump sum which by drawing down both interest and capital will provide exactly £;10,000 a year for 20 years and no more. This is known as the annuity approach. It is a simple enough matter to find the answer by reference to standard tables. The higher the assumed return on capital net of tax the lower the lump sum. If one assumes a net return of 5% the discounted figure would be £;124,600 instead of £;200,000. If one assumes a net return of 3% the figure would be £;148,800. The same point can be put the other way around. £;200,000 invested at 5% will produce £;10,000 a year for 20 years. But there would still be £;200,000 left at the end." (emphasis is added)

[23] In cases where damage is awarded by court by utilizing the multiplier –multiplicand method or any other method the future economic loss is calculated and discounted to reach a net –present-value (NPV) of the future economic loss. What is done here is to discount the future cash flow to present value. The NPV is commonly utilized in the commercial world to find out the commercial viability of any project that would generate future cash flows. This is the application of the principle in time value of money. This same principle can be applicable, when the court grants an award now, for the futureloss. This is easily applicable if the award is for loss of revenue in a particular project. The discounting factor is also mainly dependent on the cost of capital in the particular industry. When the court discounts the value arrive at future loss to reach a realistic value it also considers the time value of the money. It is clear from the following passage in the said case where it held

> '51 Lord Lloyd went on, in Wells v Wells,to describe how the courts had over the years dealt with the problem that money does not retain its value by assuming that future inflation could be accommodated by the plaintiff investing the lump sum in a mixed basket of gilt edged securities and equities. For a number of years, a discount rate of 4.5% was adopted on that basis.'

[24] These calculations are done to arrive at a more realistic value and no legislative support was sought for application of this as this is only an application of already available methods in the calculation of present value in any future cash flows or when the one grants an award for the future loss. By the same token time value of money is also a well established principle and this has been accepted in the Supreme Court of Fiji in 2008 in *Mukta Ben and Anor v Suva City Council* Civil Appeal No CBV001 of 2007S deciden on 24th July, 2008 when the Supreme Court granted compounded interest to a compensation in an acquisition of land.

[25] The High Court in *Peter Gervaise Joseph Eyre v Estate Management Services Ltd* et al High Court of Fiji HBC 407 of 1992 found that the Plaintiff was entitled to recover the purchase price together with interest thereon at the rate of 7% from the date of the notice of demand. This was based on the fact of accrual of cause of action, but in the consideration of time value of money the date of demand does not pay a significant part as it plays in the determination of limitation. This was because at that time in 1990s when that decision was delivered, the Supreme Court of Fiji has not considered the award of compound

interest in *Mukta Ben and Anor v Suva City Council* Civil Appeal No CBV001 of 2007S deciden on 24thJuly, 2008. As the principles contained in that judgment is applicable to courts in Fiji and considering the principles of precedent, the time period should be from the time of full payment in 1974 as the court is trying to consider the time value of money paid in 1974 to the present value. If any other date is considered that is not proper application of principles in consideration of time value of money paid 37 years ago, which can be considered as the ratio of the said Supreme Court Decision.

[26] It was held in *Bank of America Canada v \Mutual Trust Co* ., [2002] 2 SCR 601, 2002 SCC 43 the Supreme Court of Canada held that even the common law needs to be changed gradually to suit the needs of the society and stated at paragraph 43 as follows

> "The common law right in contract law to be awarded expectation damages is another such other right. As noted in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961 (HL), at 969, the power to award compound interest was not traditionally available at common law, although it is now. This is so because, as our jurisprudence demonstrates, the common law has been able to grow and adapt to changing conditions. In *Friedmann EquityDevelopments Inc v Final Note Ltd.* , [2000] 1 SCR 842, 2000 SCC 34, at para. 42, this Court outlined the following conditions where the rules of common law may be changed if necessary:
>
> (1) to keep the common law in step with the evolution of society,
>
> (2) to clarify a legal principle, or
>
> (3) to resolve an inconsistency."

