

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

**Civil Action No. HBC 301 of 2019**

**BETWEEN:**     **SUREN CHAND** of 4 Seria Street, Tanah Merah, Queensland 4128, Australia, Retired and Radha Kumari of 49 Emerald Drive, Eagle Vale, Sydney 2558, Australia, Domestic Duties as the Administrators of the Estate of Ram Chandar, Deceased of Walia, Nausori, Intestate pursuant to Letters of Administration No. 19881.

**PLAINTIFF**

**AND:**           **RANJESHNI DEVI** of Princess Road, Waila, Nausori, Businesswoman trading under the name and style of **SIRIS DISTRICBUTORS**

**DEFENDANT**

**Before:**           Mr. Justice Deepthi Amaratunga

**Counsel:**         **Ms. R. Naidu for the Plaintiff**  
**Mr. V. Filipe for the Defendant**

**Date of Hearing:**   **27, 28, November, 2023**

**Date of Judgment:** **29<sup>th</sup> February 2024**

**JUDGMENT**

## **INTRODUCTION**

- [1] Plaintiffs were trustee the Estate of Ram Chandar and had entered sale and purchase Agreements (The Agreements) for four lots on a proposed scheme of subdivision plan, with defendant.
- [2] The scheme of subdivision was not approved when the Agreements were entered. The obligation to complete subdivision was with the Defendant and Plaintiff had authorized the task of completion of subdivision to Defendant including cost of subdivision.
- [3] The Agreements were entered on 12.11. 2016 and subdivision is yet to be completed but Defendant had entered the premises unlawfully and built a temporary structure and had also allowed third parties to store timber, sand etc. and allowed the land to be utilized for parking of earth moving vehicles , and other heavy vehicles , for commercial purpose.
- [4] Defendant had not proved she paid deposit in full in terms of the Agreements. Defendant had without any authority 'sublet' the land for third party for storage of sand, timber, and heavy earth moving vehicles. These are beaches of fundamental terms of the Agreements.
- [5] Plaintiffs through their solicitor had issued a notice terminating the Agreements on 23.11.2018. Thereafter on 4.03.2019 notice to vacate issued. Defendant had continued to occupy the land and had also built a structure and also used the land including storage of a container belonging to them on it.
- [6] Defendant had breached the Agreements by nonpayment of deposit and also unlawfully possession of the land, including building a structure and also subletting premises to third parties.
- [7] Defendant had neither completed subdivision with an approved subdivision in order to issue separate titles to the land in terms of the Agreements, within a reasonable time, nor vacated land. So the Defendant is a trespasser on the land.
- [8] A declaration is made that the Agreements for sale and purchase regarding Lots 1,2,3,and 4 on Proposed Scheme Plan of Rupeni Consultants dated 10.12.15 is revoked. Accordingly, Defendant or any other person (Defendant's licensees, agents, servants etc.) in possession to vacate the said land are covered under sale and purchase agreements on or before 8.3.2024).
- [9] A permanent injunction issued restring Defendant including (licensees agents, servants) from remaining or entering or using said land or drive way inside CT7585 in whatsoever , (i.e. from 9.3.2024)
- [10] Defendant to dismantle and remove from all the structures on the said land on or before 8.3.2024.

- [11] Defendant is ordered to pay the Plaintiff liquidated sum of \$40,000 for breach of the four Agreements in terms of clause 13(e).
- [12] Defendant is ordered to pay a general damage of \$40,000 trespass. Plaintiffs are also granted interest.

## **FACTS**

- [13] Defendant entered into discussions with the plaintiffs with an intention to purchase vacant lots numbers 1, 2, 3 and 4 (part of balance of Certificate of Title No.: 7585) situated along Princess Road, Waila, Nausori
- [14] The Plaintiffs and the Defendant both engaged the same firm of solicitors for that purpose. Accordingly, drafting of the sale and purchase agreements and execution was done by said solicitors.
- [15] Plaintiffs and Defendant entered in to sale of Lot 1, 2, 3, and 4 in a proposed scheme plan made by Rupeni Consultants (marked X6), Consulting Surveyors and Mappers.
- [16] By an Authority letter first named Plaintiff and the Ranjeshni Devi t/as Siris Distributors engaged and authorities Rupenis Consultants to carry out the survey of the balance of Certificate of Title No: 7585 on DP 9801 and Siri Distributors agreed to pay all costs for such survey of subdivision.
- [17] 14.9.2016 the first named Plaintiff made an application for development permission and approval of plan of subdivision of balance of Certificate of Title No: 7585.
- [18] Plaintiffs on or around 21.11. 2016 authorized the defendant to carry out the subdivision and road works in respect of the said property in terms of the Sale and Purchase Agreements (the Agreements).

