

3. However the Plaintiff alleged that despite complying with the conditional requirements in the Sale and Purchase Agreement, the Defendant breached the terms of the Agreement by failing to pay the balance of the consideration for the sale of the said properties.
4. The key terms of the Agreement was that no payment of the deposit, the Plaintiff would obtain an approval to re-zone from Commercial Agriculture to General Industrial within 30 to 60 days settle the conveyancing within 60 days.
5. The Plaintiff alleged that the First Defendants failed to make any payment and the Second Defendant, as the Director of the First Defendant, made representations to arrange for payment from offshore funds. Despite reassurances, no further payments were made for which the Plaintiff relied upon.
6. The Defendants denied the allegations in the Statement of Defence and Counterclaim alleging that the Plaintiff merged the two Certificate of Titles and failed to register the titles with Registrar of Titles and thus disabled the Defendant from obtaining a collateral over the said titles.
7. The Pre-Trial Minutes is follows:

Agreed Facts

1. The Plaintiff is the registered proprietor of the properties comprised in Certificate of Title 29909 and 29910 (“the properties”).
2. The Second Defendant is the director and shareholder of the First Defendant.
3. The Plaintiff and First Defendant entered into a Sale and Purchase Agreement for the sale of the property from the Plaintiff to the First Defendant for a price of 950,000 VEP.
4. The Plaintiffs obtained the approval for the zoning of the Properties to General Industrial on 22 December 2020.
5. The Plaintiff obtained its capital gains tax certificate for the properties on 2 March 2021.
6. The Plaintiff issued the settlement notice dated 17 March 2021 which was sent to the Purchasers solicitors on 18 March 2021. Settlement was scheduled for 23 March 2021.
7. The First Defendants defaulted on settlement notice and the Agreement by failing to settle on 23 March 2021.
8. Thereafter despite numerous requests for settlement, the first defendant failed to effect settlement. The Plaintiff issued its default notice on 4 October 2021 which required the First Defendant to effect settlement.

9. The First Defendant failed to effect settlement within 30 days of default notice.
10. The Plaintiff issued a notice dated 17 November 2021 notifying that the Plaintiff was exercising its rights pursuant to clause 15 (a) of the Agreement and demanded the following:
 - a. Balance price FJD 940,000;
 - b. Interest on balance of FJD 940,000 at a rate of 15% per annum from 23 March 2021;
 - c. VAT on FJD 950,000.The said notice required the First Defendant to make the payment in 3 working days.

11. The First Defendants failed to comply.
12. The second defendant whilst being a Director of the First Defendant made several representations to the Plaintiff, solicitors of the parties and Plaintiff's real estate agents to the effect that the First Defendant was in the process of arranging transfer of funds from offshore to complete settlement knowing that such representations were untrue, false, misleading and designed to discourage the Plaintiff from issuing default notices to the First Defendant.

2. Issues to be Determined

- 2.1 Did the Plaintiff and the First Defendant enter into a Sale and Purchase Agreement for the properties? If so what was the date of the agreement?
- 2.2 Did the sale agreement become unconditional? If so, what was the date?
- 2.3 Did the First Defendant breach the sale agreement? If so, what were the breaches?
- 2.4 What remedies is the Plaintiff entitled to from the First Defendant?
- 2.5 Is the Plaintiff entitled to the relief sought against the First Defendant as pleaded in paragraphs 17-20 of the Statement of Claim?
- 2.6 Did the Plaintiff suffer losses and damages because of relying on the Defendant's representation?
- 2.7 If so is the Plaintiff entitled to damages/losses as pleaded in paragraph 17 of the Statement of Claim?
- 2.8 Is the Plaintiff entitled to costs? If so, against which Defendants and on what basis?
- 2.9 Did the Plaintiff breach the sale agreement? If so, what were the breaches?

