

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 102 OF 2017

BETWEEN : **RAJINDRAN RAJU aka RAJINDRA RAJU** as the sole Executor and Trustee of the Estate of Ram Raju and in his personal capacity of Malolo, Nadi, Businessman.

PLAINTIFF

AND : **GURU NAGAN CHETTY** trading as "*GNC Building Construction*" of Vitogo Parade, Lautoka, Contractor.

DEFENDANT

Appearances : Mr J. Sharma with Mr K.Siwan for the plaintiff
No appearance for the defendant
Trial (f/p)Date : 25 May 2018
Judgment Date : 26 June 2018

J U D G M E N T

Introduction

[01] The plaintiff brings the action against the defendant seeking the following relief:

- a) *An injunction requiring the defendant to immediately, and in any event within 7 days of an Order being made by this Honourable Court, for the defendant handover the 3 Kitchen cabinets, 1 office cabinet and 60 doors to the plaintiff, to enable the plaintiff to complete his project in the building of the state lease no. 20111.*
- b) *The defendant pays the plaintiff the sum of \$15,581.80 (fifteen thousand five hundred eighty-one dollars and eighty) as per paragraph 9 of the statement of claim.*
- c) *The defendant pays the plaintiff the sum of \$43,389.10 (Forty-three thousand three hundred and eighty nine dollars) VIP as per paragraph 13 of the Statement of claim.*
- d) *The defendant pays the plaintiff the sum of \$26,639.00 (twenty-six thousand six hundred and thirty dollars) VIP as per paragraph 13 of the Statement of Claim.*

- e) Pay damages to the plaintiff in the sum of \$5,000.00 (five thousand dollars) as per paragraph 14 of the statement of claim.
- f) Pay damages to the plaintiff in the sum of \$120,000.00 (one hundred twenty thousand dollars) as per paragraph 16 of the statement of claim.
- g) General damages.
- h) Interest.
- i) The defendant pay[s] the plaintiff costs on a solicitor client indemnity basis.
- j) Such further and other relief this Honourable Court deems just.

[02] The action is founded on breach of the construction contract.

[03] The writ of summons was duly served on the defendant. The plaintiff has filed an affidavit of service of Mr Veremo Tuilevu, 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 notice of motion to enter judgment (*'the application'*) against the defendant pursuant to Order 19, Rule 6 of the High Court Rules 1988 (*'HCR'*), which says:

Default of defence: Mixed claims (O 19, R 6)

"6 Where the plaintiff makes against a defendant two or more of the claims mentioned in Rules 2 to 5, and no other claim, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter against that defendant such judgment in respect of any such claim as he or she would be entitled to enter under those Rules if that were the only claim made, and proceed with the action against the other defendants, if any.

[04] The application was also served on the defendant. Again, the plaintiff filed an affidavit of Mr Ashok Chand, registered bailiff in proof of the service. It was personally served on the defendant on 29 December 2017, but he had refused to acknowledge by signing on the acknowledgment copy.

[05] The matter proceeded to formal proof on 25 May 2018. At the hearing without the presence of the defendant, the plaintiff, Rajindran Raju, gave evidence on his behalf and produced some 12 documents marked "P/Ex 1"- "P/Ex 12".

Background

- [06] Rajindran Raju, the plaintiff is the sole executor and trustee of the estate of Ram Raju and the sole beneficiary in the estate. The estate consists of a commercial building in Nadi on State Lease No. 20111 (hereinafter referred to as the "*Property*"). The property has residential flats.
- [07] Guru Nagan Chetty, the defendant is a contractor trading as "GNC Building Construction."
- [08] The plaintiff engaged the defendant to carry out and complete the construction and installation of certain things in the property. The parties entered into a written agreement dated 11 July 2016 (hereinafter referred to as the "*Agreement*"). The construction job includes installation of 3 kitchen cabinets; 1 office cabinet and 61 doors and other jobs such as Paint job; Roofing; Plumbing; guttering; and bell straight (hereinafter referred to as the "*construction work*") for the total sum of \$49,990.00. The construction work was to be completed by 1 January 2017. The plaintiff was to provide materials for the construction and make progressive payment after completion of different stages of work.
- [09] According to the plaintiff, he provided all the necessary materials to the defendant for the defendant to carry out the construction work in the sum of \$15,581.80 and paid the defendant the total sum of \$43,389.10 VIP before the completion of the different stages of the construction work.
- [10] The plaintiff alleges that the defendant had breached the agreement by failing to complete the construction work as agreed. The particulars of the alleged breach include:

Particulars

- i. *The defendant progressively slowed down in its work schedule;*
- ii. *The defendant failed to meet deadlines and time limits;*
- iii. *The defendant delayed the plaintiff's Project in excess of 4 months thereby causing loss and damages to the plaintiff;*
- iv. *The defendant failed to install the 3 kitchen cabinets, 1 office cabinet and 60 doors;*

- v. *The defendant failed to hand over the 3 kitchen cabinets, 1 office cabinet and 60 Doors; and*
- vi. *The defendant eventually abandoned the project.*

[11] The plaintiff states: he had to employ other contractors to complete the project at an increased price of **\$26,630.00** VIP, found out that some of the work which the defendant had carried out was faulty after appointing the new contractors and as a result he (plaintiff) had to incur further costs in the sum of **\$5,000.00**.

[12] The plaintiff brings this action against the defendant to recover the additional expenses arising out of the breach of the building contract and faulty work carried out by the defendant and general damages for breach of the contract.

The Evidence

[13] PW1's evidence is as follows:

- a) *The property has apartments, which he intended to rent out and earn income. He engaged the defendant to complete the construction work for \$49,990.00. The defendant was to complete all the work by 1 January 2017.*
- b) *He provided all the necessary materials to the defendant to carry out the works in the sum of \$15,581.80 (The invoices for the materials were tendered). He made the payments through cheques (The cheque buds were tendered).*
- c) *He said the defendant pressured for payment before the completion of the different stages of work, albeit payment was to be made after the completion of different stages of work.*
- d) *The defendant threatened him (the witness) that if he does not get paid the entire contract sum he (defendant) will abandon all the work. He confirmed the payment of \$43,389.10 to the defendant via cheques (Cheque buds were for the total sum of \$43,389.10).*
- e) *He said the defendant breached the agreement by not completing all the work as agreed, slowed down the work schedule, failed to meet deadlines and time limits, failed to install the 3 kitchen cabinets, 1 office cabinet and 60 doors although he had made them and when asked the defendant to install the 3 kitchen cabinets, 1 office cabinet and 60 doors, demanded more payment.*
- f) *He refused to make further payment to the defendant. The defendant finally abandoned the works. He employed other contractors to complete the work and incurred extra \$26,630.00. He engaged Deeshi Construction to carry out painting, bell straight and*

roofing, which were to be done by the defendant (A letter dated 28 March 2017 was tendered to confirm the payment made to Deeshi Construction).

- g) He appointed Rex Plumbing to carry out the plumbing work and made payments to Rex Plumbing (The invoices from Rex Plumbing was tendered).
- h) He incurred further costs in the sum of \$5,000.00 to fix the faulty work done by the defendant (A letter by Deshni Construction stating the faulty work and the amount which will be needed to fix the same was tendered).
- i) He sustained a monetary loss in the sum of \$30,000.00 per month since 1 January 2017 and continues to incur a loss due to the breach of the agreement and delaying the work. The defendant failed to complete the work by 1 January 2017. His project was delayed for 2 months because of the defendant's breach. He was not able to start the operation of his apartment because there were no doors. He intended to rent out a room for \$250.00 to \$300.00, he had to rent it at a lower price.
- j) He does not want the 3 kitchen cabinets, 1 office cabinet, and 61 doors as the condition of the items are unknown to him. Instead, he is asking for \$15,581.80 for the materials which he had provided to the defendant.
- k) He is also asking for the return of \$43,389.10 payment he made to the defendant.
- l) He is asking for \$26,630.00 as he had to appoint other contractors to carry out the works which the defendant had abandoned, \$5000.00 for the further costs he had to incur to rectify the faulty work which was carried out by the defendant, \$30,000.00 since 1 January 2017, till 31st December 2017, for the loss which he sustained as he could not open his apartment for business and interest, general damages and legal costs.