### **Agreement for Lot 1**

- [19] An agreement in writing made in or around 21.11. 2016 between parties. Plaintiffs agreed to sell and he Defendant agreed to purchase Lot 1 (on proposes scheme of subdivision marked X6) for a price of \$100, 000.00.
- [20] The condition of the sale *inter alia* stated,
- a. The lot was sold on “as is where is” basis

- b. The defendant would pay a deposit and part payment of \$10,000.00 into the trust account of solicitors
- c. The defendant would pay the balance sum of \$90,000.00 by bank cheque on the date settlement; (i.e transfer of title of Lot 1 to Defendant )
- d. Settlement was to take place within 60 days from the date of the agreement;
- e. Vacant possession of the property was to be taken by the defendant on the date of settlement.

### **Agreement for Lot 2**

[21] Agreement in writing made in or around 21.11. 2016 and made between the parties to this action. Plaintiffs agreed to sell and the defendant agreed to purchase Lot 2 (proposed scheme of subdivision marked X6) for a price of \$100,000.00.

[22] The condition of the sale are:

- a. The lot was sold on “as is where is” basis;
- b. The defendant would pay a deposit and part payment of \$10,000.00 into the trust account of solicitors
- c. The defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;
- d. Settlement (i.e transfer of the tile for Lot 2)was to take place within 90 days from the date of the bank agreement;
- e. Vacant possession of the property was to be taken by the defendant on the date of settlement.

### **Agreement for Lot 3**

[23] An agreement in writing made in or around 21.11. 2016 between the parties to this action. Plaintiff agreed to sell and the Defendant agreed to purchase Lot 3 (on proposed scheme of subdivision marked X6) for a price of \$100,000.00.

- [24] The conditions of the sale that:
- a. The lot was sold on “as is where is” basis;
  - b. The defendant would pay a deposit and part of payment of \$10, 000.00 into the trust account of solicitors
  - c. The defendant would pay the balance sum of \$90, 000.00 by bank cheque on the date of settlement;
  - d. Settlement was to take place within 90 days from the date of the agreement;
  - e. Vacant possession of the property was to be taken by the defendant on the date of settlement.

#### **Agreement for Lot 4**

[25] An agreement in writing made in or around 21.11. 2016 made between parties. Plaintiffs agreed to sell and the defendant agreed to purchase Lot 4 (Proposed scheme of subdivision marked X6) for a price of \$100, 000.00 which land is wrongly described in the sale and purchase agreement as Certificate of Title Number 19039.

- [26] The conditions of the sale that:
- a. The lot was sold on “as is where is” basis;
  - b. The Defendant would pay a deposit and part payment of \$10, 000.00 into the trust account of solicitors
  - c. The defendant would pay the sum of \$90, 000.00 by bank cheque on the date of settlement;
  - d. Settlement was to take place within 90 days from the date of the agreement;
  - e. Vacant possession of the property was to be taken by the defendant on the date of settlement.

[27] Defendant had entered in to possession of Lot 1, 2, 3, and 4 of proposes scheme of subdivision marked X6, (collectively referred as the Land here after) unlawfully.

- [28] Defendant had not completed subdivision of the land in order to issue separate titles for the sale of said Lot 1, 2, 3 and 4 in terms of the Agreements.
- [29] On 23 .11. 2018 the plaintiffs issued notices to the defendant demanding the defendant to restore the land (Lots 1, 2, 3 and 4) to plaintiffs and the plaintiffs pursuant to the said notices also rescind the said agreements in accordance with clause 13(b) of the said agreements.
- [30] On 04 .3. 2019 the plaintiffs issued notices against the defendant and the occupiers demanding the defendant to give to the vacant possession of Lots 1, 2, 3 and 4.
- [31] The defendant has failed and/ or refused to comply with the said notices and continues to illegally and unlawfully occupy Lots 1, 2, 3 and 4, use the said land for her business.
- [32] The Defendant has also sublet some parts of the said properties without the plaintiffs' knowledge and consent. Defendant and or her agents did following acts
- a. entered the driveway of the said property and has driven motor vehicle thereon, including lorries, vans, cars, bull dozers, diggers, excavators;
  - b. used the said property for parking and storing heavy machinery such as bull dozers, diggers, excavators, loaders and trucks.
  - c. carried on business or allowed to be carried on a business of but not limited to construction work involving earthwork operations from the said property.
  - d. used or allowed it to be used for stocking, storing and selling gravel, sand, soil and timber/ logs;
  - e. constructed buildings inclusive of houses office space, bulk and working shed on the said property.