[27] In Fiji the law relating the principle to time value of money is applicable as the Supreme Court has awarded compound interest in 2008, and if that principle is applied clearly the issue is what is the value of money paid to the Defendant at the time of judgment and obviously the time period cannot be anything other than from 1974 to end of 2010. The date of accrual of cause of action cannot be considered in the consideration of time value as the accrual of cause of action and the calculation of time value of money are mutually exclusive events. This factor of considering the date of demand notice as the start of time period for interest can be clearly distinguishable from post 2008 position where the compound interest was granted by the Supreme Court.

[28] ***DEANE J*** in *Foran v Wight* (1989) 168 CLR 385 at 438 said:

> *' Upon rescission, the purchasers were entitled to obtain restitution of the deposit which they had paid.* ***Their claim for the return of the deposit was not founded on the rescinded contract. Nor did it represent a claim for damages for the vendors' breach of its terms. It was a claim founded in the equitable notions of fair dealing and good conscience which require restitution of a benefit received as,*** or as part of, the quid pro quo for a consideration which has failed (cf per Lord Wright, FibrosaSpolkaAkcyjna v Fairbairn, Lawson, Combe, Barbour Ltd (26); Muschinski v Dodds (27)). If it be necessary to clothe that claim in a nomenclature, the appropriate one in a modern context is 'restitution' for, or of, 'unjust enrichment'. (emphasis added)

[29] So, the claim for the return of the deposit was not founded on the rescinded contract and it is also not a claim for damages for vendors terms and it is based on the equitable notion of fair dealing and restitution of a benefit the Defendant received as stated *DEANE J* in *Foran v Wight* (1989) 168 CLR 385 at 438 and the date of demand notice is not clearly the date on which the interest period starts though it may be considered for limitation. What is paramount in the application of the interest rate is to arrive at an amount that is equitable as it is 'a claim 'founded in the equitable notions of fair dealing and good conscience

which require restitution of a benefit received'. This clearly indicates that time period for interest should start from full payment of the purchase price to the Defendant.

[30] Judgment of *BRENNAN J* in *Foran v Wight* (1989) 168 CLR 385 at 432 is stated:

> *'Upon rescission of the contract, the consideration for which the purchasers had paid the deposit failed totally.* ***The purchasers became entitled to recover the deposit not as damages but in quasi-contract as money paid for a consideration that had totally failed:*** see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 esp at 57, 64-66..... The purchaser's claim for the deposit was not founded on the contract which they rescinded'.

[31] The date of start of the application of interest should be the full payment of the sale price as the purchaser became entitled to recover the money it paid not as a damages but in quasi-contract as money paid for a consideration that had failed as stated in Brennan J in the case of in *Foran v Wight* (1989) 168 CLR 385

[32] The appropriate interest rate should be applied to the FJ$51,250, as the time value of money has depreciated over the years. The payment was fully completed in February, 1974 and the value of the FJ$51,250 at that time is not what it is worth for the same amount. This contention is understandable since the time period is 37 years and over the time the value of the money has depreciated and there is no time fixed for the transfer of property by the Defendant to the purchaser.

[33] The value of money one receive now is not the same as it will be in the future and vice versa. So, it is important to know how to calculate the time value of money so one can determine the money's worth in the present day for a payment done in the past this is the only method that can give approximate value of the money paid in past or vice versa.

[34] This time value of money is considered in the interest rate when one selects to pay in the future for instance in a scheme of payment through installments. When one selects an option of payment through installments the full amount is not paid once, but in the future so an interest is to be added to as the same amount paid today will not be equivalent to the same amount paid in future. This principle was applied by the Defendant when the purchaser exercised the option to obtain the two lots of lands through installment payments, where he was required to pay an interest of 7.5% per annum on the balance and the installments and the prices for the two lots were determined accordingly. This clearly indicates that even for a short period of time the Defendant was charging an interest on the remaining unpaid amount an interest of 7.5%. Which indicates that cost of obtaining money for the business was 7.5% at that time for the said business of estate management.

