

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

**CIVIL ACTION NO. HBC 128 of**  
**2007**  
**CONSOLIDATED WITH CIVIL**  
**ACTION NO. 130 OF 2010**

**BETWEEN** : **BIRONDA FIJI LIMITED** t/as **TRUE BLUE HOTEL** a limited liability company incorporated under the laws of Fiji.

**FIRST PLAINTIFF**

**A N D** : **SHANIL NAIDU** father's name Chinmunsami Naidu of Koala Way, Horsley Park, New South Wales 2175, Australia, Businessman/Managing Director.

**SECOND PLAINTIFF**

**A N D** : **AVINESH CHANDRA NAIDU** father's name Muthu Krishan Naidu of Sigatoka, Nadroga/Navosa, Fiji, Medical Practitioner as a trustee of the Sigatoka Club.

**FIRST DEFENDANT**

**A N D** **SIGATOKA CLUB** a club duly registered under the Registration of Clubs Act (as amended).

**SECOND DEFENDANT**

**Appearances** : Mr S. Krishna with Mr N. Kumar for Plaintiff

Mr E. Narayan for Defendants

**Date of Trial** : 11 August 2016 & 1 March 2017

**Date of Judgment** : 06 July 2017

**J U D G M E N T**

## **Introductory**

[01] The Plaintiff initiated these proceedings against the Defendants seeking among other things specific performance of a Tenancy Agreement, certain declarative orders and costs. In the second amended statement of claim dated 3 August 2016, the Plaintiffs seek the following orders against the Defendants:

- a) *Specific performance of the Tenancy Agreement dated 6<sup>th</sup> June 2003.*
- b) *Declaration that the Plaintiffs are entitled to the Tenancy of the subject property till November, 2018.*
- c) *An order that the Defendants do not interfere and/or disrupt the Plaintiffs business operation, restaurant, bar and/or guest at the Premises.*
- d) *An order that the Defendants given extra key to the locked gates on the Premises in the front and the back of the Property giving access to the room accommodation.*
- e) *An order that the Defendant give adequate parking space to the Plaintiff and its customers and/or guests.*
- f) *General damages.*
- g) *Interest.*
- h) *Punitive Damages and Special damages against the Defendants;*
- i) *Costs on a solicitor/client indemnity basis; and*
- j) *Further orders deemed just by this honourable court.*

[02] The Defendants filed their statement of defence and sought dismissal of the claim and counterclaimed against the Plaintiff in the sum of \$1,144,400.00 with costs.

[03] At the trial of the matter, the Plaintiff gave evidence and called two (2) other witnesses in support of the claim and a Mr Vijay Singh testified on behalf of the Defendants.

[04] Having opted to file closing submissions, both the parties have filed their respective written submissions. I am grateful to both counsel for their elaborative submissions concerning their respective case.

### **Background Facts**

[05] In January 2003, Shanil Naidu, the second Plaintiff and Sigatoka Club, the second Defendant made a verbal agreement to the effect that the second Plaintiff would develop the general property, by adding 2 floors to the property, including approximately 400 seating for an up-market restaurant and bar, accommodation, pool and jetty to run a tourist boat.

[06] In February 2003, they formally entered into an agreement ("*the Base Agreement*") wherein the parties agreed that the Plaintiff would develop the first floor of the building on the Property ("*the Premises*") and in consideration of the development, the Defendants would give the Plaintiffs a lease to run the property. The trustees including the 1<sup>st</sup> Defendant, Avinesh Chandra Naidu will not have any objection whatsoever and authorised to carry on with the Project as planned for the betterment of the Club and its members.

[07] The Plaintiffs commenced the development of the Property around the end of February 2003.

[08] As the construction was in progress, the parties entered into a Memorandum of Agreement dated 6 June 2003, ("*the Tenancy Agreement*") in respect of the first and second floor with the following conditions:

- *The Tenancy Agreement was for a period of 12 years commencing on the 1<sup>st</sup> November 2003 and an option to renew for a further period of 3 years.*
- *The Parties agreed that the first 2 years of the Tenancy Agreement, the monthly rental will be \$800.00 per month (VEP) to be paid in advance on the 1<sup>st</sup> day of every month beginning on the 1<sup>st</sup> November 2003 and subject to the completion of the building.*
- *The Defendant, however, could waive the payment of the rent for the 6 weeks of the term.*
- *The Parties further agreed that the rental would be reassessed at 2-years intervals for the remaining 10 year period subject to the approval of the Prices and Incomes Board.*

[09] The Plaintiff developed the Premises substantially and invested, according to the Plaintiff, more than FJD \$550,000.00 into the development of the Premises, which included the general upgrade of the ground floor, construction of the first and second floor of the building and addition of rooms for accommodation purposes.

