

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

**CIVIL ACTION NO. HBC 115 OF 2013**

**BETWEEN** : **PADAM SINGH** of Muasara, Sigatoka, Businessman trading in the name and style of **PADAM SINGH CONSTRUCTION** having its principal place of operation at Muasara, Sigatoka.

**PLAINTIFF**

**AND** : **MAUI BEACH VILLAS LIMITED** a limited liability company having its registered office at c/- Aliz Pacific, Level 8, Dominion House, Thompson Street Suva, P O Box 2475, Government Buildings, Suva in the Republic of Fiji.

**DEFENDANT**

**Appearances** : Mr J. Singh for the plaintiff  
: Mr A. K. Narayan (Jnr) With Ms S. Lata for the defendant

**Date of Trial** : 17-21 June 2019, 11-12 July 2019, 10-11 September 2019 & 30 September 2019

**Date of W/submissions** : 4 March 2020 (defendant)

**Date of Judgment** : 28 May 2020

# J U D G M E N T

## **Introduction**

[01] The plaintiff brought this action against the defendant seeking among other things, judgment for monies allegedly owing under a contract for the construction of a residential tourist villa for the defendant.

[02] Initially, the plaintiff had obtained a default judgment against the defendant on 4 September 2013, but it was later set aside unconditionally by the court on 14 May

2014. Thereafter, the defendant filed its statement of defence and counterclaim on 4 June 2014.

[03] The parties had later amended their pleadings. The plaintiff filed an amended statement of claim on 24 March 2015 and the defendant its defence and counter claim on 24 April 2015. The plaintiff filed a reply to statement of defence and defence to counterclaim on 8 June 2015.

[04] The defendant moved for an order for specific discovery and leave to file and deliver interrogatories on 14 February 2018, the court by consent granted orders on that application on 18 July 2018.

[05] On 24 August 2018, the defendant applied to the court for an order that the plaintiff's action be struck out and dismissed on the ground that the plaintiff had failed to comply with the orders granted on 18 July 2018. On 10 September 2018, the court struck out the plaintiff's claim for non-compliance with the discovery orders made on 18 July 2018 and further ordered that the trial proceed on the defendant's counterclaim.

[06] After the plaintiff's claim was struck out, the court ordered that the plaintiff was to file and serve the answer to the interrogatories by 3.30 pm on 22 March 2019. The plaintiff then complied with the orders and filed an affidavit on 22 March 2019 discovering the documents and providing the answers to the defendant's interrogatories filed on 14 February 2018.

[07] The trial of the defendant's counterclaim commenced on 17 June 2019 and continued till 21 June 2019 and was adjourned part heard. The trial again continued on 11-12 July, 10-11 September and finally concluded on 30 September 2019.

## **Background**

[08] The background facts of the case are briefly as follows:

[09] The plaintiff is a businessman trading in the name and style of Padam Singh Construction having its principal place of operation at Muasara, Sigatoka.

[10] The defendant is a limited liability company carrying out tourism and hospitality business having its registered office at c/- Aliz Pacific, Level 8, Dominion House,

Thompson Street, Suva, P O Box 2475, Government Buildings in the Republic of Fiji.

- [11] The defendant entered into an agreement on the 15 day of March 2012, with the plaintiff to build a residential building tourist villa at Lot 1, Maui Bay, Korolevu, Sigatoka (the “*villa*”).
- [12] The building works were supposed to be done under the direction of Mr Khemindra S Narain of Khemindra S Narain & Associates and Dalman Architects and Notice of Tenderers 1, 2 and 3.
- [13] The agreed sum for the construction works was in the sum of \$498,172.50. The completion date of the villa was 15 day of September 2012, but later was revised to 7 January 2013, then to 27 January 2013 due to the delay of two months in obtaining building permit and the claim lodged by the plaintiff for delay due to unfavourable weather conditions.
- [14] The schedule of process payments mutually agreed between the parties was as follows:

1. Preliminary and general, site works	\$ 45,000.00
2. Completion of building ground floor slab	\$ 60,000.00
3. Completion of first floor slab	\$ 60,000.00
4. Completion of roof framing	\$100,000.00
5. 50% completion of finishing works	\$ 84,355.00
6. 100% completion of finishing works	\$100,000.00
7. Retention until expiry of defects liability period	<u>\$ 48,817.50</u>
<b>Contract sum (vip)</b>	<b><u>\$498,172.50</u></b>

### **The counterclaim**

- [15] The trial proceeded on the counterclaim only as the plaintiff’s claim was struck down.
- [16] I will now summarize the background facts upon which the counterclaim is based.