[35] So, it is nothing but just and equitable to reciprocate the said principle of time value of money when the money is repayed to the Plaintiff. The Defendant cannot argue that Plaintiff is not entitled for the interest when Defendant has charged an interest of 7.5% per annum from the vendee of the two lots of lands when the money is paid through installments and time period is from 1974 to end of 2010.

c. Rate of interest

[36] It is clear that an interest should be applied to the fully paid amount in 1974 considering the time value of the money and the depreciation of the value of the money over last 37 years. If this is not done it will result an unjust enrichment for the Defendant who is the defaulter and it will be of much greater injustice to the Plaintiff as the value of money has diminished drastically over the years.

[37] The Plaintiff is seeking an interest rate of 13.5 % per annum in the amended statement of claim being the commercial overdraft interest rate, the interest rate of overdraft rate, is clearly not a rate of interest which the court can award in present circumstances and it is a rate for short term abridgment of cash short falls in commercial world. Short term interest rates are higher than the usual term of one year as it is for emergency.The interest rate that the Defendant charged when they received the money in installment basis, nearly 37 years ago was 7.5 % per annum. In 1975 the Reserve Bank of Fiji's minimum lending rate was 6% and commercial banks' lending rate was 10% and for the deposits where the principle sum involved is less than $ 250,000 was 6.5% and the Average Government Bond Rate for long term (5year) was 9%. The Plaintiff is not a bank or financial institution so clearly the Reserve Bank's lending rate will not apply to an individual. So, if the said sum was borrowed from a local commercial bank that would have incurred an annual interest of 10% and at the same time if this money was deposited in a commercial bank as a term deposit he would have obtained a 6.5% interest and if the same amount was invested in government bond it would have yield an interest of 6.9% which is risk free as it is a gilt edged safest liquid investment available. So, in deciding an interest rate the best risk free investment available at that time was a return of 6.9%. The Defendant's charged a rate of 7.5% interest at that time and this indicates that cost of capital would have been close to that amount of rate for the Defendant, at that time. Though government bond rate it is preferred there is a practical problem as it has not issued bonds from 1996 to 1998 according to the information obtained from the reserve bank. I have not been provided with 5 year bond rates after 1995, but it seems that 5 year bond were being issued from 1999 to 2009 and again in 2010 and 2011 no 5 year bond rates were available. The next best option is the commercial banks' term deposit rate provided by the Plaintiff and I have applied it. It is needless to state that saving account rate is not suitable for time value of money calculations.

[38] Since the period is 37 years the annual commercial bank term deposit rate(provided by the Reserve Bank of Fiji)is applied for the each year and this method is considered as the fit and proper interest considering the circumstances of this case as the second best option available to ensure that proper value, as close as to the value of the money paid to the Defendant in 1974.

d. Claim for Compound Interest

[39] In both *Peter Gervaise Joseph Eyre v Estate Management Services Ltd et al* High Court of Fiji HBC 407 of 1992 and *Sydney James Lee et al v Estate Management Services Ltd* the High Court of Fiji Civil Action No 70 of 2001 awarded **simple interest** from the date of the notice of default though a claim for compound interest was sought by the Plaintiff's counsel.

[40] The abovementioned two cases were decided in 1997 and 2005 respectively when Court's in Fiji were not award compound interest. However, the law in Fiji in the area of award of interest has since significantly evolved with

the decision of Fiji's highest court in the Supreme Court case of *Mukta Ben and Anor v Suva City Council Civil* Appeal No CBV001 of 2007S deciden on 24th July, 2008.

[41] In *Mukta Ben and Anor v Suva City Council Civil* Appeal No CBV001 of 2007S deciden on 24th July, 2008 the petitioners commenced proceedings in the High Court – on 25 October 1967. However, they chose first to litigate a claim that the acquisition was invalid, Stuart, J resolved the matter in favour of the respondent in 1975. An appeal to the Court of Appeal failed and a further appeal to the Privy Council was dismissed with costs in 1979. The parties then endeavored to resolve the quantum issue by agreement, but when settlement failed, returned to the High Court. Judge Winter, in the High Court determined that:

> (1) The value of the land at the date of the notice of intention to take the land assessed under s 12 (a)(i) was $40,000;
>
> (2) The petitioners were also entitled under s 12 (a)(iv) to $2,400 for injurious affection; and
>
> (3) Interest should be allowed on the $42,000 total sum at 10.5% compounded at yearly restes

[42] As result of the High Court's finding the petitioner was entitles to of $1,705,709 in compensation **including a compounded interest.** The appeal by the Council to the Court of Appeal was successful save as to the interest component. "The Court of Appeal held that there was no authority, statutory or otherwise, for allowing interest at compound rates. It set aside the award of compound interest and determined that simple interest should be calculated at the rate determined in the High Court (10.5%)."The Supreme Court in *Mukta Ben and Anor v Suva City Council Civil* Appeal No CBV001 of 2007S deciden on 24th July, 2008 **overturned the Court of Appeal's finding that only simple interest rate was applicable in Fiji.** Their Lordships stated as follows:-

> "There is no longer any basis for taking such a constricted view. Both the common law and equity have abandoned lingering objections in principle to the award of interest, including compound interest, where it is just to do so in order to provide a proper remedy for an established entitlement. **For example, compound interest may be awarded if this is appropriate to** provide compensatory damages according to general principles in contract (see e.g. *Hungerfords v Walker* (1989) 171 CLR 125) or to **provide restitution for unjust enrichment** (*see Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2007] 3 WLR 354). These developments are, in part, the working out of general principles freed from any lingering hostility to interest as usury and, in part, the consequence of recognizing the ravaged of inflation since the Second World War. In Sempra, Lord Hope stated (at [41]) that "**the obvious reason for awarding compound interest is that it reflects economic reality."** See also *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443."45 [emphasis is mine]

[43] This is applicable to the present circumstances as non application of compound interest would be to deviate from the economic realties of the commercial world. The Defendant is not only functioning as estate management services but also charging and collecting interest from the purchasers including the late Ahlmann at the rate of 7.5% in 1974 clearly indicting that the time value of money is to be considered even for a short period of time. So, when the time is 37 years, if compound interest is ignored, it will be a wind fall for the Defendant who charged 7.5% from the purchaser for the remaining balance in the receipt of part payment scheme for a comparatively short period of time.

[44] In *Bank of America Canada v \Mutual Trust Co* [2002] 2 SCR 601, 2002 SCC 43 the Supreme Court of Canada held that awarding simple interest would result in a windfall for the defendant as it would lend the money it owed to the other parties on compound interest rates. In that case the defendant was a Bank, but in the case before me though the Defendant is not a bank it had allowed the purchaser to pay in installment basis on a fairly high interest rate in 1974 (ie 7.5%) on the reducing balance of the purchase price indicting that its cost of capital is 7.5% at that time when the commercial term deposit rate was only around 6%. It can be deduced that non payment to the Plaintiff for such a long period of 37 years, will also be a windfall if simple interest is applied.

[45] In *Bank of America Canada v \Mutual Trust Co,* [2002] 2 SCR 601, 2002 SCC 43 at paragraph 13 it was held in the Supreme Court of Canada as follows

> 'The respondent opposed the award of compound interest for three reasons. First, the appellant's statement of claim did not plead compound interest. Second, the appellant did not miss investment opportunities for lack of funds because it could have obtained funds from its parent corporation or other lenders. Finally, the interest rate in the Loan Agreement should not apply to the respondent as it was not a party to the contract.

[46] In *Bank of America Canada v \Mutual Trust Co* , [2002] 2 SCR 601, 2002 SCC 43 at paragraph 19 it was held

> 'As well, Goudge J.A. held that the discretion granted to the court under s 130 *CJA* to vary an interest award from what is prescribed under ss 128 and 129 does not include the authority to award compound interest. **He found that the court's jurisdiction to award compound interest stems from the court's general equitable jurisdiction.** If the principles of equity warrant an award of compound interest, it is, in the language of ss 128(4) (g) and 129(5), "payable by a right other than under this section". As a result, this being in his view a simple breach of contract, equitable principles did not warrant damages at compound interest rates'

[47] In the said judgment in the analysis under the heading of **time value of money** the Supreme Court justices (including the Chief Justice of Canada) succinctly, described the principle of time value of money and I cannot add more to that and I will reproduce those paragraphs below in my ruling;

> "21. The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: **(i) opportunity cost (ii) risk, and (iii) inflation.**
>
> 22. The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G H Sorter, M J Ingberman and H M Maximon, *Financial Accounting: An Events and Cash Flow Approach*(1990), at 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and 'financial systems.
>
> 23. Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that **compound interest reflects the time-value component to interest payments while simple interest does not.** Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.

24. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is **therefore a more precise measure of the value of possessing money for a period of** time."

e. Interest as compensation

[48] Without prejudice to what was stated above the awarding of interest can also be considered as a form of compensation. Interest awards under statute may be described as "interest" or "damages". There is no essential incompatibility between these concepts. (*Riches v Westminister Bank Ltd* [1947] AC 390 at 406)Inters may also be called "compensation".(*Riches v Westminister Bank Ltd* [1947] AC 390 at 408)

[49] In *Bank of America Canada v \Mutual Trust Co* [2002] 2 SCR 601, 2002 SCC 43 it was held under the heading 'interest as compensation' as follows

'In *The Law of Interest in Canada*(1992), at pp 127-28, M A Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp 127-28, she wrote:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem. The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

37 After acknowledging that historically compound interest was not available at common law, Waddams, *supra*, at p 437, concludes that an award of compound interest should be available to courts so as to allow them to award full compensation to a plaintiff.

[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token defendant will have had the benefit of compound interest"

It was further held

'A contrary rule would lead to inequity and provide incentives to breach contracts. If courts were restricted to simple interest in assessing damages for breach of contract…..'

Non award of compound interest cannot be justified considering the circumstances of this case and the time period of 37 years and the award of interest either as compensation or as to bring the value to commercial ralities should be essential in order to prevent any injustice.

[50] The essence of interest can also be considered as to compensate for the fact that the person claiming compensation has been out of his or her money. As Viscount Simon said in *Riches v Westminster Bank Ltd* [1947] AC 390, when referring to interest that could be awarded under the *Law Reform Miscellaneous Provisions) Act 1934* (UK):

"…the discretion conferred on the court by the enacting words is a direction to add interest when judgment is given for a debt or damages, although there is no contractual right to interest. The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest".

[51] Lord Wright in the said case held at page 400 as follows

> "…because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law".

[52] In the same case Lord Simonds cautioned against seeking to characterize the nature of interest by reference to the authority under which it was awarded51:

> "I come then to the second stage and ask what is the character of interest allowed under s 28 of the Act of 1833. Here the argument is that, call it interest or what you will, it is damages, and, if it is damages, then it is not 'interest in the proper sense' or 'interest proper', expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. *It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the court.* In the first case it may be called 'interest' and in the second and third cases 'damages in the nature of interest,' or even 'damages.' *But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead.*" [underlining added]

[53] Lord Simonds went on to quote with approval from the judgment of Evershed J at first instance(1945) 114 LJ(Ch) 164,169:

> "But to my mind the answer is given by Evershed J. in his judgment in words which I cannot improve upon and therefore adopt '…the proposition that interest is awarded as damages or by way of damages, as in the case of Cook v Fowler54, imports the justification for the award or for the rate awarded but does not affect the quality of interest as such …' *Perhaps the position may become even clearer if for 'damages' the word 'compensation' is substituted*."

[54] The House of Lords in *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2007] 3 WLR 354 Lord Nicholes of Birkenhead stated at paragraph 52:

> "We live a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credits cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognize and give effect to this reality."