The Law

- [14] 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.
- [15] 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 recognise in some manner.
- [16] 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.

Discussion

- [17] The plaintiff seeks relief against the defendant for breach of the construction contract.
- [18] The parties entered into a building contract in that the defendant agreed to carry out and complete installation of cabinets, doors, plumbing etc. for the sum of \$49,990.00. The agreement dated 11 July 2016, among other things states: -

...

Dear Sir,

I do hereby enclose the agreement for the full compilation of sink bench for kitchen 1,2,3 with professional finishing and white 2 pack as for the price of Gen contract including draws, vanity and all cabinet door and office cabinet with a size confirmed by owner (Mr Raju).

Amount agreed below.

Price General contract : ~~\$46,220.00~~

Amount paid : \$23,000.00

Balance : ~~23,220.00~~

Doors for building 61 doors in total the price for each door \$98.90 including labour 2 pack paint and wood edge. Only door hinges and locks to be supplied by Mr Raju.

Amount for 61 doors below

Total amount for 61 finished doors \$7,625.00

All job to be finished within 90 days.

30 days to complete doors.

...

- [19] The plaintiff states that some of the terms of the agreement were verbal. However, he did not provide particulars of the oral agreement. I would, therefore, stick to the written agreement only.
- [20] In support of his claim, the plaintiff gave oral evidence on his behalf. He explained in his evidence how the defendant breached the construction agreement. The plaintiff's evidence remains unchallenged that I have no hesitation to accept his evidence as credible.
- [21] There is evidence before the court that the defendant had breached the building agreement entered into between the parties by not installing the 61 doors and cabinets and by not doing the job up to the standard expected of him. The

plaintiff supplied material for the constructions. Although, the defendant made 61 doors, 3 kitchen cabinets and 1 office cabinet he refused to fix them demanding more money. On the evidence, on a balance of probability, I am satisfied the defendant as executing party had breached the construction contract. As such, I find that the plaintiff is entitled to damages for breach of the contract.

Interim Injunction

- [22] The plaintiff applied for an interim injunction against the defendant for the immediate delivery of the 3 kitchen cabinets, 1 office cabinet and 60 doors to the plaintiff to enable the plaintiff to complete construction. The injunction application was served on the defendant. The fact was proved by producing an affidavit of service sworn by Veremo Tuilevu, the registered bailiff. The defendant did not attend. The Master heard the application and made an order against the defendant for the immediate delivery of the items to the plaintiff. The plaintiff states that the defendant had not complied with the order to date, despite service of the order on the defendant on 5 July 2017 (see AoS of Ashok Chand filed 10 July 2017).

Assessment of damages

- [23] I now proceed to measure damages payable to the plaintiff for breach of the construction contract.
- [24] With regard to the assessment of damages, the plaintiff referred to me a case authority of *Wadann v Kamea*, [2001] FJHC 179; HBC307.2000S (19 April 2001), where there was a breach of a contract. The plaintiff had given the defendant contract to build a residential premise-2 bedroom house within 3 months for \$36,676.59. The parties extended the contract to include further building works for a price of \$44,410.00 and extended again by another 6 ½ months, at which the defendants would pay a daily penalty if incomplete. The defendants completed 50% of the house and did not pay any penalty, and the plaintiff spent a further \$20,399.00 on another builder to complete the upper levels. The plaintiff filed a writ, and in absence of a defence, sought assessment of damages, Madam Justice Shameem (as she then was) stated as follows:

"The measure of damages due to the Plaintiff, is the cost to him of completing his house in a reasonable manner, and the value of the use of the premises lost by reason of the delay (Mertens-v-home Freeholds Co. (1921) 2 KB 526).

In Bank of Baroda v Chauhan Investments Ltd. Civil App. No. 33/92, the Fiji Court of Appeal said:

"The Company was entitled to recover as damages all losses resulting from breach of the contract which were within the reasonable contemplation of the parties when they entered into the agreement (Victoria Laundry (Windsor) Ltd. (1949) 2 KB 52 and Koufos v C. Czarnikow (1969) 1 AC 350)."