## **ANALYSIS**

- [33] The following facts are agreed in terms of the minutes of pretrial conference

- “1. The Plaintiffs are the Administrators of the Estate of the deceased Ram Chandar, of Waila, Nausori who died intestate. The Plaintiffs reside in Australia.*
- 2. The Plaintiffs in their capacity as Administrators of the Estate of Ram Chandar are the registered proprietors of all that property comprised and described as Lots 1, 2, 3, 4 and 5(part of balance of Certificate of Title No: 7585) situated along Princess Road, Waila, Nausori.*
- 3. The defendant is businesswoman engaged in the business of general merchants, wholesale and retail blank media and electronic items and movie shop, fast-food take ways and refreshment bar, internet shop and apartments.*
- 4. Sometime in 2015, the defendant entered into discussions with the plaintiffs with an intention to purchase vacant lots numbers 1, 2, 3 and 4 (part of balance of Certificate of Title No: 7585) situated along Princess Road, Waila, Nausori (“the said property”).*
- 5. The Plaintiffs and the Defendant both engaged the same firm of solicitors Sherani & Co in Suva to draft the sale and purchase agreement and represent them in the conveyance.*
- 6. By letter dated 25 June 2016 1<sup>st</sup> named Plaintiff authorised Mr. Hemendra Nagin of Sherani & Co to act for him in the sale of the lots to the Defendant. It was agreed between the parties all outgoing cost in relation to the sale of the lots was to be paid by the Defendant including legal costs, subdivision costs, costs associated with the registration of the subdivision with the Department of lands and costs for the construction of a driveway.*
- 7. By an Authority letter (undated) the 1<sup>st</sup> named Plaintiff and the Defendant Ranjeshni Devi t/a Siris Distributors engaged and authorised Rupeni Consultants to carry out the survey and subdivision of the balance of Certificate of Title No: 7585 on DP 9801 and the Defendant agreed to pay all costs.*
- 8. On or about 14 September 2016 the 1<sup>st</sup> named Plaintiff made an application for development permission and approval of plan of subdivision of balance of Certificate of Title No: 7585.*

9. *The plaintiffs sometime in 2016 authorised the defendant to carry out the subdivision and road works in respect of the said property.*
10. *The Plaintiffs did not authorise the Defendant to build any type of structure, dwelling, office whatsoever on the lots, develop or occupy any of lots or use it in any manner or form.*

*Agreement for Lot 1*

11. *By an agreement in writing made in or around September -November 2016 (exact date is not known) and made between the Plaintiffs of the one part and the Defendant of the other part ("the said agreement"), the Plaintiffs agreed to sell and the defendant agreed to purchase Lot 1 (part of balance of Certificate of Title No: 7585) for a price of \$100,000.00.*
12. *IT was a condition of the sale that:*
  - (1) *the lot was sold on 'as is where is" basis.*
  - (2) *the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement.*
  - (3) *the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;*
  - (4) *settlement was to take place within 60 days from the date of the agreement;*
  - (5) *vacant possession of the property was to be taken by the defendant on the date of settlement.*
13. *The defendant took possession of the property, fenced it, build a house and a work shed on it, stored containers on it, parked vehicles on it and has been using it for her business.*
14. *Clause 13 (b) of the said agreement for Lot 1 provides that if the defendant makes default in payment of any moneys when due or in performance or observance of any other conditions of the agreement and if such default continues for 14 days then the plaintiffs may rescind the*



*contract of sale and monies paid under the agreement shall be forfeited to the plaintiffs as liquidated damages.*

*Agreement for Lot 2*

15. *BY an agreement in writing made in or around September –November 2016 (exact date is not known) and made between the Plaintiffs of the one part and the Defendant of the other part (“the said agreement”), the Plaintiffs agreed to sell and the defendant agreed to purchase Lot 2 (part of balance of Certificate of Title No: 7585) for a price of \$100,000.00.*
  
16. *It was a condition of the sale that:*
  - (1) *the lot was sold on “as is where is” basis.*
  
  - (2) *the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement ;*
  
  - (3) *the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;*
  
  - (4) *settlement was to take place within 90 days from the date of the agreement;*
  
  - (5) *vacant possession of the property was to be taken by the defendant on the date of settlement.*
  
17. *The defendant took possession of the property, built a building on it and has been using it for her business.*
  
18. *Clause 13 (b) of the said agreement for Lot 2 provides that if the defendant makes default in payment of any moneys when due or in performance or observance of any other conditions of the agreement and if such default continues for 14 days then the plaintiffs may rescind the contract of sale and monies paid under the agreement shall be forfeited to the plaintiffs as liquidated damages.*

Agreement for Lot 3

18. *By an agreement in writing made in or around September –November 2016 (exact date is not known) and made between the Plaintiffs of the one part and the Defendant of the other part (“the said agreement”), the Plaintiffs agreed to sell and the defendant agreed to purchase Lot 3 (part of balance of Certificate of Title No: 7585) (which land is wrongly described in the said agreement as Certificate of Title No: 19039) for a price of \$100,000.00.*
  
19. *It was a condition of the sale that:*
  - (1) *the lot was sold on “as is where is” basis.*
  
  - (2) *the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement.*
  
  - (3) *the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;*
  
  - (4) *settlement was to take place within 90 days from the date of the agreement;*
  