[55] Lord Walker of Gestingthorpe in the same case in awarding compounded interested concluded

> "The judgment of the ECJ is in my opinion a powerful encouragement for this House to reconsider the basis on which a monetary award reversing unjust enrichment can and should take account of the time value of money. In modern economic conditions simple interest does not provide full compensation in a case where unjust enrichment has lasted for a significant period (a fact which is now reflected, as Lord Hope points out, in the practice of the European Commission). As Hobhouse J said in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council; Kleinwort Benson Ltd v Sandwell Borough Council* at first instance, [1994] 4 All ER 890, 955
>
> "Simple interest does not reflect the actual value of money. Anyone who lends or borrows money on a commercial basis receives or pays interest periodically and if that

interest is not paid it is compounded (eg Wallersteiner v Moir (No 2); *Moir v Wallersteiner (No 2)* [1975] QB 373 and *National Bank of Greece SA v Pinios Shipping Co (No 1) (The Maira)(The Maria)* [1990] 1 AC 637). *I see no reason why I should deny the plaintiff a complete remedy or allow the defendant arbitrarily to retain part of the enrichment which it has unjustly enjoyed*."

[56] In *Mukta Ben and Anor v Suva City Council Civil* Appeal No CBV001 of 2007S decided on 24th July, 2008 at paragraph 10 held as follows

> [10] The Act is modelled on the Land Clauses Consolidation Act 1845 (UK). Under that Act, the service of a 'notice to treat' by the acquiring body has long been regarded as **creating a relationship analogous to that between vendor and purchaser**, subject to the statutory provisions (see *Tiverton and North Devon Railway Co v Loosemore* (1884) 9 App Cas 480 at 493, 503 and 511). A well-established corollary was the principle that a landowner with good title that has given up possession to the acquiring authority is to be paid interest on **the 'purchase money' on the analogy of the position of a vendor under a specifically enforceable contract for sale who has given up possession without receiving the full purchase price** (see *In re Pigott and the Great Western Railway Co*(1881) 18 Ch D 146; *Inglewood Pulp & Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492; *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 323-4; *Marine Board of Launceston v Minister of State for Navy* (1945) 70 CLR 518 at 531-3, 534-5. In the last mentioned case, Dixon J pointed out (at 531-2) that:
>
> '*The difference, I think, is quite clear between the sum awarded or assessed as compensation as at the date of acquisition for loss of property and a sum awarded for interest or compensation because the acquisition deprived the claimant of the profitable occupation or use of the property* ***without any immediate recoupment of capital in money.*** *But, where a legislative instrument empowers a court or tribunal to deal with the question of compensation,* ***it is a question of interpretation whether its jurisdiction is extensive enough to cover incidental matters and so to enable the court or tribunal to order that interest shall be paid*** *on the compensation assessed and awarded, where according to legal or equitable principles it is payable.* ***Though in America the reparation expressed by the word compensation is considered incomplete unless pending payment it includes interest on the capital sum arrived at, in English law I should not think that without context the primary meaning of the word would go so far.*** *But the jurisdiction to determine compensation may be readily interpreted as extending to what is consequential upon or incidental to the award. Where the sum awarded carries interest according to the substantive law, including in that expression the doctrines of equity, it is no great step to say that the tribunal dealing with the matter may so declare.'*

[57] In paragraph 12 of the *Mukta Ben and Anor v Suva City Council Civil* Appeal No CBV001 of 2007S decided on 24th July, 2008 it was held that there is no need to show any profit to the Defendant in order to award compound interest to the Plaintiff. In doing so the Supreme Court stated that 'it also recognized that the equitable principle based on the application of the vendor and purchaser cases applied to the said case on reparation. So, the case before me being a one of vendor and purchase the compound interest is applicable to the Plaintiff according to the findings of the said Supreme Court Judgment and also for the reasonings given in this ruling.

[58] In the circumstances I am inclined to award compound interest from 1974 at the term deposit interest rate for each year as supplied to me by the Plaintiff(with the concurrence of Reserve Bank of Fiji) and the calculation is done below.