"Clearly the parties must have known that if the house was not completed, the Plaintiff would have to pay another builder to finish it, and that the Plaintiff would have to live somewhere else while the house was under construction."

"The cost of completion must be assessed when the contract had in effect, been terminated. The Plaintiff must show that he completed his house at a reasonable time and in a reasonable manner, and that he has not delayed the building unnecessarily."

"Having heard the Plaintiff in the witness-box, I accept his evidence that the house, which was to be completed by April 11th 2000, under the terms of the contract dated March 1st 2000, was only half-completed, by that date. I accept that the Plaintiff paid the 1st Defendant \$37,825.00, and that the value of the work done was only to the cost of \$22,250.00"

"I also accept his evidence that the completion of the house has cost him \$20,339 with a further \$10,000 needed to complete it. He also had to pay \$500 for an engineer's certificate (which the Defendant had undertaken, by contract, to provide) and \$2,100 for electrical works. I further accept the Plaintiff's evidence that he was forced to rent a home while his house remained incomplete at \$900 per month."

"The Plaintiff is therefore entitled to the sum paid to the Defendant over and above the value of the work done by the Defendants. The sum he is entitled to is \$15,485.00, the Plaintiff, being entitled to the cost of completing the building, a further award of \$30,399.00. Also under this head of general damages the plaintiff is entitled to \$500 for the engineer's certificate; and to \$2,100 for electrical works, both of which had been the responsibility of the Defendants under Clause 7 of the contract of the 1st of March."

“The cost to the Plaintiff consequential upon the delay in the completion of the house, is recoverable provided it is not remote that the Defendant must have realised was a likely result of his breach of contract.”

“The Defendant must certainly have known that the Plaintiff was forced to rent property because of the delay in the building of the house, and I therefore award the sum of \$900.00 per month from 11th April to 16th September 2000, in the total sum of \$4,500.00. I decline to award \$250.00 for trips to Pacific Harbour. I have no doubt that the Plaintiff would in any case, have visited the building site frequently to check on progress.”

- [25] The common law remedies for breach of contract are substantial in nature, providing an award of many damages in substitution for the performance of the actual promise.
- [26] 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.
- [27] 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.

Damages for defective workmanship

- [28] The evidence before me is that the plaintiff paid an additional sum of \$5,000.00 to Deeshi Construction to rectify the defendant’s defective workmanship. This payment is proved by the document issued by Deeshi Construction (PEx6). There is no evidence that the defendant repaired the construction defect within a reasonable time. On the evidence, I am satisfied that the plaintiff is entitled to claim \$5,000.00 he spent on repairs of the construction defect.

Costs incurred in the completion of the project

- [29] 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.

- [30] The plaintiff's evidence was that he had to engage other contractors to complete the work the defendant left. He spent a sum of \$ 26, 630.00 on this. The fact of payment of this is proved by the document issued to the plaintiff by Deeshi Construction (PEX6 & 9). The defendant agreed to complete the project by 1 January 2017. However, he did not complete the same. There is evidence before me that the plaintiff had made total contract price by then. In breach of the contract, the defendant left the project without completion as agreed. The plaintiff had to engage other contractors to finish the project up. The costs for completing the project from the stage where the defendant refused to complete the project were \$26,630.00. The defendant stopped the project demanding more money. The defendant had breached the contract by not performing the actual promise that he will complete the project by 1 January 2017. 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 the sum he paid to perform the contract from the stage where the breach had occurred. I allow the sum of \$26,630.00 as reasonable costs of completion of the project.

Cost of material provided

- [31] The plaintiff provided materials to the defendant in order to make furniture, which includes 3 kitchen cabinets, 1 office cabinet and 61 doors. The defendant had made the furniture, but he refused to release the same to the plaintiff despite the court order. The plaintiff claims costs of materials supplied to the defendant, which he estimates at \$15, 581.80 I accept this claim as reasonable costs of the materials given to the defendant to make the furniture. On the evidence, I find the plaintiff is entitled to claim the sum of \$15, 581.80 as costs of the materials supplied to the defendant.