2.10 What remedies is the First Defendant entitled to from the Plaintiff?

2.11 Are the Defendants entitled to costs? If so, on what basis?"

PART B: EVIDENCES

8. The Plaintiff called only one witness and the Defendant did not call any witnesses despite being aware of the Trial dates. The Court however proceeded to trial given that the matter had been pending for some time. Tendered were the following documents:

- (i) The Certificate of Titles;
- (ii) The Sale and Purchase Agreement;
- (iii) Approval for re-zoning from Director of Town and Country planning;
- (iv) The mortgages with HFC;
- (v) Discharge of Mortgage with HFC;
- (vi) Transfer documents;
- (vii) Capital Gains Tax Certification;
- (viii) Settlement notice;
- (ix) Emails between the parties;
- (x) Notice of default and Vendors rights.

9. The Plaintiff called its witness, a Director and Shareholder for the Plaintiff. The company owned Certificate of Titles 29909 and 29910. The property was listed for sale. His business partner, Rohit had directed the lawyers to prepare documents for 26 August 2020 where it was executed. The purchase price for both properties was \$950,000 VEP. There was a \$10,000 deposit with interest rate of 15% per annum for late payment. He confirmed re-zoning the pieces of land to General Industrial. The two lots were mortgaged to HFC which was discharged for the sum of \$1.42 million. The transfer documents were prepared for transfer of titles to the First Defendant for value of \$950,000. Capital Gains Tax was also paid. A settlement notice was issued to Sherani company and seeking settlement for 23 March 2021. Emails sent on 18/3/21, 6/4/21. Request for extension was sort by Defendant to seek to balance settlement funds. A default notice was issued on 4/10/21. The notice indicated that if the default was not remedied within 30 days, the Plaintiff would seek to enforce the Sale and Purchase Agreement in clause 15 (a). No response was forthcoming from the Defendants nor a Notice pertaining to a breach of contract that they are now claiming. They were also seeking 15% on the balance per annum for late payment and VAT on \$950,000.

10. The 2nd Defendant made several representations to the solicitors for the plaintiff and real estate agents of arranging transfer of funds offshore which was untrue, false and misleading and designed to discourage the Plaintiff from issuing default notice. The 2nd Defendant was saying on email tat personally going to PNG to arrange the funds. The obtaining finance was not a condition of sale. The property was a chicken farm leased to Goodman Fielder and was dormant for short time prior to sale. The rental was \$14,533 per month. Because of the arrangements with 2nd Defendant, they could to change the zoning of the land. If it

was not sold and not rezoned they would have continued with the leasing for chicken farm which is the loss of rental. He confirmed the titles were not amalgamated but remained the same as two titles. No correspondences or communication by the Defendant that their loan application was not granted as they could not take proper collateral security. He was not informed why the Defendant did not complete settlement.

11. In cross-examination he denied the Plaintiff had breached the Agreement. He admitted they were asked by the Defendant to re-zone. He admitted there needed to be a certification of completion when re-zoning is conducted. He admitted the re-zoning process started when he signed the Sale and Purchase Agreement. He denied that the Agreement was not complied with just because there was no re-zoning completion certification. The Defendants intended to buy the lands when they were negotiating at the beginning. He could not comment on whether the re-zoning was complete.
12. In re-examination he admitted they had reached approval stage of re-zoning in accordance with the clauses in the Sale and Purchase Agreement. The Defendants law firm was satisfied with the Town and Country Planning approval and no notice of breach or non-compliance was given.

PART D: SUBMISSIONS BY PARTIES

13. In the Plaintiffs oral submissions, the Plaintiff claimed for specific performance for breach of contract. The allegation is that the Defendant breached the term of conditions. The Plaintiff is now seeking specific performance, liquidated sum of \$940,000 the balance sum owing, 15% per annum for the late payment, general damages with interest at 8%. The Sale and Purchase Agreement was not subject to amalgamation of titles nor loan offer to the Defendant.
14. The Defendant in their submissions argued that the Plaintiff failed to prove that the and had been re-zoned to industrial purpose. Lastly the representations by the 2nd Defendant did not waive the requirements for legally re-zoned land into General industrial. The land given to them was still agricultural and not completely re-zoned to industrial.

