

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 75 of 2019

BETWEEN : **CARALINE DUNN COALALA and NEMANI
QASEKURU COALALA**
PLAINTIFFS

AND : **FALEKAU HOMES**
FIRST DEFENDANT

: **PAUL PETERS**
SECOND DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFFS : Ms. S. Nayacalevu [Shekinah Law]
DEFENDANTS : Mr. Rokedreu [Valenitabua & Associates]
RULING BY : Master Ms Vandhana Lal
DELIVERED ON : **01 August 2023**

INTERLOCUTORY RULING

[Leave to Enter Judgment]

1. This is the Plaintiff's application for leave to enter final judgment in respect of their claim for special damages and interlocutory judgment for the claim for exemplary damages.
2. Despite being ordered to file/serve their opposition, the Defendants failed to file one.
3. The Plaintiff's claim is in respect of a building contract they had with the Defendants.

According to the Plaintiffs, the Defendants breached the contract and hence they claim damages. In June 2017 their solicitors had written to the Defendants regarding the breach of contract.

Despite there being court order to appoint an arbitrator, the Defendants failed to communicate and facilitate the appointment of an arbitrator.

As a result, the Plaintiffs had to obtain quotation to complete the construction costing them \$20,139.77 more than the \$70,000 agreed upon.

The Plaintiff claim \$58,500 being payments made to the Defendant with interest of 10% and exemplary damages.

4. The writ of summons was served on the Defendants and an affidavit of service was filed by the Plaintiff's solicitors.
5. The Defendants failed to acknowledge service and contest the court's jurisdiction in hearing the matter or contest the claim.
6. Order 13 Rule 5 of the High Court Rules allows the Plaintiff where the writ issued is endorsed with 2 or more of the claims mentioned in the foregoing rules and no other claims to enter judgment after the prescribed time
7. Annexure "C-1" to the Plaintiffs affidavit in support is copy of the building contract Agreement between Caraline Dunn and Falekau Homes.

The contract price was for \$70,000 to construct a 2 bedroom timber house. Payment was to be made as follows:

- \$30,000 as deposit
- \$40,000 upon completion of the work.

Work was to be completed in 10-12 weeks (weather permitting) and from the approval date for construction from the relevant authorities.

8. Annexures D and E are copy invoices for payments made to Falekau Homes totalling a sum of \$58,500.
9. The claim is brought under the Building Contract Agreement between Caraline Dunn Coalala and Falekau Homes.

10. I do not find the second named Plaintiff has any cause of action against Falekau Homes. Hence the second named Plaintiff Nemani Qasekuru Coalala is struck out as a party to the proceedings.
11. Furthermore, there is no cause of action outlined against the second named Defendant.
12. There is seal placed on the contract by Falekau. The First Defendant is a company and it can be sued under its name.
13. Accordingly, the claim against the Second Defendant is dismissed and struck out.
14. Breaches of contract are actionable without proof of damage.
15. *“The object by an award of damages is to give the claimant compensation for the damage, loss or injury suffered”* McGregor on Damages (19th Ed); Sweet & Maxwell, 2003 at page 13.
16. Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39 defined the measure of damages as:
“That sum of money which will put, the party who has been injured, or who has suffered, in same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”
17. In determining the level of compensation to be paid as damages the basic proposition is that a Plaintiff “is so far as money can do it, to be placed in the same position as if the contract had been performed” – *Robinson v Harman* (1848) 154 ER 363 at 365.
18. In cases involving the cost of remedying defective work in building or construction contracts damages will in all but exceptional circumstances. Respect in the Plaintiff recovering costs incurred in remedying the defective work done – *Tabcorp Holdings Limited –v- Bowen Investments Pty Limited* (2009) 236 CLR 272.

19. G Trietel, *The Law of contract*, 11th Ed; Thomson – Sweet & Maxwell, London; 2005 at page 935 summarizes the position on exemplary damages for breach of contract:

“As a general rule punitive damages cannot be awarded in a purely contracted action, since the object of such an action, is not to punish the defendant but to compensate the claimant. Punitive damages are not available even though the breach are committed deliberately and with a view to profit.”

20. In the local case of **Michael v Mahesh [2019] FJHC 1068; HBC 128.2005 (08 November 2019)** the High Court whilst distinguishing between aggravated damages and exemplary damages relied on the decision of Lord Delvin in the House of Lords in **Rookes v Barnard [1964] AC 1129**.

Lord Delvin had stated there were 3 categories of cases in which exemplary damages could be awarded. These were:

- a. Where there had been oppressive, arbitrary or unconstitutional actions by servants of the government;
- b. Where the tortfeasor’s conduct had been calculated to make a profit for him which might exceed the damages payable to the injured party;
- c. Where exemplary damages are expressly authorized by the statute.

The High Court further went on to cite the Fiji Court of Appeal in **James Arthur Rennie Borron and Mago Islands Estate Ltd –v- Fiji Broadcasting and Newspapers of Fiji Limited & Others a Civil Appeal No. 40/81** at page 5, where the Court of Appeal held:

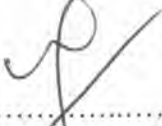
“Exemplary damages are damages which are awarded to punish a Defendant and vindicate the strength of the law. In considering whether the exemplary damages should be awarded the court should ask itself whether the sum it proposes to award as compensating damages which may include an element of aggravated is adequate in all the circumstances for compensating a Plaintiff and also for punishing or deterring a Defendant. Only if it is inadequate for the latter purpose should the court consider awarding exemplary damages.”

21. The Court of Appeal also stated that exemplary damages or punitive damages are exceptional and only in rare cases they are awarded.
22. In the current proceeding, despite being paid \$58,500, the construction remains incomplete and the Defendant has failed to agree for Arbitration and resolve the matter.
23. Hence the Plaintiff is entitled to the full refund of \$58,500 paid to the Defendant.
24. I do not find the Defendant's action in the instant case has reached the threshold required for an award of exemplary damages for breach of contract.
25. And since an order has been made for full refund of the monies paid to the Defendant, the Plaintiff's claim for exemplary damages is refused.

Orders

26. Nemani Qasekuru Coalala and Paul Peters are removed as parties to the proceedings.
27. The Plaintiff is awarded special damages in the sum of \$58,500. Interest is awarded at 6% per annum on the said sum from June 2017 till March 2020.
28. The claim for exemplary damages is dismissed.
29. Plaintiff is also entitled to cost for this action which is summarily assessed at \$2,000.




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Vandhana Lal [Ms]
Master of the High Court
At Suva.

01 August 2023

TO:

1. Suva High Court Civil File No. HBC 75 of 2019;
2. Shekinah Law, Solicitors for the Plaintiffs;
3. Valenitabua & Associates, Solicitors for the Defendants.