  - (5) *vacant possession of the property was to be taken by the defendant on the date of settlement.*
  
20. *The defendant took possession of the property, dug the land, and removed soil as a result of which the land is now in the shape of a pond/lake which is filled with water.*
  
21. *Clause 13 (b) of the said agreement for Lot 3 provides that if the defendant makes default in payment of any moneys when due or in performance or observance of any other conditions of the agreement and if such default continues for 14 days then the plaintiffs may rescind the contract of sale and monies paid under the agreement shall be forfeited to the plaintiffs as liquidated damages.*

Agreement for Lot 4

22. *By an agreement in writing made in or around September-November 2016 (exact date is not known) and made between the Plaintiffs of the one part and the Defendant of the other part ("the said agreement"), the Plaintiffs agreed to sell and the defendant agreed to purchase Lot 4 (part of balance of Certificate of Title No: 7585) for a price of \$100,000.00 which land is wrongly described in the sale and purchase agreement as Certificate of Title Number 19039.*
23. *It was a condition of the sale that:*
- (1) the lot was sold on "as is where is" basis.*
  - (2) the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement*
  - (3) the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement;*
  - (4) settlement was to take place within 90 days from the date of the agreement;*
  - (5) vacant possession of the property was to be taken by the defendant on the date of settlement.*
24. *The defendant took possession of the property, built on it and is using it for her business.*
25. *Clause 13 (b) of the said agreement for Lot 4 provides that if the defendant makes default in payment of any moneys when due or in performance or observance of any other conditions of the agreement and if such default continues for 14 days then the plaintiffs may rescind the contract of sale and monies paid under the agreement shall be forfeited to the plaintiffs as liquidated damages.*

26. *There has been a substantial and unreasonable delay on the part of the defendant since 2015 in completing the subdivision work.*
27. *On 23 November 2018 the plaintiffs issued notices to the defendant demanding the defendant to restore the land (Lots 1, 2, 3 and 4) to its former condition, to give vacant possession of the said lots to the plaintiffs and the plaintiffs pursuant to the said notices also rescinded the said agreements in accordance with clause 13(b) of the said agreements.*
28. *On 04 March 2019 the plaintiffs issued notices against the defendant and the occupiers demanding the defendant to give to the plaintiffs vacant possession of Lots 1, 2, 3 and 4.*
29. *The defendant has failed and/or refused to comply with the said notices and continues to occupy Lots 1, 2, 3 and 4 and use the said land for her business.*
30. *The defendant has caused some subdivision work to be carried out but the work remains incomplete.*
31. *The defendant has also sublet some parts of the said properties without the plaintiff's knowledge and consent."*

[34] Plaintiff gave evidence and there is no dispute to material facts or the documents. Both parties filed a common 'agreed bundle of documents' and there was no dispute as to said documents.

[35] Defendants admit the Agreements entered regarding sale of the Lot 1, 2, 3, and 4 contained in the proposed scheme plan marked X6

[36] Defendant had admitted that she had entered the Land and erected a temporary structure. In her evidence she further elaborated that it was a security hut.

[37] Defendant had also 'sublet' it to a third party for commercial purpose to as a storage space. This third party reside opposite to Plaintiff's residence and Defendant and her husband had allowed the Land to be used by third party for storage of timber, sand etc. This fact was known to Defendant.

[38] Siri Dhar Nimagdda, husband of Defendant admitted allowing the Land to be used by a third party for commercial purpose. According to evidence presented by Plaintiffs, there were earth moving vehicles parked on the Land and from analysis of the evidence it was proved on

the balance of probability that Defendant and or her husband had unlawfully authorized third parties to possess the Land for commercial purpose.

[39] Apart from allowing third party to utilize the Land, Defendant had erected a temporary structure near to the common boundary between Plaintiff and Defendant. Defendant's commercial building is adjoining this structure and on the balance of probability this structure was also used for commercial purpose.

[40] Defendant had not paid \$40,000 as the Deposit for the Land. According to evidence of Defendant she had paid only \$10,000 as deposit to her previous solicitor. This was not proved through receipt. So there was no proof of payment of deposit for all the Agreements.

[41] Before entering into the Agreements, the parties made the following arrangements in writing.

(1) the first named Plaintiff and the Defendant engaged and authorized Rupeni Consultants to carry out the survey and subdivision of the balance of Certificate of Title No. 7585 DP 9801 and to subdivide the balance land into 5 Lots of which four will be purchased by Defendant for 100,000 each lot.

(2) Defendant agreed to pay the survey and subdivision costs for the 5 lots. In addition Ranjeshni Devi agreed to pay all outgoing costs in relation to the sale of the lots including legal costs, costs associated with the registration of the subdivision with the Department of Lands and costs for the construction of the driveway.

(3) The Plaintiffs authorized Defendant to carry out subdivision and road works in respect of the Land.