- [17] The Building Contract was comprised of and included the Fiji Standard Form of Building Contract (without quantities private edition 1978), the Architectural & Engineers Drawings and Specifications (the "*Contract*").
- [18] The building works were not supposed to be carried out under the direction of Mr Khemindra S Narain of Khemindra Narain & Associates but Khemindra Narain was in fact the Certifying Engineer (the "*appointed Engineer*") under the Contract and the works were carried out pursuant to his directions.
- [19] The Schedule of Progress Payments is fully set out in the Contract clause "*Schedule of Progress Payments*".
- [20] On 21 January 2013, the defendant made a payment of \$60,000.00 for the completion of the first-floor slab and \$45,000.00 and \$60,000.00 on 6 April 2012 and 30 October 2012 respectively, and such payments were made upon the certification and approval of the relevant stages of works by the appointed Engineer pursuant to the terms of the Contract.
- [21] The plaintiff warranted and assured to the defendant that it could supply the required materials; and based on this representation and assurance the Contract accordingly provided such requirements from the plaintiff; and the plaintiff at no time informed that he would be unable to supply and use the materials for the construction.
- [22] The works as alleged by the plaintiff were not conducted by him in any event to any extent thereof.
- [23] The plaintiff stopped works which constituted a breach of the Contract to duly complete the works required of him. As a result, the defendant was compelled and otherwise left with no option other than to engage other persons to complete the pending works at its own cost.
- [24] The works pertaining to the swimming pool was not part of the Contract and was intended to be completed by a third party. The defendant alleges that on the insistence of the plaintiff, it agreed to allow him to conduct solely the concrete component of the swimming pool. This work was agreed between the parties to be undertaken in the sum of \$20,000.00 which the defendant paid upon completion thereof.

[25] The last payment made by the defendant to the plaintiff was a sum of \$60,000.00 on 21 January 2013; and no progress thereafter was made by the plaintiff on the remaining components of the construction which would warrant a payment under the Contract and direction of the appointed Engineer.

[26] The plaintiff, according to the defendant, breached the contract by abandoning the works without proper notice to the defendant and/or its agents). As a result, the defendant has suffered substantial damages and losses as follows:

- i. The defendant it suffered significant losses and damages in the sum of \$717,382.72, which is made up as follows:

Liquidated damages at the daily rate of \$1500.00 per Diem under the Contract from 27 January 2012 until 15 January 2013 (354 days): \$531,000.00

Amount expended by the defendant on the Purchase of Building materials: \$ 98,231.89

Amount paid for Workers' wages: \$ 41,030.83

Amount paid for Employees Transportation \$ 12,120.00

Amount paid for Project Management \$ 35,000.00

- ii. The defendant incurred further losses and in particular for prospective income from the rental of the Villa.
- iii. General Damages under the Commerce Commission Decree;
- iv. Interest on the judgment sum; and
- v. Costs against the plaintiff on a full Solicitor/Client indemnity basis;

### **The defence to counterclaim**

[27] The plaintiff's defence to the counterclaim was as follows:

- i. The building works were supposed to be carried out under the direction and supervision of Mr Khemindra S. Narain and he oversaw and reported all the progress of the works carried out to the defendant.
- ii. The defendant wanted three months guarantee from the suppliers of A-grade mahogany which none of the suppliers wanted to give.
- iii. With the consent of the building owner and the consent and approval of the site engineer, the plaintiff started with and finished the 50% completion of finishing works as per contract payment No. 5.
- iv. The additional works were carried out with the consent of the project engineer and the building owner.
- v. The plaintiff did stop work at the building site and this was due to the non-payment of additional works being carried out with the consent and approval of the building owner and the project engineer and the defendant was well aware of the situation of the plaintiff as the plaintiff had made several requests for the payment and the defendant failed to adhere to the requests made by the plaintiff.
- vi. The last payment made to the plaintiff was in the sum of \$60,000.00 and after the payment the plaintiff has carried out significant construction works at the site and the defendant is well verse with the works carried out by the plaintiff.
- vii. The defendant hired the services of other contractors to finish the work and the plaintiff stopped works at the construction site due to the non-payment on the part of the defendant as the plaintiff had to make his payments as well being labourers.
- viii. The plaintiff did not abandon works at the site but did not proceed any further with the works as the defendant did not make the necessary payments as agreed upon for the additional works being carried out and since the plaintiff was unable to pay his labourers the plaintiff stopped work.

## Agreed facts

[28] At the Pre-Trial Conference the following facts were agreed between the parties.

1. The plaintiff is a businessman and trading in the name and style of "*Padam Singh Construction*" who is engaged in the business of property development and construction based out of Sigatoka, Fiji.
2. The defendant is a limited liability company having its registered office at C/-Aliz Pacific, Level 8, Dominion House, Thomson Street, Suva, P.O. Box 2475, Government Buildings, Suva in the Republic of Fiji Islands.
3. On 15 March 2012, the plaintiff and defendant entered into an agreement (hereinafter referred to as "*the contract*") for the plaintiff to build a residential building/tourist villa at Lot 1, Maui Bay, Korolevu, Sigatoka (hereinafter referred to as "*the site*") for the defendant.
4. The contract comprised of the following documents:
  - i. Fiji Standard Form of Building Contract (without quantities private edition 1978) dated 15 March 2012;
  - ii. Notice to Tenderers 1, 2, and 3;
  - iii. Dalman Architect drawings A1.01 to A4.03;
  - iv. Dalman Architect Specifications dated 9 December 2011
  - v. Khemindra Narain & Associates Specifications S0 to S28 dated November 2011.
5. Mr Khemindra S. Narain of Khemindra Narain & Associates was the appointed certifying engineer and works were carried out pursuant to his direction (hereinafter referred to as "*the appointed Engineer*").
6. The agreed sum of the said construction was **\$498,172.50** VAT inclusive price.

7. The completion date was 15 September 2012, but was later revised to 7 January 2013, and final to 27 January 2013, due to the delay of two months obtaining building permit and for unfavourable weather conditions.
8. The schedule of progress payments pursuant to the contract (and in particular the document titled "*Schedule of Progress Payments*" dated 1 March 2012) required payments to be made at the completion of each of the following stages.
9. On or about 21 January 2013, the defendant paid a sum of \$60,000.00 to the plaintiff upon the completion of the "*first floor slab*" (third stage) pursuant to the approval and certification of the works by the appointed Engineer.
10. The defendant agreed and was supposed to supply all roofing items above the purlins being plyboard, shingles and fixings.
11. The plaintiff had stopped works prior to the completion of the construction.
12. The defendant completed the construction after the plaintiff had stopped works.

### **The law**

[29] 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.

[30] 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.



[31] 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**

[32] As the plaintiff's claim was struck out for non-compliance of the court order made relating to discovery of documents, the counterclaim proceeded to trial. This judgment concerns the counterclaim filed by the defendant. The counterclaim appears to have been made for damages for defective workmanship, schedule related damages, and damages for failure to perform.

[33] The counterclaim states that the plaintiff breached his obligations, failed to complete the building works under the contract and abandoned the contract without any proper/lawful notice. Therefore, the defendant suffered losses and damages in the sum of \$717,382.72 which includes liquidated damages of \$531,000.00 for purchase of building materials by the defendant and wages and project management.

[34] The plaintiff in the reply to statement of defence to amended statement of claim (defence to counterclaim) states: the plaintiff did stop works at the building site and this was due to the non-payment of additional works being carried out with the consent and approval of the building owner and the project engineer and the defendant was well aware of the situation as the plaintiff had made several requests for the payments and the defendant failed to adhere to the requests made by the plaintiff.