[10] In the meantime, in October 2004, the Defendant entered into another Memorandum of Agreement for the Premises with the Plaintiffs then Caretaker and Manager, Jack Prasad (*"the Second Tenancy Agreement"*), which the Plaintiff alleges is illegal.

### **Defendants' case**

[11] On October 2004, the Plaintiff and the second Defendant entered into Memorandum of Agreement dated 5 October 2004 (the Agreement). According to the Agreement, the monthly rental for the premises is \$1,800.00 per month. The Plaintiff did not pay the monthly rental, therefore, was in breach of the Agreement. Despite the numerous request made to the Plaintiff by the second Defendant, the Plaintiff failed to pay the rent. As a result of the Plaintiffs' breach, the Agreement was

terminated. In the second amended statement of defence, the second Defendant claims:

- 1) *An order for dismissal of the Plaintiffs claim and orders as sought in paragraphs a – j;*
- 2) *A Declaration that the Plaintiff is an unlawful occupation of all that piece and parcel of land comprised in Certificate of Title No.24715;*
- 3) *An order that the Plaintiff forthwith give vacant possession of the said premises;*
- 4) *An order that the Plaintiff pay the second Defendant in the sum of \$1,144,400,00,00 as per paragraph 32 hereinabove;*
- 5) *An order that the Plaintiff pay mense profit to the second Defendant until the actual date of possession and occupation at a rate of \$1,800.00 per month;*
- 6) *An order to the Plaintiffs forthwith provide details statement of accounts of all the income that it has derived from the premises;*
- 7) *That the Plaintiff pay costs on a solicitor/client basis;*
- 8) *General damages;*
- 9) *Such other relief that this court being just and expedient.*

### **Agreed Facts**

[11] At the Pre-trial Conference Minutes dated 30 November 2010 the parties had agreed to the following facts:

- 1) *On 6<sup>th</sup> June 2003, the Plaintiffs and Defendants executed the tenancy Agreement (**Tenancy Agreement**).*

- 2) *The Purported Tenancy Agreement makes no reference to the Base Agreement.*
- 3) *Jack Prasad paid \$20,000.00 to the Defendants under the Purported Tenancy Agreement.*
- 4) *On 23<sup>rd</sup> January 2017, the Plaintiff wrote to the Defendants to give notice of the Plaintiffs overpayments of rent for the premises has not been paid for the months of December 2006, January and February 2007 and, until 28 February 2007 to vacate the premises failing which the Defendants will institute eviction proceedings against the Plaintiffs.*
- 5) *On 31<sup>st</sup> January 2007, the Plaintiffs then Solicitors replied to the Defendant re-stating the overpayment in rent and reminding the Defendants of their obligations under the Tenancy to allow the Plaintiffs quiet and enjoyment of the Premises.*

## **Evidence**

### *Plaintiff*

- [12] At the trial of the matter, the Plaintiff called three witnesses namely Shanil Naidu, the second Plaintiff (PW1), Madan Sen (PW2) and James Satish Bachu (PW3). The Plaintiffs also tendered the following documents:
1. A copy of the letter dated 19<sup>th</sup> February 2003 from Defendant to the Plaintiff (PE-1).
  2. The Memorandum of Agreement between the Plaintiff's and Defendant's dated 6<sup>th</sup> June 2003 (PE-2).
  3. A copy of the letter from Satish Kumar.
  4. Letter dated 1<sup>st</sup> November 2013 by Sigatoka Town Council.
  5. Letter from Sigatoka Town Council to FTIB.
  6. Foreign Investment Certificate.