[42] The 'irrevocable Authority' (marked X5) of 2015 between Suren Chand and Ranjeshni Devi t/a Siris Distributors ((undated) (Exhibit 5)). The cost of the subdivision to be paid by Siri Distributors, owned and operated by the Defendant.

[43] By way of an Application for Approval of Plan of Subdivision first named Plaintiff had authorized the subdivision by Rupeni Consultants for five lots. (X 12). The cost of the payment was to be paid by Siri Distributors a commercial entity belonging to Defendant. On the same day 14.9. 2016 the first named Plaintiff made an application for development permission and approval of plan of subdivision of balance of Certificate of Title No: 7585 through Rupeni Consultants (Exhibit 13).

[44] Thereafter the Plaintiffs and the defendant entered into the Agreements, dated 21 .11. 2016 pursuant to which Defendant agreed to buy the four

undivided plots of land (Lots 1,2,3 and 4) contained in the proposed scheme of subdivision by Rupeni Consultants,(X6) dated 10.12.2015.

[45] In terms of the Agreements Defendant purchased the Land before approval of the scheme of subdivision and issuance of separate titles for said four lots. So the obligation for subdivision was with Defendant.

[46] The sale and purchase agreement for Lot 1 stated

- (1) the lot was sold on “as is where is” basis (clause 3);
- (2) the defendant would pay a deposit and part payment of \$10,000.00 into the trust account of Sherani & Company upon execution of the agreement (clause 2 (i));
- (3) the defendant would pay the balance sum of \$90,000.00 by bank cheque on the date of settlement (clause 2(ii));
- (4) settlement was to take place within 60 days from the date of the agreement (clause 4);
- (5) vacant possession of the property was to be taken by the defendant on the date of settlement (clause 5).

[47] The sale and purchase agreements for Lots 2, 3 and 4 has the same conditions except that it provided for settlement to take place within ninety days from the date of settlement.

[48] Defendant and her husband in evidence admitted that they had built a temporary structure and the Land was possessed by them after entering in to the Agreements.

[49] It is an agreed fact that Defendant had ‘sublet’ the Land for third party. There were evidence presented by an eye witness of the usage of the Land for commercial use by Defendant and or her husband and ‘sublet’ to a third party for business.

[50] After executing the Agreements, Defendant moved onto the land, took possession of the land, built on it and has been using it for her business without consent and approval from the plaintiffs.

[51] Roshni Devi, who lived in an adjoining land, was an eye witness to use of land and first named Plaintiff who was abroad at that time.

[52] The defendant remains in occupation and possession of the land in violation of the Agreements entered on or around 21.11.2016. The defendant also let some parts of the said property to third parties without the plaintiff’s knowledge and consent.

- [53] In terms of clause 5 of the Agreements, the vacant possession to Defendant, was to be given on date of settlement. Clause 4 dealt with the 'date of settlement'. Accordingly, the ownership needs to be transferred and full payment of price needs to be paid on 'date of settlement' and this date by latest was fixed sixty days or ninety days from the date of execution of the said Agreements.
- [54] It is an agreed fact that the said Agreements were executed in 2016 and date of 'settlement' had expired without title being transferred. The obligation to subdivide land is a prerequisite for issuance of the separate title.
- [55] Defendant's position is that she could not pay for Lot 1,2,3,4 as there were no separate title issued. Before that she needs to pay deposits for the above Lots. She admitted a sum of \$40,000 was due as deposits but not paid as deposits for said Lots.
- [56] Defendant admits that the obligation to subdivide the land was with her including settlement of fees for that. So the delay of transfer of titles caused by Defendant due to non-completion of subdivision.
- [57] Defendant had taken more than five years to subdivide the land and without an approved survey plan separate title could not be issued. Defendant cannot take advantage of her own failure to subdivide and delay completion of subdivision and also at the same time illegally occupy the Land and also allow third parties to use it for commercial purposes.
- [58] Defendant had not paid deposit for four lots. Defendant in her evidence stated that she paid \$10,000 as deposit but was unable to prove to which lot it was paid. She admitted that \$30,000 deposit remained unpaid as deposit for over seven years!
- [59] Defendant had neither paid deposit nor taken steps to subdivide the land and settle the transfer of the property to her. Instead unlawfully entered in to possession and using the land.
- [60] Defendant had breached the Agreements, firstly by nonpayment of deposit monies for four lots in the sum of \$40,000. Secondly Plaintiff could not execute the settlement of separate titles for four lots as Defendant had failed to complete the subdivision of five lots within 60 or 90 days as the case may be. Thirdly Defendant had unlawfully entered in to possession of the Land prior to 'settlement' of the titles in terms of the Agreements. Fourthly Defendant had unlawfully 'sublet' the Land for third party for commercial purpose. Any one or combination of any of the aforesaid four actions constitute beaches of Clauses 2(i) , 4,5, of the Agreements marked as X15, X16, X17, X18 read with X5.
- [61] For breach of the Agreements Plaintiff is entitle for damages. In the statement of claim Plaintiff is claiming liquidated damages for breach of contract in terms of Clause 13(b) of the Agreements.