[35] The issue before the court is whether the plaintiff abandoned the contract without any proper/lawful notice or failing to comply with his obligations under the contract.

[36] The counterclaim is largely depended on the expert's evidence, namely evidence of Mr Khemindra Narain, the project engineer or certifying engineer (Khemindra).

[37] The defendant tries to rely on the affidavit evidence of Khemindra. The court allowed the affidavit evidence in chief of Khemindra to be filed. The plaintiff also

did not object to it. However, the court indicated the affidavit evidence would be admitted subject to the infirmity of cross examination. This means that the defendant should make Khemindra available for cross examination. Khemindra's affidavit evidence was tendered on the basis that he would be unable to come to give oral evidence because of his busy schedule.

- [38] Since the defendant wants to present the affidavit evidence in chief of Khemindra it was duty incumbent on the defendant to make Khemindra available for cross examination by the plaintiff. The defendant is, therefore, not entitled to pass on his obligation to the plaintiff. In my opinion, Khemindra is the defendant's witness, therefore, the defendant should have made Khemindra available for cross examination after filing his affidavit evidence in chief.
- [39] Khemindra would have been a material witness for the defendant because the plaintiff claims that he did 50% additional works such as tile works with the consent of Khemindra (project engineer) and the plaintiff.
- [40] I would disregard Khemindra's affidavit evidence in chief as he was not present in court for cross examination.
- [41] It was common ground that the completion date was 15 September 2012, but was later revised to 7 January 2013, and final to 27 January 2013, due to the delay of two months in obtaining building permit and for unfavourable weather conditions.
- [42] It was plaintiff's evidence that the completion was further delayed because of the plaintiff's demand of A grade Mahogany instead of Structural Grade (NZ3 3602) and A grade Mahogany was not available in Fiji. The defendant said he tried to assist the plaintiff in securing Mahogany with the view to avoiding the delay in the project.
- [43] The defendant did not terminate the construction contract because of the delay on the part of the plaintiff. The completion date had been extended from time to time for diverse reasons including bad weather conditions.
- [44] The amended statement of claim (paragraph 12) particularises additional work that were carried out with the approval and consent of the project engineer and the building owner. It was the plaintiff's evidence at the trial that he did

additional site works and 50% finishing works including tiling, plaster works and painting with the oral approval of the project engineer as well as the building owner, the defendant. The plaintiff confirmed in his evidence that he did the tiling.

- [45] The notice to tendered 3 (Ex. P5) provides that the construction of “[a]ll building works as detailed in the Architects and Engineer’s drawings including Pool Deck and all exterior concrete works.” The defendant says the sea wall part of the construction works because the Architectural Drawing (Ex. P6, pg 7 and 8) provides the sea wall (that holds up the pool decking) to the bottom right of the bure.
- [46] The defendant is not an engineer or architect to interpret and explain the Architects and Engineer’s drawings. Therefore, I reject the defendant’s evidence that because the Architectural Drawing provides the sea wall (that holds up the pool decking) to the bottom right of the bure. He is not an expert to express that opinion.
- [47] It is of worth to note that during cross examination the plaintiff admitted to the suggestion that it was part of the Architectural plans based on which he had prepared his tender proposal. He also admitted that his tender was unconditional (Ex. P9).
- [48] The plaintiff’s bank statements relevant to the period of the contract with the defendant (20 March 2012-25 March 2013) demonstrate that he had not only received payments for 3 stages of constructions (1<sup>st</sup> stage-\$45,000.00 (12 April 2012), 2<sup>nd</sup> stage-\$60,000.00 (1 November 2012) and 3<sup>rd</sup> stage-\$60,000.00 (22 January 2013) but also some other funds.
- [49] It appears that the plaintiff’s bank statements had been discovered to demonstrate that the plaintiff had received some other funds by way of other jobs during the contract period with the defendant.
- [50] There is nothing in the contract which prohibits the plaintiff from undertaking any other jobs or works for other people whilst working for the defendant. The plaintiff’s bank statements reflect that some other funds had been credited his account during the period the plaintiff worked for the defendant. The plaintiff was unable to explain from where or from whom these sums came in. In the

absence of some evidence, I am unable to infer these sums came from conducting other works.