7. A copy of the Financial Statement of the Sigatoka Club.
8. The Memorandum of Agreement between the Trustees of Sigatoka Club and Jack Prasad.
9. A letter from Fiji Islands Trade and Investment Bureau dated 30<sup>th</sup> January 2006.
10. Photos of the damages and harassments done by the Defendants.
11. A letter dated 12<sup>th</sup> February from Irene Nisha to the Plaintiff.
12. A copy of the letter dated 3<sup>rd</sup> February 2007.
13. Letter dated 5<sup>th</sup> February 2007 from the Sigatoka Town Council to the Defendant.
14. A copy of the letter dated 7<sup>th</sup> October 2008.
15. Letter dated 7<sup>th</sup> October 2008 from the Plaintiff to the Commissioner of the Police.
16. Letter dated 26<sup>th</sup> May 2007 from the Plaintiff to the Commissioner of the Police.
17. Letter dated 17<sup>th</sup> October 2008 from the Plaintiff to the Defendant.
18. Letter dated 1<sup>st</sup> October 2008 from the Plaintiff to the Defendant.
19. A copy of a letter from True Blue Hotel.
20. Various copies of Boarding Passes of the Plaintiff.
21. Authority Letter.
22. Letter of Renewal of Tenancy Lease dated 5<sup>th</sup> February 2015.

[13] PW1 in evidence states that:

- He is the Director and the Majority Shareholder of the 1<sup>st</sup> Plaintiff.
- He is an Australian Citizen and foreign investor in Fiji.
- He has been the tenant of the Defendants.
- He was the visitor in Fiji when he was introduced to the Defendants by a friend for potential investment in Fiji.

- The Defendants orally promised that the Plaintiffs to develop the subject property and operate a restaurant and hotel from the property and to develop the Sigatoka Club building and in return, the Plaintiff will get the lease from the Defendants.
- The Defendants issued a letter advising that the Plaintiff would develop the first floor of the building on the property and in consideration of the development, the Defendant would give the Plaintiff lease to run the property (**PE 1**)
- The Defendants and the Plaintiff entered into a Tenancy Agreement dated 6<sup>th</sup> June 2003 under the common seal (**PE 2**).
- As per the two agreements, “PE 1 and PE 2” the Plaintiff started the development works. The total cash of \$314,282.00 was transferred from the offshore account into the Westpac Bank account in Fiji (**PE 3**). Some materials were imported from overseas thus making the cost of the Development around \$500,000.00 to \$600,000.00.
- The Plans were drawn and the development took place. This was the biggest project at the Sigatoka Town at the moment.
- He exercised his rights to renew and delivered the notice to the Defendant to exercise its power to extend the tenancy for a further period of 3 years (**PE 22**).
- He did not receive any correspondence to the letter and as such continued staying on the subject property as per the tenancy agreement.
- The letter of the renewal was served at the Defendant’s office and it was accepted by Mr Suresh Naidu, the Trustee and the President of the Club.
- He also had renewal talks with the trustees and the Management of Sigatoka Club mainly Vijay Singh, Krishna Rattan Bhan and Suresh Naidu.They all were happy to renew the tenancy agreement.
- That the Lautoka High Court Civil Action No. 130 of 2013 was settled, the full payment was made as per the arrangement between the Parties (**PE 4**).



- The Sigatoka Town Council wrote to the Fiji Trades & Investment Board via letter confirming that the Plaintiff is carrying out the Development at the subject property (**PE 5**).
- He was issued with the Foreign Investment Certificate (**PE 6**).
- The Financial Statements of the Defendants stated that the Defendants owed to the building investor in the sum of \$400,000.00 (**PE 7**).
- After the Development started, he went back to Australia and the care taker manager (Jack Prasad) was in charge of the business.
- While he was in Australia, the Defendant entered into another agreement with Mr Jack Prasad, this contract was executed when the agreement dated 6 June 2003 was valid. The Defendant has breached the agreement dated 6 June 2003 by entering into a subsequent agreement with Jack Prasad (**PE 8**).
- The agreement with Mr Jack Prasad was signed without the common seal.
- Because of this, his business was almost taken over by Mr Jack Prasad.
- Fiji Trade and Investment Board investigated the matter and they established that the agreement dated 5 October 2004 was illicit and not valid and that Mr Shanil Naidu (the witness) is the rightful owner (**PE 9**).
- The Defendants or their agent had continually harassed and intimidated his patrons and as such his business had greatly suffered loss.
- The Defendants were refusing the entry of the guests of the 1<sup>st</sup> Plaintiff by locking the main gates, not providing a key for the gates locked, sabotaging the gas and the water supply by shutting it off, making noise in early hours of the morning disturbing guests, urinating in front of guests, trespassing on the premises, throwing stones and beer bottles, demanding extra rent and not obeying the court order and the Defendants stealing electricity and water. He tendered photographs of the acts and intimidation (**PE 10**). Because of this harassment and intimidation, his (the Plaintiff's) guests demanded refunds, had to be compensated and he had to travel from