[62] According to the terms of the Agreements the deposit and any other payment made at the time of termination are liable to be forfeited as liquidated damage. So at that time parties intended payment of deposit of \$10, 000.00 to solicitor.

[63] In this action Defendant ought to have paid a deposit of \$40,000 as deposit. This is the minimum liquidated damage for a breach by the purchaser, as agreed at the time of making the Agreements, as payment of deposit was an immediate action Defendant ought to have done.

[64] The fact that Defendant did not pay or paid only a part of it in violation of the Agreement is not a reason to reduce the minimum liquidated sum , which was the deposit agreed by the parties to pay at the time when sale and purchase agreements were entered.

[65] Halsbury's Laws of England<sup>1</sup> under 'Damages and other Available Remedies for Breach of Contract' states,

**"366. Damages and other available remedies.**

Whether or not a breach of contract gives rise to a right to terminate, it gives the injured party a right of action for damages. Of course, the amount of damages recoverable depends on what has been promised and performed, because the primary purpose of damages for breach of contract is to offer the promise the value of performance. Whilst the innocent party is entitled to damages as of right, to recover more than nominal damages he must prove loss. **The contract may provide for a sum payable as liquidated damages in the event of breach.** A claim for damages for breach of contract must be distinguished from a claim for a debt arising under a contract: an action in debt lies upon a primary obligation to pay, whereas an action for breach of contract is a secondary obligation arising from breach of any other primary obligation of performance. There are restrictions on the power to transfer a damages claim; and a claim for more than nominal damages is subject to the rules of remoteness and mitigation" (foot notes deleted)(emphasis added)

[66] Plaintiff can claim for damages for breach of contract. In this instance Agreements contained a specific condition for which parties agreed in case of breach by the purchaser. Clause 13(b) of the Agreements parties had agreed that money paid including deposit up to the point of breach will be considered as liquidated damages.

[67] Plaintiff cannot claim for liquidated damages and for general damages for breach of contract. Liquidated damages is the damages agreed by the parties in the event of a breach in lieu of general damages for breach

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<sup>1</sup> Halsbury's Laws of England Contract (Volume 22 (2019)) 8. Discharge of Contractual Promises (4) Discharge by Termination for Breach of Contract (v) Damages and other Available Remedies for Breach of Contract



of contract. Parties had agreed for a way to assess the damage for breach.

- [68] According to Defendant she had paid only \$10,000 for four Agreements and that itself was a breach of fundamental term of the said Agreements. If the purchaser had paid more than deposit that sum can also be considered as liquidated sum, but if deposits were not paid that cannot reduce the liquidated damages. So the minimum liquidated damages for breach of the four agreements is \$40,000. This is for breach of the Agreements. No general damages granted for breach of contract as liquidated damage agreed between parties.
- [69] Plaintiff through his solicitors on 23.11.2018 issues four separate notices regarding breach of Clauses 4, 5, of the Agreements and had given notice to vacate the Land in terms of Clause 13 of the Agreements. Defendant had not vacated the land and in evidence admitted that there is a temporary structure and also a container on the Land.
- [70] Plaintiff had no authority to possess the land in terms of the Agreements and possession to be given at the date of settlement which is the transfer of the separate titles of subdivided four lots. The conditions stated in Clause 4 needs to be fulfilled for settlement. It is undisputed that settlement did not happen as subdivision of the land had not completed with approved deposited plan.

### **Trespass to Land**

- [71] Halsbury's Laws of England states 'what constitutes trespass', as;
- "A person's unlawful presence on land in the possession of another** is a trespass for which a claim may be brought, even though no actual damage is done. A person trespasses upon land if he **wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another.** He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires. (footnotes deleted) (emphasis added)
- [72] Defendant had erected a structure and also placed a container on the Land. Defendant and her husband used or caused to use the Land by themselves or through a third party for storage of sand, timber and vehicles for commercial purpose. Accordingly possession of Defendant as well as its agents and or licensees is unlawful and it constitutes a trespass to the land.

[73] Halsbury's Laws of England<sup>2</sup> under 'Torts Affecting Land' described measure of damages for 'Trespass to Land' as follow,

*"420. Trespass to land.*

A claimant is entitled to nominal damages for trespass to land even if no loss or damage is thereby caused.<sup>3</sup> Such damages will be given for largely innocuous invasions<sup>4</sup>, or in cases where the claimant has been fully compensated by some other remedy<sup>5</sup>. If the trespass is more serious, for example involving substantial interference with property or with privacy, **then substantial damages may be recovered**<sup>6</sup>. Consequential losses may be claimed<sup>7</sup>, as can damage to the land itself or buildings or fixtures on it<sup>8</sup>.