PART C: LAW AND ANALYSIS

Was there an Agreement and what were the Terms of the Agreement?

15. It is not disputed in evidence, which the Court accepts that the parties had entered into a formal Agreement on 1st September 2020 to Sell and purchase two pieces of adjoining land for a value of \$950,000 subject to certain conditions.
16. The obligations for the Defendant, who was the purchaser, was to pay a deposit of \$10,000 on the date of execution of the Agreement and then to settle the balance amounting to \$940,000 on the date of settlement i.e 30/60 days from the date of the Agreement or on an extended date of settlement at the consent of both parties.

17. The obligations for the Vendor s in clause 12 of the Agreement as follows:

ZONING AND PURCHASERS ACKNOLWEDGMENTS

- 12.1 That the Vendor warrants that the property is zoned as stipulated on page 1.
- 12.2 The purchaser acknowledges that it has caused the property to be inspected and that the same being purchases 'as is' and solely in reliance upon the Purchasers' own judgment and not due to any representation or warranty made by the Vendor or any agent of the Vendor. The purchaser has made its own enquiries as to the zoning of the property and is purchasing the property subject to possession and possession date as stipulated on page 1 of the Agreement.

18. In page 1 of the Sale and Purchase Agreement under Zoning are the words:

Zoning: Commercial Agriculture (re-zoning to General Industrial Land)
Settlement Date: 30/60 after approval to General Industrial

19. The Additional Terms of Sale in the Agreement were as follows:

- 1. Settlement shall be subject to approval rezoning to General Industrial usage, 30/60 days, both agree in meeting;
- 2. Purchaser deposit payment \$10,000 refundable if the agriculture land not approve for re-zoning to General Industrial.
- 3. Purchaser agreed to use the land immediately after deposit paid and execution in the contract.
- 4. The sale condition as is where is base.
- 5. Chattels list will be listed, generator, silo, fencing, chicken tunnel shades, two concrete residences.
- 6. Boundary already survey and pegged. The purchaser and agent inspect the boundary before sign this contract.
- 7. Vendor would connect power and water when purchaser ready to move into the property before settlement. The purchaser will pay his electrician re-wiring, his own design and purpose usage.

20. In considering an Agreement, the Court must interpret the Agreement objectively.

21. In the case of Carpenters Fiji Ltd -v- Meat Cuisine Fiji Ltd [2022] FJCA 140; ABU0093;2018 (25 November 2022) Basnayake JA, Lecamwasam JA and Dayaratne JA stated on interpretation of Contracts:

“[27] Learned counsel for the Appellant in his supplementary written submissions filed in this court has emphasized that *‘written commercial contracts must be interpreted objectively’*. I am in full agreement with that submission. He has also cited the judgment of the High Court of Australia

in the case of Mount Bruce Mining Pty v Wright Prospecting Pty [2015] HCA 37; (2015) 256 CLR 104 in support of that position. He has cited several paragraphs of that judgment which I agree are relevant to this case but I wish in particular to quote the following parts;

‘The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to text, context and purpose’. ‘In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract’. ‘Ordinarily, this process of construction is possible by reference to the contract alone.....’. ‘However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where the task is facilitated by an understanding of the genesis of the transaction, the background, the context[and] the market image the parties are operating’.

I am in full **agreement** with these views and will therefore follow that approach in the interpretation of this contract.”

22. The Court adopts this approach when interpreting the Agreement.
23. The intention of the sale and purchase of the properties was to obtain land development re-zoning to General Industrial in order to enable the Purchaser to enter and occupy and use the land.
24. The current Agreement did not interpret or explain what constituted a re-zoning approval. It however obligated the Vendor to obtain re-zoning approval.

