

**IN THE RESIDENT MAGISTRATE'S COURT**  
**AT SUVA-CIVIL DIVISION**

**Civil Action No MBC 271 of 2018**

**BETWEEN:**           **PRIMETIME PROPERTIES LIMITED** a limited liability  
having its registered office at Suva.

**PLAINTIFF**

**AND:**               **HIBISCUS COMPANY (FIJI) PTE LTD** a limited liability  
company having its registered office at Suva.

**1<sup>st</sup> DEFENDANT**

**AND:**               **PETER CHANG** of Suva (Exact Address unknown to the  
Plaintiff), Consultant.

**2<sup>nd</sup> DEFENDANT**

**For the Plaintiff**           : Mr. G. O'Driscoll (**Messrs. O'Driscoll & Co.**)

**For the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**       : Mr. Patel (**Messrs. Sherani & Co.**)

**Date of Hearing** : 6<sup>th</sup> June 2023

**Date of Judgment** : 18<sup>th</sup> July 2023

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## **Judgment**

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1. Listed herein are the pleadings:

- i. Writ and Statement of Claim : 13<sup>th</sup> November 2018;
- ii. Statement of Defence and Counter Claim :12<sup>th</sup> February 2019
- iii. Reply to Defence and Defence to Counter-claim : 18<sup>th</sup>  
November 2019
- iv. Reply to Defence to Counterclaim: 18<sup>th</sup> December 2019

2. The matter proceeded to a hearing where the Plaintiff called one (1) witness<sup>1</sup> who was a representative of the Plaintiff, whilst the 1<sup>st</sup> and 2<sup>nd</sup> Defendant did not call any witnesses.

3. A total of seven (7) exhibits were tendered by the Plaintiff.

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<sup>1</sup> Rajeev K Jamnadas

4. The respective positions of the parties in this matter are quite clear.
5. In terms of the plaintiff it is a claim in the amount of \$49,737.90 which is the sum claimed to be owed to them by the Defendants for the rental and subsequent repairs for Shops 1, 10 and 11, along Gordon Street and Victoria Parade, Suva.
6. During the hearing the only witness for the Plaintiff gave evidence. He stated that the 1<sup>st</sup> Defendant had entered into a lease agreement with their company to lease Shop 1, 10 and 11 along Gordon Street and Victoria Parade, Suva, specifically the Sabrina Building.
7. The lease agreement was tendered<sup>2</sup> and it amongst other things set out the lease period and the rental amount.
8. The lease period under the lease was 1<sup>st</sup> February 2017 to 31<sup>st</sup> January 2022. The lease agreement has been executed by the parties, of which page 10 shows the 2<sup>nd</sup> Defendant as a signatory.
9. In fact it was the evidence of the Plaintiff's witness that the 2<sup>nd</sup> Defendant at all times was the person whom they were liaising with in terms of email communications, discussions, viewing and rental discussions.
10. Whilst the lease agreement was stated to be for a period of five (5) years, the Plaintiff's witness tendered<sup>3</sup> a copy of an email from a Peter Chang dated 10<sup>th</sup> May 2018 which indicated that they were vacating Shop 1, 10 and 11 along Gordon Street and Victoria Parade, Suva
11. As a result the Plaintiff upon inspecting the leased properties which were vacated by the Defendants noted that there were substantial damages which needed to be rectified.

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<sup>2</sup> Plaintiff's Exhibit No.1

<sup>3</sup> Plaintiff's Exhibit No.2

12. The Plaintiff's witness tendered<sup>4</sup> the inspection report, which highlighted the defects to their leased properties.
13. The Plaintiff's witness stated that the total amount paid out during the inspection was the sum of \$1650.00. This was paid out to Pola Designs and the invoices were tendered<sup>5</sup>.
14. It then followed as explained by the Plaintiff's witness that Lenzwork Designs were engaged to conduct the repairs.
15. The Plaintiff paid a total of \$82,000.00 for the same as highlighted by the tendered<sup>6</sup> invoices.
16. In addition an electrical company were paid \$5,586.00 to correct electrical defects. Their invoice was tendered<sup>7</sup> as well.
17. The Plaintiff's witness further explained that by the Plaintiff's letter dated 30<sup>th</sup> July 2018 which was tendered<sup>8</sup>, the Plaintiff set out a schedule of all the costs associated with Shop 1, 10 and 11 in terms of rent reminders, repair costs and loss of rent.
18. He also stated that they were not claiming the entire amount as well, as they had deducted the bond amount sum of \$30,000.00 from their total claim.
19. He further stated that Mr. Chang had understood the nature of their claim wherein during a face to face meeting, Mr. Chang had made some representation which caused a deed to be drawn up. Unfortunately the deed was not signed.
20. When the Plaintiff's witness was cross examined that Mr. Chang gave no such representation, the Plaintiff's witness denied the same.