Loss of income

- [32] The plaintiff claims loss of income arising from the delay in the performance of the contract pursuant to its terms. Under this head, he claims \$30,000.00 a month for the loss of rental income from 1 January 2017 till 31 December 2017. He says he had intended to open the apartment by 1 January 2017 but it was delayed till 31 December 2017 because of the breach of the contract on the part of the defendant.
- [33] Delays in completion of construction projects may result in various consequential damages other than mere speculation. The court may grant consequential damages if the evidence supports such damages. However, the determination of damages is within the discretion of the court. There may not be a limitation on the types of consequential damages that may be recovered from the defaulting party. Recovery may be limited only by what a plaintiff can actually prove to a reasonable degree of certainty and what was reasonably foreseeable or contemplated by the parties at the time of contract.
- [34] The plaintiff merely speculates that he would have earned \$30,000.00 (if rooms were fully booked). The defendant promised to complete the project by 1 January 2017. The plaintiff claims loss of revenue arising from the delay from 1 January 2017 till 31 December 2017.
- [35] It is worthy of noting that the plaintiff stated in evidence that the delay was about 2 months.
- [36] The plaintiff speculates that he would have started the business immediately after the completion of the project. It is doubtful that the rooms would have been fully booked even if the plaintiff were able to commence his business from 1 January 2017.
- [37] The evidence before the court does not prove to a reasonable degree of certainty and what was reasonably foreseeable or contemplated by the parties at the time of the contract that the defaulting party will be liable to pay damages for revenue loss arising from non-performing or delaying the performance of the contract. However, I am prepared to award nominal damages for breach of the contract, which I assess at \$15,000.00.

Recovery of contract price paid to the defendant

- [38] 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.
- [39] It is true the plaintiff had made progressive payment upon completion of each state, totalling \$43,389.10. It was the plaintiff's evidence that he made progressive payments after completion of each stage of the work. It translates that the payments had been made for the work done by the defendant. For breach of contract, defective workmanship and the delay on the part of the defendant and costs of engaging other contractors to complete the performance under the construction contract, the plaintiff has been granted damages separately. The plaintiff had paid the total contract price for the work the defendant had done. Therefore, in my view, the plaintiff is not entitled to recover the contract price paid to the defendant.

Pre-Judgment interest

- [40] 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.
- [41] 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).
- [42] In exercising the power under s.3, I order that there shall be included in the judgment sum at the rate of 6% per annum between the date of the writ of summons (30 May 2017) and the date of the judgment.

Costs

[43] The plaintiff is entitled to costs of these proceedings, especially as a prevailing party in a construction defect and refusal to fully complete the project. The plaintiff was represented by counsel. There was a hearing in respect of the claim, which lasted for 2 ½ hours. The plaintiff had filed a helpful submission. I consider all these, I summarily assess the costs at \$2,500.00, which the plaintiff will be entitled to recover from the defendant.

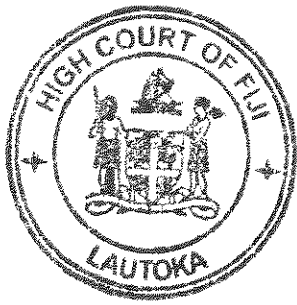
Summary

[44] The summary of damages allowed is as follows:

No.	Particulars	Amount
1	Material provided to make furniture (3 kitchen cabinets, 1 office cabinet and 61 doors)	\$15,581.80
2	Amount paid to other contractors to complete the construction work	\$26,630.00
3	Additional expenses incurred in fixing the faulty work (defective workmanship)	\$5,000.00
4	General damages for breach of the contract	\$15,000.00
	Total	\$62,211.80
5	Costs	\$2,500.00
6	Interest on the judgment sum at the rate of 6% per annum from the date of the writ of summons (30 May 2017) till the date of the judgment.	

The Result

1. The defendant shall pay the plaintiff damages in the sum of \$62,211.80 with pre-judgment interest at the rate of 6% per annum from the date of the writ of summons (30 May 2017) and till the date of the judgment.
2. The defendant shall also pay the plaintiff summarily assessed costs of \$2,500.00.



M. H. Mohamed Ajmeer
26/6/18

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

26 June 2018

Solicitors:

For the plaintiff: M/s Janend Sharma Lawyers, Barristers & Solicitors

For the defendant: No appearance