- [51] The defendant heavily relies on the amended statement of claim to contradict the plaintiff. However, I will not consider what the plaintiff say in his amended statement of claim as it has been struck out. It would be only reasonable for me to look at the counterclaim, defence to counterclaim and reply to defence to counterclaim given the fact that the trial proceeded on the counterclaim only.
- [52] The counterclaim is based on the breach of the contract on the part of the plaintiff by stopping or abandoning the project after the completion of stage 3.
- [53] The plaintiff had received payments for all 3 stages. Stage by stage payment was made by the defendant upon certification by the certifying engineer. There is no dispute about payment up to stage 3.
- [54] The burden is now on the defendant to prove its counterclaim on the balance of probability.
- [55] The defendant said in evidence that he assisted the plaintiff in good faith by paying his material and labour, which the plaintiff admitted under cross examination. However, it is significant to note that according to the contract certain materials were to be provided by the defendant as well.
- [56] According to the plaintiff he had done some additional concrete works at the site and completed 50% of finishing works (5<sup>th</sup> stage).
- [57] The dispute between the plaintiff and the defendant had arisen when the plaintiff claimed payment for the additional works. It was the plaintiff's evidence that the defendant had refused or ignored to make payment despite several requests. As a result, the plaintiff had abandoned work at the site. It is significant to note that the plaintiff dropped an email (PEx. 35) to the certifying engineer (Khemindra Narayan) on 26 May 2013, just a few days prior to the abandonment, stating that:

*"From : padam singh  
[padamsinghco@gmail.com]  
Sent : Sunday, 26 May, 2013 8.56 AM*

To : Khemindra@connect.com.fj  
Subject : francis kumar lot 1

*last payment received on 10<sup>th</sup> jan 2012 for the completion of first floor sum of \$60,000.00 as per contract payment number 3. at the moment we have done the wall, roof beam and flat roof completed, the driveway is ready to pour concrete with the walkway, 90% plaster works on ground floor 30% painted. we did all works while waiting for the roof members to be supplied. at the moment we qualify for the progress payment number 5. 50% completion of finishing work for the sum of \$84,355.00 as per contract the owner refused to pay saying that he did not want to take the risk which we don't understand, without the payment we cannot resume work at the villa because we have run out of funds our overdraft of \$100,000.00 has been finished only used at the villa and also publishing work 80% done [Emphasis provided]*

*Please as the project engineer advice me what to do. and we have not been compensated for the change of detail in the seawall from FW2 to new detail provided by the engineer*

*regards"*

- [58] The email the plaintiff sent to the certifying engineer clearly explains why the he was abandoning the work at the site.
- [59] The plaintiff evidence was straightforward. He was coherent and he answered the cross examination questions without any hesitation. The evidence of the plaintiff, in my judgement, appears to be more credible and probable compared to evidence of the defendant.

### **Conclusion**

- [60] On the evidence, having been satisfied on the balance of probability, I find that the plaintiff did some additional concrete works at the site and completed some finishing works which include tiling, plastering and painting with the approval and consent of the defendant as well as the certifying engineer. I also find that the defendant refused to make payment for the additional works the plaintiff

did. Since the defendant had refused to make payment for the additional works, the plaintiff was entitled to abandon work at the site or to terminate the contract. In the circumstances of the case, the abandoning work at the site or termination of the construction contract with the defendant is reasonable and justifiable. This follows that the plaintiff is not liable to pay damages to the defendant. I would accordingly dismiss the counterclaim with summarily assessed costs of \$4,500.00 payable to the plaintiff by the defendant. In assessing the costs summarily, I have taken all into my consideration including the length of the trial.

**The result**

1. Counterclaim dismissed.
2. Defendant shall pay summarily assessed costs of \$4,500.00 to the plaintiff.



*M. H. Mohamed Ajmeer*  
*28/5/20*

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**M. H. Mohamed Ajmeer**

**JUDGE**

**At Lautoka**  
**28 May 2020**

Solicitors:

Samusamuvodre Sharma Law, Barristers & Solicitors for the plaintiff

AK Lawyers, Barristers & Solicitors for the defendant