Land Development Permission

25. Section 7 of the Town and Country Planning Act 1946 (referred hereto as the ‘Act’) restricts development of lands within the vicinity of town areas (including re-zoning) without the consent of the Director of Town and Country Planning as well as the local authority with or without conditions.
26. Section 7 (6) of the Act is an offence creating provision as well and requires the defaulting and liable person guilty of the offence to also take steps to restore the land at its own costs.
27. In the approval granted for Land Development on 22 December 2020 (tendered by Plaintiff as **Exhibit 5** of the evidences), the following conditions of approval were imposed for re-zoning from Agriculture to industrial:

1. That Lot 1 DP 10254, Duilomaloma, Nausori is rezoned from agriculture to industrial.
 2. That adequate landscaping shall be provided within the site to the satisfaction of the Nausori Town Council. This shall be continually maintained to enhance the aesthetic quality of the state.
 3. That no building development shall be permitted on the site prior to the approval of the survey plan.
 4. That an EIA screening application shall be submitted to the Department of Town and Country Planning and Approval of Nausori Town council.
 5. That any other development shall require the consent of the Director of Town and Country Planning and Approval of Nausori Town Council.
 6. That no other activity shall be carried out on site other than the approved by the Director of Town and Country Planning.
 7. That this approval is valid for two (2) years.
28. There are two issues of the terms of conditions herein that the Court must consider.
 29. Firstly, the Approval to Develop Land was for Lot 1 of DP 10254. The property for which the Sale and Purchase Agreement related to was for Certificate of Title 29909 legally described as Lot 14 of DP 7192 with an area of 5.11 acres and Certificate of Title No. 29910 legally described as Lot 8 on DP 7190 with an area of 4.992 acres.
 30. The email records of 7 January 2021 from the Defendants which was admitted by the Plaintiff in evidence was that the two lots in the properties were being amalgamated into one Deposit Plan, for which the application was made to the Director of Town and Country Planning.
 31. The arrangements for amalgamation was admitted in evidence by the Plaintiff.
 32. The two lots when amalgamated consisted of the Deposited Plan surveyed with the correct land area. This was evidenced from the Land Development Permission document and the Certificate of Titles. The DP reflected correctly the two lots and their deposit Plans.
 33. It was therefore clear that, the parties were aware of the amalgamation as an enabler to obtain Land Development permission.
 34. However, despite the admittance of the amalgamation, the Plaintiff thereafter relied upon an email from the Defendant's Counsel on 7 January 2021 acknowledging that the Land Development Permission Certification issued on 22 November 2020 containing the amalgamated new Deposited Plan was satisfactory.
 35. There was no further negotiations by the Defendant or the Plaintiff on how, what and who was to be responsible to fulfil the conditions of approval. There was also no contest or dispute by the Defendant over the new Deposited Plan cited as part of the conditions of approval.
 36. The Court therefore finds, that the Land Development Permission which merged the two lots, did not in any way render the terms of the sale and purchase agreement defective as the deposited plan was a correct amalgamation of the acreage and location of the two lots.

37. The Court finds that based on the terms of the Agreement and further terms of sale, the Defendant, on payment of the deposit, was allowed to occupy and use the land in accordance with the conditions of approval provided in the Land Development Permission.
38. The Defendant had failed to occupy the property at any time despite payment of the deposit and receipt of the Land Development Permission. It was their loss in failing to effect their benefits from the terms of the Agreement.
39. Hence the Vendor, in accordance with the Agreement, had fulfilled their obligation by obtaining the Approval.

Did Extensions over the period of settlement affect the Agreement?