Aggravated and punitive damages are available in trespass where appropriate<sup>9</sup>" (emphasis added)

[74] Accordingly, Plaintiff is entitled to substantial damages as opposed to nominal damages considering they type of trespass and benefit her and or her business had derived.

[75] The measure of damages for trespass according to Halsbury's Laws of England it the benefit accrued. It states.

**"263. Measure of damages or compensation.**

In such a case of trespass, damages will generally be **measured by the benefit received by the trespasser**; that will ordinarily be the price a

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<sup>2</sup>Halsbury's Laws of England ; Damages (Volume 29 (2019)) ; 7. Measure of Damages in Tort ; (2) Torts other than Those Involving Personal Injury ; (ii) Torts Affecting Land

<sup>3</sup>Bl Com (19th Edn) 209–210; *Entick v Carrington* (1765) 19 State Tr 1029, 2 Wils KB 275 at 291 per Lord Camden CJ. For a more recent instance see *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA.

<sup>4</sup> See eg *Twyman v Knowles* (1853) 13 CB 222; *Rust v Victoria Graving Dock Co* (1887) 36 ChD 113 at 119, CA; *Behrens v Richards* [1905] 2 Ch 614.

<sup>5</sup> Eg where the claimant is only concerned to establish his right: see *Cass v Hall* (1960) 176 Estates Gazette 823

<sup>6</sup> See eg *Simper v Metropolitan Police Comr* [1982] CLY 3124 (£300); *Cash v Lancashire Chief Constable* [2008] EWHC 396 (Ch), [2008] All ER (D) 52 (Feb) (£150 for 15-minute police trespass with press present); *Jolliffe v Willmetts & Co* [1971] 1 All ER 478 (£250) (incursion by private detective); *Mehta v Royal Bank of Scotland plc* [1999] 3 EGLR 153 (trespass in course of wrongful eviction).

<sup>7</sup> *Huxley v Berg* (1815) 1 Stark 98 (illness of wife); *Bracegirdle v Orford* (1813) 2 M & S 77; *Davis v Bromley UDC* (1903) 67 JP 275, CA; *Pritchard v Long* (1842) 9 M & W 666; *Bisney v Swanston* (1972) 225 Estates Gazette 2299, CA (loss of profits). See also *Wormald v Cole* [1954] 1 QB 614 at 625, [1954] 1 All ER 683 at 688, HL, per Lord Goddard CJ (trespasser knocking over occupier on dark night). In a suitable case it seems there can be liability for mental distress: see *Mehta v Royal Bank of Scotland plc* [1999] 3 EGLR 153; and *Millington v Duffy* (1985) 17 HLR 232.

<sup>8</sup> The measure of such damages is the same as for any other injury to land or fixtures: see para 421 et seq

<sup>9</sup> See the following cases of aggravated damages: *Jolliffe v Willmetts* [1971] 1 All ER 478; *Horsford v Bird* [2006] UKPC 3, [2006] 1 EGLR 75 (though not on the facts). See the following cases of punitive damages: *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA; *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985, [2012] 1 All E 903, [2011] 2 P & CR 351. As to aggravated damages see paras 322–324. As to punitive damages see paras 325–333.

reasonable person would pay for the relevant right of user<sup>10</sup>. Thus, the measure of damages for the trespass on another's land by the carriage of minerals<sup>11</sup> is the value of the land for the purposes for which it is used; compensation is measured by way leave rent in respect of the minerals carried<sup>12</sup>, and the rate, if any, used in the neighborhood is adopted as a convenient measure<sup>13</sup>.”

[76] It is not proved through evidence how much benefit received by Defendant from continuous usage of the Land. Plaintiff had not led evidence as to gain or probable gain to Defendant through their continuous occupation for commercial use, and also ‘sublet’ to third party for commercial use. General damages can be assessed from the facts presented to court. Absence of such evidence, is not a reason to refuse damage when there was proof of gain or benefit to Defendant

[77] In my mind general damage can be granted for trespass upon the evidence presented. From the evidence it is proved on balance of probability that Plaintiff is using the Land for her commercial ventures and this is proved through unlawful possession and refusal to vacate the land and also admission of storage of a container on the land even at the time of hearing. Defendant had also ‘sublet’ the Land for commercial purposes and on the balance of probability these activities had gained substantial benefit to Defendant. This is corroborated by Defendant’s refusal to vacate the land even after notice of termination of the Agreements. Defendants had not vacated the Land after eviction notices served. This indicate that Defendant is gaining a substantial gain though occupation of the Land.

[78] Considering the circumstances and also time period used a general damage of \$10,000 for one Lot. This general damage is granted for trespass including use of property for commercial purpose by Defendant for her gain. Defendant had constructed a temporary structure and according to her own evidence it was a security post.