Australia to solve the issues or problems raised by the Defendants (**PE 20**). He also tendered a letter from Ms Nisha confirming the acts and harassment (**PE 11**).

- He reported and requested the assistance of the Fiji Military and Fiji Police Force (**PE 15-17 and 19**).
- He also tendered a letter from the interim President of the second Defendant stating to its members that there will be an investigation by the Fiji Military and Fiji Police (**PE 12**).
- He also raised his grievance of harassment and intimidation with the trustees of the Sigatoka Club, the second Defendants via its letters (**PE 14**).
- The trustees of the second Defendant themselves hired people to harass him or his guest.
- He said he has not received any notice from the Defendants in regards to the rent increase.
- He had completely built the 2<sup>nd</sup> and 3<sup>rd</sup> floor. The total development was close to \$500,000 to \$600,000.00.
- There were many other projects for development at the subject property which was in line but could not be completed because of the Defendant's actions.
- His wife committed suicide because of the continuous harassments and intimidation from the Defendants.
- The Defendants at the moment have rented its office to the 3<sup>rd</sup> party which is operating at the ground floor of the subject property.
- He operates the hotel from the subject property and due to the disturbance from the night club, losing from the business as patrons don't want to stay at the Plaintiff's premises because of the disturbance from the nightclub.
- The business has suffered losses and damages due to all the harassments and intimidation by the Defendants.

[14] Under cross-examination, PW1 states:

- He confirmed that he actually spent around \$500,000.00 on the construction.
- He agreed that he had a discussion with the trustees and management of the Club, Permal Goundar, Sani Narayan and Madan Sen for renewal of the lease in 2013.
- The extension work was part of the overall discussion on the settlement.
- He confirmed that he actually wrote that letter and that letter was sent through his staff and that they received the letter and he discussed with Suresh Naidu who was the Secretary.
- He denied that he was fully aware of the terms and conditions of the contract dated 5 October 2004.
- He also denied the suggestion that he owes Sigatoka Club rent in the sum of \$64,000.00

[15] PW 2's evidence is that:

- He was the President of Sigatoka Club.
- He was a financial member since 1967 and President of the Sigatoka Club in the year 2010, 2011 and 2012.
- He was a member at the time when the Plaintiff started a project for the Club.
- He knows of the Club and the Plaintiff entered into an agreement on 6<sup>th</sup> June 2003. He has seen the contract.
- As the President, he had Authority to handle legal matters for the Club and make decisions for the Club. The authority was tendered as exhibit marked as **PE 21**.
- He is aware that there was another contract made between Jack Prasad and the Club.
- The agreement made between Jack Prasad and the Club is illegal. It was not signed by the Director, Shanil Naidu because the Club had entered into a legal agreement in which Shanil Naidu was carrying out works. Jack Prasad was the only employee of Shanil Naidu and a

member of the Club and as such he used his influence on the trustees to get into that contract.

- The Plaintiff would have spent close to \$400,000 to \$500,000 for whole constructions and development and he kept us updated in meetings.
- He confirmed that the Plaintiff went through harassment and intimidation and interference and he saw incidents such as breaking water pipes so that hotel doesn't have water supply, locking the main gates to accommodation and emergency exit doors, making noise in early hours of the morning disturbing guests, urinating in front of guests, not allowing parking access for the guests and damaging vehicles and tampering with engines and cutting tyres of the vehicle. This led to the guests leaving the premises demanding the refund from the Plaintiff.
- When he was President of the Club, he (witness) agreed to compensate the Plaintiff for the damage and loss he suffered.
- He was aware that the Plaintiffs had delivered the Notice to the Defendant for renewal of the Tenancy Agreement and that the Defendants have had no objection to the renewal of the Tenancy Agreement.