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<sup>4</sup> Plaintiff's Exhibit No.3

<sup>5</sup> Plaintiff's Exhibit No.4 (a), (b), (c), (d)

<sup>6</sup> Plaintiff's Exhibit No.6

<sup>7</sup> Plaintiff's Exhibit No.7

<sup>8</sup> Plaintiff's Exhibit No.5

21. The Plaintiff closed its case and the Defendants when given the opportunity were not able to call any witnesses, wherein they closed their case as well.
22. With the above in mind in order to prove this, the standard of proof in civil matters is one of proof on the balance of probabilities.
23. In *Miller v. Minister of Pensions* 1947 2 All E.R. 372 Lord Denning stated the standard of proof regarding balance of probabilities as;
- "That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."*
24. The Plaintiff in the court's view has adduced evidence that proves the monetary amount of their claim, as it was unchallenged. As such on a balance of probabilities the Plaintiff has met the evidentiary threshold of the standard of proof.
25. Has that meant, that the claim is made out against both Defendants especially when the Defendants did not adduce any evidence to rebut the Plaintiff's claim?
26. Order 31 Rule 4 (a) of the ***Magistrates Court Rules 1945***, is authority for the view that even though the Defendant produces no evidence, they are entitled to state their defence and reply generally.
27. This the Defendants have done via their Solicitor, in their closing submissions. As such whatever has been submitted in the closing submissions can be considered by this court.
28. The closing submissions of the Defendant has sought that the court deem the second defendant (Peter Chang) not legally responsible or liable.

29. This is premised on three things, that is:
- a. By virtue of Section 59 (b) of the **Indemnity Guarantee and Bailment Act 1881**, the second accused is not liable;
  - b. There is no privity of contract; and
  - c. Under the laws of agency the agent is not as a general rule, liable on the contract to the other contracting party.
30. A reading of the **Indemnity Guarantee and Bailment Act 1881** specifically section 59 (b) draws the conclusion that the 2<sup>nd</sup> Defendant should have expressed his wish to be personally liable in writing.
31. The evidence led by the Plaintiff goes as far as a deed being prepared however this was never executed.
32. As a result under the **Indemnity Guarantee and Bailment Act 1881**, this court agrees that the statute has barred any personal liability to be imputed against the 2<sup>nd</sup> Defendant.
33. Issues concerning privity of contract and the law of agency now become moot points only.
34. Therefore, the 2<sup>nd</sup> Defendant is not personally liable as a result.
35. Given the above finding and noting the contents of paragraph 24, this court finds that the 1<sup>st</sup> Defendant is liable to pay as claimed because it is a named party to the lease agreement.
36. The only remaining matter for discussion is the counter-claim by the Defendant.
37. As the Defendant did not call any evidence, the counter-claim becomes a non-suit, wherein the Plaintiff has no case to answer to.

38. The counter-claim is dismissed as a result.
39. In summary this are the court's findings:
- a. The 1<sup>st</sup> Defendant is liable to pay the monetary sum as claimed;
  - b. The 2<sup>nd</sup> Defendant is not liable to pay; and
  - c. The Counter-claim of the Defendant is dismissed.
40. Judgment is ordered against the 1<sup>st</sup> Defendant only as follows:
- i). Judgment in the sum of \$49,737.90 (Forty Nine Thousand Seven Hundred and Thirty Seven Dollars Ninety Cents);
  - ii). Costs in the sum of \$2500.00.
41. Any aggrieved party is at liberty to appeal to the High Court, wherein the statutory appeal period (7 days) shall apply.

  
JEREMAI N.L SAVOCA  
Resident Magistrate