40. Further extensions to the settlement date to enable financing to be arranged and had been sorted and agreed between the parties.
41. Clause 21 of the Agreement states that changes or modifications after execution is granted if in writing and signed by both parties.
42. Both parties had consistently modified the dates of settlement with the Defendant seeking further time to finalise finances for the purposes of settlement. This was emailed and agreed to by the Plaintiff although there nothing signed by the parties.
43. The Court accepts that the emails seeking for modified dates of settlement by the Defendant and accepted in writing by the Plaintiff was sufficient to establish an extension to the settlement date in writing.

Misrepresentation by the Defendants that they would settle

44. The Defendant had sort for extensions of the Agreement arguing taxation as well as finances being sorted. The provisions of the Agreement allowed for modifications in the contract.
45. The representations was a promise to settle, which the Plaintiff relied upon. Such a representation reflected in the contract is a breach of contract. Representations not in the contract, are representations, if they misrepresent intentions, may give a relief in common law.
46. In UK High Court decision in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (11 July 2011) discussed about misrepresentation and stated:

“Making a representation

215. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: see *Raiffeisen*,

supra, at [81]; Kyle Bay Ltd v Underwriters Subscribing under Policy No. 01957/08/01 [2007] EWCA Civ 57; [2007] Lloyd's Rep IR 460, 466, at [30]–[33], per Neuberger LJ.

216. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However, as stated in *Clerk & Lindsell* para 18-13:

"A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud."

218. A statement as to the future may well imply a statement as to present intention: "that which is in form a promise may be in another aspect a representation" - *Clerk & Lindsell*, para 18-12, quoting Lord Herschell in Clydesdale Bank Ltd v Paton [1896] UKLawRpAC 30; [1896] AC 381, 394.

47. Therefore on the basis of the representations by the Defendant that they intended to purchase the properties was the Agreement drafted and duly signed by both parties.
48. Therefore any misrepresentation by the Defendant would construe a breach of contract.
49. Despite the Defendants argument, the emails proved, on a balance of probabilities, that their Counsel had accepted that there was a Zoning Approval for Lot 1 Deposit Plan 10254 for an area of 4.0885 ha that was the same 2 lots that were to be amalgamated.
50. The evidence of the Plaintiff, which the Court accepts is that despite written reminders and a settlement and later a demand notice, the Defendants failed to settle the matter within the time period agreed between the parties despite later extensions.
51. The Court therefore finds that the Defendant had breached the terms of the Agreement.

What reliefs are available for a default of the Purchaser?

52. According to the Agreement, clause 15 provides for the Vendor's remedies as follows:
 - (i) Enforce the contract;
 - (ii) Rescind the contract and forfeiture of the deposit;
 - (iii) Sue for specific performance;
 - (iv) Resell the property by public auction or private contract on cash or credit and on terms and conditions that the Vendor deems proper;
 - (v) Re-enter and take possession of the property without notice;
 - (vi) Charge interest for the delay in settlement;
53. The Plaintiff has sort for the full unpaid amount and interest in clauses 15 (a) and (f) available under the Agreement and common law damages.

Monies from balance of Sale

54. The Plaintiff has sort for the consideration of the balance to the Agreement be awarded as a remedy for default in the Agreement.
55. The Court's power to exercise the discretion arises judiciously.
56. The discretion to award remedies of damages is to put the person who lost out in a position he was in prior to the contract.
57. In this instance, the Plaintiff did not have any monies of such nature with him prior to the Agreement.
58. The monies owing from the balance of the Sale and Purchase Agreement was for consideration of the properties being exchanged.
59. However for the Plaintiff to seek such relief, the Plaintiff should have transferred the property and monies were owing.
60. In this instance, none had arisen. I therefore find that the claim is inequitable as the settlement and more importantly, there has not been any completion of purchase culminating with registration of a transfer to establish change of ownership in order to entitle the Plaintiff to the relief sort.