[16] During cross-examination, PW2 confirmed whatever he stated in his evidence in chief.

[17] Summary of evidence given by PW 3 is as follows:

- He was employed by the Plaintiff. He worked for the Plaintiff from 2006 to 2008 as the GM, the year 2008 to 2010. Now he is the Public Consultant for the Plaintiff.
- The rent was not increased after two years because the Plaintiff had developed the Property.
- During his period as the GM, he encountered issues such as, demanding extra rent, disturb the peaceful employment of our guest, pull out the fence to disturb the security of the premises, deliberately setting fire, locking main gates and doors, making noise early hours in the morning and damaging vehicles of the guests.

- The Defendants did not do anything about these issues though complained to them.
- As a result of the disturbances, the business started to suffer loss due to guests not coming to the hotel.
- After the agreement between Jack Prasad and Sigatoka Club, Jack Prasad took control over the property and business.
- During his term as a GM, he had to engage the services of Military Officers due to severe harassment from the Defendants.

### *Defendants*

[18] The Defendants called only one witness namely Vijay Singh (DW1). He gave evidence on behalf of the Defendants. He in his evidence states:

- He has been a member of the Sigatoka Club since 1992 and became a trustee in September 2013.
- Bironda is the tenant to the Club, 13 years now.
- There was an agreement between the landlord (the Club) and the tenant (the Plaintiff).
- Jack Prasad was a shareholder and partner to Mr Shanil Naidu.
- \$1,800.00 was paid by Bironda and later there was dispute amongst the two agreements which later the court ordered for \$800.00. The court order was actually into the other agreement which Mr Shanil Naidu signed plus Vat.
- According to him, the total improvement work was close to \$100,000.00. He said there was a valuation report.
- The first agreement has expired with the optional three years. There was no application or anything done from Bironda Fiji to extend.
- He could not recall whether there was any application or letter to renew the lease.

[20] Under cross-examination he DW1 states:

- He admitted that he was recently (last year) convicted on an assault charge and spent a few months in prison. He is now on bail pending appeal.
- Night Club at the bottom started in 2014.
- He was not aware of the Plaintiff's complaint to Sigatoka Club about harassment and intimidation.

## **Discussion**

[21] The Plaintiff's claim stems from a tenancy agreement dated 6 June 2003. The agreement includes the following conditions:

- *The Tenancy Agreement was for a period of 12 years commencing on the 1<sup>st</sup> November 2003 and an option to renew for a further period of 3 years.*
- *The Parties agreed that the first 2 years of the Tenancy Agreement, the monthly rental will be \$800.00 per month (VEP) to be paid in advance on the 1<sup>st</sup> day of every month beginning on the 1<sup>st</sup> November 2003 and subject to the completion of the building.*
- *The Defendant, however, could waive the payment of the rent for the 6 weeks of the term.*
- *The Parties further agreed that the rental would be reassessed at 2-year intervals for the remaining 10 year period subject to the approval of the Prices and Incomes Board.*

[22] Essentially, the arrangement between the Plaintiff and the Defendant was that the Plaintiff would develop the first floor of the building on the property and in consideration of the development, the Defendant would give the Plaintiff a lease to run the property. This arrangement resulted in the tenancy agreement.

[23] It is not in dispute that on 6 June 2003, the Plaintiff and the Defendant executed the tenancy agreement.

[24] The Plaintiff primarily seeks a declaration that he is entitled to the tenancy of the subject property till November 2018. The declaratory claim is based on the premise that the Defendant had extended the tenancy agreement for a further period of three years from November 2015 when the agreement expired.