Principle Amount	Year	One Year Deposit Rate Less than $250,000	Interest	Interest + Principle
$ 51,250.00	1975	6.50%	$ 3,331.25	$ 54,581.25
$ 54,581.25	1976	6.75%	$ 3,684.23	$ 58,265.48
$ 58,265.48	1977	6.75%	$ 3,932.92	$ 62,198.40
$ 62,198.40	1978	6.50%	$ 4,042.90	$ 66,241.30
$ 66,241.30	1979	6.50%	$ 4,305.68	$ 70,546.98
$ 70,546.98	1980	7.00%	$ 4,938.29	$ 75,485.27
$ 75,485.27	1981	8.00%	$ 6,038.82	$ 81,524.09
$ 81,524.09	1982	8.00%	$ 6,521.93	$ 88,046.02
$ 88,046.02	1983	8.00%	$ 7,043.68	$ 95,089.70
$ 95,089.70	1984	8.00%	$ 7,607.18	$ 102,696.88
$ 102,696.88	1985	8.00%	$ 8,215.75	$ 110,912.63
$ 110,912.63	1986	8.00%	$ 8,873.01	$ 119,785.64
$ 119,785.64	1987	8.00%	$ 9,582.85	$ 129,368.49
$ 129,368.49	1988	8.00%	$ 10,349.48	$ 139,717.97
$ 139,717.97	1989	7.50%	$ 10,478.85	$ 150,196.82
$ 150,196.82	1990	8.50%	$ 12,766.73	$ 162,963.55
$ 162,963.55	1991	8.50%	$ 13,851.90	$ 176,815.45
$ 176,815.45	1992	8.00%	$ 14,145.24	$ 190,960.69
$ 190,960.69	1993	7.00%	$ 13,367.25	$ 204,327.94
$ 204,327.94	1994	7.75%	$ 15,835.42	$ 220,163.36
$ 220,163.36	1995	7.00%	$ 15,411.44	$ 235,574.80
$ 235,574.80	1996	5.77%	$ 13,592.67	$ 249,167.47
$ 249,167.47	1997	5.18%	$ 12,906.87	$ 262,074.34
$ 262,074.34	1998	4.01%	$ 10,509.18	$ 272,583.52
$ 272,583.52	1999	2.88%	$ 7,850.41	$ 280,433.93
$ 280,433.93	2000	3.00%	$ 8,413.02	$ 288,846.95
$ 288,846.95	2001	2.43%	$ 7,018.98	$ 295,865.93
$ 295,865.93	2002	2.17%	$ 6,420.29	$ 302,286.22
$ 302,286.22	2003	1.70%	$ 5,138.87	$ 307,425.09
$ 307,425.09	2004	1.77%	$ 5,441.42	$ 312,866.51
$ 312,866.51	2005	2.03%	$ 6,351.19	$ 319,217.70
$ 319,217.70	2006	9.05%	$ 28,889.20	$ 348,106.90
$ 348,106.90	2007	4.45%	$ 15,490.76	$ 363,597.66
$ 363,597.66	2008	3.00%	$ 10,907.93	$ 374,505.59
$ 374,505.59	2009	5.83%	$ 21,833.68	$ 396,339.27
$ 396,339.27	2010	4.73%	$ 18,746.85	$ 415,086.12

D. CONCLUSION

[59] In this case the Defendant has had the benefit of the Plaintiff's money from February 1974 (when the Plaintiff paid full purchase price for both Lots). After entering into the Agreements with the Plaintiff to sell two Lots the Defendant

then proceeded to sell a parcel of land including the Plaintiff's Lots to the Third Party sometimes in 1990 (to which transaction the Defendant benefitted from). The Defendant did not obtain the Plaintiff's consent to its dealing with the Third Party which directly impacted the Plaintiff's Lots and/or at least inform the Plaintiff which would have enabled him to reconsider his options whether to proceed any further with these transactions. The Defendant has breached the sale and purchase agreement this was also held in similar action by High Court as well as Court of Appeal. Plaintiff is entitled for Summary Judgment for FJ415,086.12 (ie principle paid in 1974 with compound interest as calculated in the table.

E. FINAL ORDERS

a. Enter summary judgment for the Plaintiff in the sum of FJ 415,086.12
b. Legal interest of 4% for the said from the date of judgment till it is fully paid.
c. Cost of this application is assessed summarily at $1,500 to be paid by the Defendant to the Plaintiff.

Summary judgment entered for plaintiff.

Adam Anastasi
Solicitor