Damages

61. The award of damages for a breach of contract is to place the innocent party in the position he was in prior to the contract as stated in the case of Robinson –v- Harman (1848) 1 Ex 850; 154 ER 363 at 365 Parke B stated:

“that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.’
62. According to commentaries and materials in the book “Contract: Commentary and Materials” by Peter Heffey et al (8th edn, Law Book Company, NSW) page 839-840 stated:

“The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendants performance arising out of or created by the contract. ... The onus of proving damages sustained and the amount of damages will be commensurate with the plaintiff's expectation, objectively determined rather than subjectively ascertained. To be entitled to civil claim, the Plaintiff must show that there was a breach of contract for which a civil wrong attracted actionable damages which are compensatory. There was no consistent secondary evidences to show the losses sustained from the breach of contract.”
63. The Plaintiff has also claimed for damages for loss of earnings as a result of the property not being occupied awaiting completion of the terms of settlement for rental profits earned at the sum of \$14,533.33 per month.

64. The plaintiff had stated this in his evidence explaining that the lands operated chicken farms leased to Good man fielder earning \$14,533.33 per month. In addition a super wind turbine was built valued at \$1.1 million by the Plaintiff for the chicken farms
65. Plaintiff has not provided any evidences of this specific losses by way of secondary evidences. So despite his primary evidence on oath, there is no consistent evidences by documentary to verify this. The witness is a shareholder and Director of a Company. It would be prudent that the company keep documentations of the same as part of its audited finances.
66. I find that the Plaintiff is unable to prove this claim for loss of rental earnings.
67. The Plaintiff had claimed for depreciation value of the buildings, fixtures and fittings from 23 March 2021 to 17 November 2021. However no audited reports verified the value of these assets to corroborate the claim for damages of such.
68. The Court will not grant any award of damages on such.
69. The plaintiff sort for interests charge for HFC from 23 March 2021 to 8 April 2021. There was no evidences of these interest by way of bank statements or letter or offer. Again this was not established by evidences from the Plaintiff.
70. The Plaintiff however also claims for damages for expenses sustained from preparation of the land for zonal approval, discharging of mortgage and payment of stamp duties. All these acts were evident from the documents filed into court.
71. The value of the properties during mortgage was 1.3 million each. However despite claims of discharge documents being prepared, there was no document filed into Court to show that the discharge documents had been lodged and registered. Therefore it is clear from evidences that the documents were prepared but not lodged unless the parties settled the matter.
72. There was a capital gain tax clearance organized by the Plaintiff. There was no documentation to show the expenses arising to arrange for this clearances.
73. So the Plaintiff had encountered expenses for the preparation of the documents to transfer the properties. However no specific monies were rendered into Court.
74. The Court will therefore grant damages a conservative amount of \$2,000 as damages approximating from expenses in preparation for settlement.

Interests as per section 15 (f)

75. The Plaintiff has also claimed for interest in accordance with the Agreement. This is a provision that the Court will award to the Plaintiff from the date of settlement to the date of default as agreed upon by the parties at 15% per annum from 23 March 2021.

Retention of deposit

76. The Plaintiff has the deposit. Since the Defendant's Statement of Defence has been struck off, the Court accepts that as per the admission of facts in PTC and as per the evidence by the Plaintiff in court, that \$10,000 was paid.
77. Given that the default was the Defendants and not the Plaintiff, the Court will grant that the deposit be retained by the Plaintiff.

Costs

78. The Plaintiff has incurred costs for the matter to be brought into this Court. The Court summarily assesses costs at \$2000.00.

PART D: ORDERS OF COURT

79. Court finds there was a breach of Agreement and grants to the Plaintiff the claim and awards as follows:
- (a) Retention of Deposit of \$10,000;
 - (b) General damages of \$2000.00;
 - (c) Interest of 15% annually from the date of breach until date of judgment;
 - (d) Post- judgment interest at 5%;
 - (e) Costs summarily assessed at \$2000.00.



A handwritten signature in blue ink, consisting of a large, stylized initial 'S' followed by a wavy line.

Mrs Senileba LTT. Waqainabete-Levaci

Puisne Judge