*Whether the tenancy agreement was extended*

- [25] The question arises whether the agreement was extended by the Defendant for a further period of three years upon expiration in November 2015.
- [26] The Defendant denies extending the agreement for a further period of three years after expiration as claimed by the Plaintiff.
- [27] According to the Plaintiff, he exercised his option to renew for a further period of three years, he made an application to the Defendant to that effect and the Defendant approved.
- [28] Cl.6 of the Tenancy Agreement provides:

*“If the tenant desire to have a further tenancy of the said premises granted to him to a further period of three (3) years after the expiration of the term hereby granted and gives to the landlords notice in writing to that effect not less than three months prior to the expiration of the term hereby created then provided that at the date of exercise of the powers under this clause there is no subsisting breach by the tenant of the Covenants, terms, conditions and provisions herein contained the Landlords shall grant to the Tenant and the Tenant shall accept a lease of the said premises for a period of three (3) years commencing on the day following the date of expiration of the term hereof upon and subject to the covenants, terms, conditions and provisions contained herein and agreed to between the parties.”*

- [29] By his letter dated 5 February 2015 (PE 22), the Plaintiff seeks an extension of the tenancy in this way:

*“Thursday 5<sup>th</sup> of February 2015*

*The Secretary  
Sigatoka Club  
**Sigatoka***

*Dear Sir,*

**RE: RENEWAL OF TENANCY LEASE NOTICE OF PROPERTY SITUATED AT  
1<sup>ST</sup> FLOOR & 2<sup>ND</sup> FLOOR ON TOP OF SIGATOKA CLUB, TRADING AS  
BIRONDA FIJI LTD T/A TRUE BLUE HOTEL**

*Notice is hereby given to the SIGATOKA CLUB, ITS MEMBERS AND BOARD OF TRUSTEES that Bironda (Fiji) Limited trading as True Blue Hotel is exercising its rights, duties, obligations as to the said renewal of the said lease which will expire later this year.*

*Bironda (Fiji) Limited is seeking to express renewal of the said lease for a further... period of 3 years ...*

*Sgd/*

*Managing Director ...  
Bironda (Fiji) Limited  
T/A True Blue Hotel"*

- [30] PW1 stated in his evidence that one of his staff members delivered the letter to the Defendant's Office. DW1's evidence in this regard was that the letter may have been delivered to the office of the Defendant. Significantly, PW2 who was the member of the second Defendant and had authority from the Defendants to take legal decision on behalf of the Defendants confirmed in his evidence that the letter was put in the meeting of the members of the Defendants and that it was agreed by all members to grant renewal of the tenancy to the Plaintiff.
- [31] It is noteworthy that if the Defendant had not received any application for renewal of the tenancy, the Defendant would have issued quit notice on the Plaintiff if he is still in occupation after expiration the tenancy and if there were non-compliance with the notice, then the Defendant would have initiated eviction proceedings against the Plaintiff. None of these occurred.
- [32] The Defendant did not write to the Plaintiff informing him of their intention not to renew the agreement for a further period of three years upon expiration of the agreement. Nor did they take out any eviction



proceedings against the Plaintiff after the agreement expired in November 2015. In the absence of any of these actions by the Defendants, the Court can reasonably infer that the Defendant had approved the extension of the agreement for further three years commencing November 2015. I would, therefore, find that the Defendants by their conduct extended the agreement for a further period of three years entitling him to have agreement till November 2018.

*Breach of the agreement*

[33] I now turn to the issue of breach of the agreement.

[34] The Plaintiff alleges that the Defendant breached the tenancy agreement firstly by entering a second agreement with a Jack Prasad for the same subject property while the first agreement with the Plaintiff still existing and secondly through their acts of harassment and intimidation.

*Second agreement*

[35] While the Plaintiff was in Australia, in October 2004 the Defendant entered into another tenancy agreement with a Mr Jack Prasad who was the care taker and manager of the Plaintiff. As a result of this agreement, Jack Prasad took over the business of the Plaintiff and paid \$20,000.00 to the Defendant from the Plaintiff's account. He also paid increased rate of rental (\$1,800.00) for the property.

[36] The Plaintiff gave evidence to the effect that he had to travel to Fiji from Australia as the Plaintiff (True Blue Hotel) was not allowed to enter the premises of its own property. The Plaintiff complained of this to Police and the Fiji Trade and Investment Bureau. They did their investigation and the business was returned to the Plaintiff.

[37] The plaintiff is not privy to the second agreement. It is made with an employee of the Plaintiff without the Plaintiff's company seal.