[79] This also substantiate valuable items stored in the Land, thus proves use of the Land for commercial purpose. She also admitted a container being placed on the land and her husband admitted allowing a contractor to store valuable equipment on the land. Accordingly \$40,000 granted as general damages for Lot 1, 2, 3, and 4, for trespass.

[80] Plaintiff had alleged that there was damage to Lot 2 and 3 but this was not proved in evidence. According to Defendant for subdivision proper drainage was required and she had developed the land by levelling a

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<sup>10</sup> Martin v Porter (1839) 5 M and W 351; Jegon v Vivian (1871) LR 6 Ch App 742; Whitwam v. Westminster Brymbo Coal Co [1896] 2 Ch 538; A-G v Blake (Jonathan Cape Ltd, third party) [2001] 1 AC 268, [2000] 4 All ER 385, HL; Bocardo SA v Star Energy UK Onshore Ltd [2010] UKSC 35, [2011] 1 AC 380, [2010] 3 All ER 975.

<sup>11</sup> As to the meaning of 'minerals' see para 10

<sup>12</sup> See Martin v Porter (1839) 5 M & W 351; Powell v Aiken (1858) 4 K & J 343; Hilton v Woods (1867) LR 4 Eq 432; Jegon v Vivian (1871) 6 Ch App 742; Phillips v Homfray, Fothergill v Phillips (1871) 6 Ch App 770; A-G v Tomline (1880) 15 ChD 150, CA; and damages vol 29 (2019) para 421.

<sup>13</sup> Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538, CA.

part of it for proper drainage. According to evidence of Defendant a substantial sum was spend on that. This cannot be considered as a damage. At the same time due to insufficient evidence the cost of development could not be assessed. In the circumstances development done in order to use the Land unlawfully cannot be considered as damage to the Land. Defendant had not claimed for such development and only asked for strike out of Plaintiff's action.

[81] Plaintiff is also claiming for mesne profit as an alternate claim for general damages for possession. Damages for Trespass is granted so there is no need to grant damages for possession

[82] Halsbury's Laws of England states

*" 302. Mesne profits.*

*Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises<sup>14</sup>.*

[83] Plaintiff had not authorized Defendant to possess the land so mesne profit cannot be assessed or granted. Mesne profit is a type of damage granted for trespass when initial possession was lawful. Defendant's possession of the Land was unlawful from the beginning.

## **CONCLUSION**

[84] Defendant is in illegal occupation of the Land even before termination notice given on 23.11.2018. Defendant had violated the Clauses 2(1), 4, and 5 of the Agreements for the reasons given above. Accordingly a declaration is made that Sale and Purchase Agreements for Lot 1, 2, 3, and 4 has been terminated and they are no longer binding on Plaintiff.

[85] An order is made that Defendant whether by herself or by her agents or otherwise howsoever remove and or dismantle all structures constructed on remaining undivided land of CT 7585 on or before 8.3.2024.

[86] Permanent injunction is issued restraining Defendant whether by herself, or through servants or agents or otherwise howsoever from remaining or continuing in occupation of the Land after from 9.3.2024.

[87] Permanent injunction is also issued restraining Defendant and or her agents, servants, or through any other person using the Land or driveway on the Land.

[88] An order is issued for Defendant and her agents or any third party under her authority who had entered the Land to vacate the Land on or before 8.3.2024.

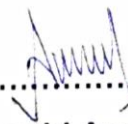
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<sup>14</sup> Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538, CA.

**FINAL ORDERS:**

- i. A declaration is made that the Agreements for sale and purchase regarding Lots 1,2,3,and 4 on Proposed Scheme Plan of Rupeni Consultants dated 10.12.15 is revoked. Accordingly, Defendant or any other person (Defendant's licensees, agents, servants etc.) in possession to vacate the said land are covered under sale and purchase agreements on or before 8.3.2024).
- ii. A permanent injunction issued restrig Defendant including (licensees agents, servants) from remaining or entering or using said land or drive way inside CT7585 in whatsoever, (i.e. from 9.3.2024)
- iii. Defendant to dismantle and remove from all the structures on the said land on or before 8.3.2024.
- iv. Defendant is ordered to pay the Plaintiff liquidated sum of \$40,000 for breach of the four Agreements in terms of clause 13(e). Interest of 6% is applied to liquidated damages and 10,678 is awarded.
- v. Defendant is ordered to pay Plaintiff a general damage of \$40, 000 for illegal/ unlawful occupation/ trespass. Interest 6% from the date of institution of this action to 4 years and 164 days \$10,678.00(approx.).
- vi. Cost of this action is summarily assessed at \$10,000.



  
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**Deepthi Amaratunga**  
**Judge**

**At Suva** this 29<sup>th</sup> day of February, 2024.

**Solicitors:**

**Naidu Law**

**Redwood Law**