[38] PW2 who was the president of the Defendant (Sigatoka Club) in his evidence stated that: *The agreement made between Jack Prasad and the Club is illegal. It was not signed by the Director, Shanil Naidu because the club had entered into a legal agreement in which Sanil Naidu was carrying out works. Jack Prasad was the only employee of Sanil Naidu and a member of the Club and as such he used his influence on the trustees to get into that contract.*

[39] The second agreement the Defendant entered with Jack Prasad has been made while the first agreement entered with the Plaintiff was still valid and existing. The second agreement is silent about the first agreement. The Defendant should have terminated the first agreement before entering the second agreement. I would, therefore, find that the second agreement the Defendant entered into with Jack Prasad is illegal and not binding on the Plaintiff. I also find that Defendant breached the agreement with the Plaintiff by entering an illegal agreement with an employee of the Plaintiff, Jack Prasad.

#### *Injunction*

[40] After the second agreement, the Defendant started to or caused to harass and intimidate the Plaintiff in order to disturb the Plaintiff's business. As a result, the Plaintiff had to apply for interim injunction to prevent the Defendants from committing acts of harassment and intimidation. The court, considering the Plaintiff's application, on 23 July 2010 granted an interim injunction as sought by the Plaintiff to be valid until the final determination of the substantive claim.

[41] The Plaintiff gave evidence on how the Defendant and their agents harassed and intimidated him and his business. He stated in his evidence that: *The Defendants were refusing the entry of the guests of the 1<sup>st</sup> Plaintiff by locking the main gates, not providing a key for the gates locked, sabotaging the gas and the water supply by shutting it off, making*

*noise in early hours of the morning disturbing guests, urinating in front of guests, trespassing on the premises, throwing stones and beer bottles, demanding extra rent and not obeying the court order and the Defendants stealing electricity and water. He tendered photographs of the acts and intimidation.*

[42] The Plaintiff's evidence concerning the harassment and intimidation was confirmed by PW2 who is the member and former president of the Defendant (Sigatoka Club).

[43] DW1 merely asserted that no such things happened as alleged by the Plaintiff. DW1 could not disprove that the Plaintiff's complaint to Police and then to Fiji Military about the acts of harassment and intimidation by the Defendant or their agents.

[44] I accept the Plaintiff's evidence that he and his business was harassed and intimidated by the Defendant and/or their agents. I accordingly find that the Plaintiff is entitled to the injunction sought in the claim.

#### *General Damages*

[45] The Plaintiff also claims general damages against the Defendant for breach of contract and loss suffered as a result of harassment and intimidation.

[46] PW1 states in his evidence that he spent approximately a sum between \$400,000.00 and \$500,000.00 on the development and upgrading the Defendant's property in term of the agreement.

[47] The Defendant denies that the Plaintiff developed the building as agreed.

[48] The Plaintiff's development work reflects on the Financial Statement of the Defendant (PE 7), where it states that the Defendant owes the building investor (Plaintiff) a sum of \$400,000.00. The Defendant could not deny the fact that their financial statement reflecting this figure. In

addition, PW2, the member and former president of the second Defendant also confirmed that the Plaintiff had spent around \$400,000.00 on the building development. I, therefore, have no problem in accepting the Plaintiff's evidence that he spent a sum of approximately \$400,000.00 on the building development.

[49] Giving evidence on the acts of harassment and intimidation, PW1 states that: *The Defendants were refusing the entry of the guests of the 1<sup>st</sup> Plaintiff by locking the main gates, not providing a key for the gates locked, sabotaging the gas and the water supply by shutting it off, making noise in early hours of the morning disturbing guests, urinating in front of guests, trespassing on the premises, throwing stones and beer bottles, demanding extra rent and not obeying the court order and the Defendants stealing electricity and water. He tendered photographs of the acts and intimidation (PE 10). Because of this harassment and intimidation, his (the Plaintiff's) guests demanded refunds, had to be compensated and he had to travel from Australia to solve the issues or problems raised by the Defendants (PE 20). He also tendered a letter from Ms Nisha confirming the above acts and harassment (PE 11).*

[50] The Plaintiff gave straightforward evidence on the Defendant's act of harassment and intimidation. He lodged police complaint about the Defendant's acts. He even complained to the Fiji Military. Eventually, he had to obtain an injunction against the Defendants to restrain them from harassing and intimidating the Plaintiff and/or their guests.

[51] PW2 confirmed that the acts of harassment and intimidation did happen and that the Plaintiff and his business were disturbed immensely due to the Defendants acts of harassment and intimidation.

[52] In breach of the agreement made with the Plaintiff, the Defendant entered into a second agreement with Jack Prasad, the Plaintiff's Caretaker and Manager.

[53] I am satisfied that the Plaintiff and his business suffered loss and damages as result of the acts of harassment and intimidation and breach of the contract. I am also satisfied that the Plaintiff's peaceful enjoyment of the property was greatly disturbed or interrupted by the Defendant's acts. The Plaintiff had to travel from Australia to deal with all these issues. I, considering all, assess the loss and damages at \$50,000.00. I accordingly award a sum of \$50,000.00 to the Plaintiff for loss and damages suffered. However, I would decline to grant interest on the award of general damages. This is because both parties have contributed to the delay. The action was instituted in 2007 and the Plaintiff was able to obtain an injunction to stop the Defendant's acts of harassment and intimidation. The Plaintiff could run his business smoothly after obtaining the interlocutory injunctive orders in July 2010.

#### *Counterclaim*

[54] The Defendant counterclaims in the sum of \$1,144,400.00. The counterclaim is based on the mesne profit of the rental from 1 November 2004.

[55] The Plaintiff is paying the rent in accordance with the agreement. There is no evidence that the Plaintiff is in arrears of the rent. Although the rent agreement provides for the review and reassessment of the rent payable under contract at two-year interval for the remaining ten year period, this was never exercised by the Defendant. The issues that the rent was reassessed and the Plaintiff failed or refused to pay the rent according to reassessment and that he is in arrears of the rent did not arise at the trial.

[56] There is no evidence whatsoever to prove the counterclaim. I would, therefore, dismiss and struck out the counterclaim as baseless.

*Costs*

[57] As a winning party the Plaintiff is entitled to costs of these proceedings. He brought this action in 2007. He is appearing through his solicitors throughout the proceedings. He has made a few interlocutory application in the meantime. As I said elsewhere in this judgment both parties contributed to the delay. I, taking all into my account, summarily assess costs at \$3,500.00.

**Conclusion**

[58] On the evidence adduced by the Plaintiff, I am satisfied that the Plaintiff has, on the balance of probability, proved its claim. I, on that basis, find that the Plaintiff exercised its option to renew the tenancy agreement with their terms and that there is no evidence whatsoever to establish that the Defendant terminated the agreement. Therefore the Plaintiff is entitled to the declaration that they are entitled to the tenancy of the property in dispute till November 2018. I also find that there should be an injunction in place to protect the Plaintiff's right under the agreement. I accordingly grant an injunction as prayed for in the prayer (c), (d) and (e) of the second amended statement of claim. I further find that the Plaintiff is entitled to general damages for breach of the contract on the part of the Defendant and for loss suffered as a result of the Defendants' and/or their agents' acts of harassment and intimidation. I award a sum of \$50,000.00 to the Plaintiff as general damages. However, I decline interest on the sum allowed as general damages. The Plaintiff is also entitled the summarily assessed costs of \$3,500.00. I decline to grant punitive damages and special damages, for they are not proved.

[59] As to counterclaim made by the Defendant, I find that the counterclaim is not proved. As such, I dismiss and struck out the counterclaim as baseless.

**The Result**

1. There will be judgment in favour of the Plaintiff.
2. The Plaintiff is entitled to the tenancy of the property in dispute till November 2018.
3. There will be an injunction in favour of the Plaintiff as prayed for in the prayer (c), (d) and (e) of the second amended statement of the claim.
4. The Plaintiff is also entitled to general damages in the sum of \$50,000.00. Interest on this sum is declined.
5. Punitive damages and Special damages declined.
6. The counterclaim of the Defendant is dismissed and struck out.
7. The Plaintiff is entitled to summarily assessed costs of \$3,500.00.

*M.H. Mohamed Ajmeer*  
..... 6/7/17

**M.H. Mohamed Ajmeer**

**JUDGE**

**At Lautoka**

**6 July 2017**

Solicitors:

M/s. Krishna & Co, Barristers & Solicitors for Plaintiffs

M/s. Patel Sharma Lawyers, Barristers & Solicitors for Defendants

