

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 263 of 2021

BETWEEN: **BLUE PACIFIC (FIJI) PTE LIMITED** a limited-liability
company having its registered office at Lot 805 Pacific
Harbour, Deuba, Fiji.

PLAINTIFF

AND: **VINOD PATEL & COMPANY PTE LIMITED** a limited
liability company having its registered office at 1 Ratu Dovi
Road, Centrepont, Suva, Fiji.

DEFENDANT

Counsel: Mr. B. Solanki for the Plaintiff
Mr. Kalim for the Defendant

Dates of Hearing: 13.10.2023, 13 and 14 March 2025
and 30 and 31 July 2025.

Date of Judgment: 11.9.2025

JUDGMENT

INTRODUCTION

- [1] Plaintiff leased the land (The Lease) and building situated 4 Ross Street, Nausori described in Certificate of Title No 15918 being Lot 21(The Property) to Defendant for ten years from 15.11.1997 for a monthly rent of \$1000.
- [2] According to lease agreement parties agreed that the premises was in '*rundown condition*' hence, substantial improvements required in order for Defendant to use it for the purpose it was leased and all such improvements were allowed at '*discretion of landlord*' and costs were to be borne by lessee.
- [3] Accordingly commercial rental for the Property for ten years was fixed, and there was no clause for exercise of option for further, fixed term, but tenant could seek renewal with consent of Plaintiff, upon such request being made

three months prior to the expiration of ten-year fixed term for renewal. No request for renewal made with stipulated time and the tenancy continued

- [4] In the absence of such request for renewal, the occupation becomes monthly tenancy in terms of Clause 5 (f) of the Lease.
- [5] Defendant, after expiration of the lease in 2007, continued on monthly basis and no request made for increase of rentals for nearly for another eight years and rental paid at the end of the Lease was paid and accepted till request for increase was made in October, 2015
- [6] Plaintiff requested increase in rental from 15.11.2015. There was no dispute as to requirement to increase the rental, as commercial rental of the Property had remained unchanged for over eighteen years.
- [7] So, parties negotiated on the basis of the valuation reports obtained around August and September 2015 by two valuers.
- [8] Plaintiff had requested a monthly rental of \$11,000 and term was for two years with option for renew biannually. Plaintiff had also drafted a new lease agreement with retrospective effect from 15.11.2015. Defendant had not agreed to the amount of rent and term and had suggested few options but Plaintiff refused the same.
- [9] On 29.8.2016 Plaintiff issued a letter to Defendant and notified that the required rental at \$11,000 per month VEP effective from 15.11.2015. It also stated if not agreeable ninety day period allowed for vacation of the Property. Defendant neither agreed for rental requested by Plaintiff nor vacated premises within ninety-day time period.
- [10] This led to Plaintiff instituting an action for eviction and Defendant also instituting an action seeking equitable relief, but both actions did not proceed as Defendant vacated the Property on 30.11.2021
- [11] Defendant vacated the Property at its convenience approximately four years from Plaintiff's first notice to vacate, on 30.11.2021.
- [12] During this period without prejudice basis Plaintiff accepted rentals paid including increased rentals without prejudice basis.
- [13] Plaintiff is claiming for damages for loss of income from 15.11. 2015

Facts and Evidence

[14] Following facts agreed;

- a. That the Plaintiff is a limited liability company incorporated in Fiji and engaged in the business of properties including leasing of the same.
- b. The Defendant is a limited liability company incorporated in Fiji and inter alia in the business of hardware retail and export.
- c. The Plaintiff is the registered proprietor of all that land and building situated at 4 Ross Street, Nausori, comprised and described in Certificate of Title No. 15918 being Lot 21 (The Property)
- d. That Plaintiff. entered into a Lease Agreement with the Defendant on or about 29 .1.1998 for a term of 10 years and a monthly rental of \$1,000 and VAT. (The Lease)
- e. The Lease commenced retrospectively from 15.11.1997.
- f. The Defendant conducted a hardware retail business from the said property.
- g. That following the expiration of the Lease on or about 15.11.2007, the Defendant became a month-to-month tenant .
- h. That on or about 24.10.2015; the Plaintiff began liaising with the Defendant for a new Lease Agreement.
- i. That despite a period of negotiations, the Plaintiff and the Defendant were unable to agree to new terms and conditions and a new Lease Agreement had not been signed or executed between the parties.
- j. That on 29 .8.2016, the Plaintiff issued a letter to the Defendant whereby it stated that the revised rental would be \$11,000 per month plus VAT effective from 15 .11. 2015.
- k. In the same letter, the Plaintiff also informed the Defendant that if they did not pay the new rental within 20 working days, they were required to vacate the property within 90 days from

the date of the expiration of the 20-working day notice referred to above.

- i. The Plaintiff solicitor, Solanki Lawyers issue and served a Notice to Vacate/Quit on the Plaintiff and such Notice which was duly received by the Defendant on or about 24 .1. 2017.
- m. The Plaintiff on the 5th of July 2017 made an application, pursuant to section 169 of the Land Transfer Act, (Civil Action No. 198 of 2017) for vacant possession against the Defendant.
- n. That on 14.9.2021, the Defendant informed the Plaintiff that it intended to vacate the property by 30 November 2021 and did vacate the property on that day.
- o. Civil Action No. 198 of 2017 was discontinued by the Plaintiff on 14 .12. 2021 with costs of \$1000 in favour of the Plaintiff.
- p. That High Court Civil Action No. 241 of 2017 was discontinued by the Defendant (being the Plaintiff in that action) on 9 .12. 2021 with costs of \$1000 in favour of Plaintiff (being Defendant in that action).
- q. Plaintiff instituted this action thereafter on the same day seeking damages and or loss of income for the occupation of Defendant from 15.11.2015 till they vacated.

[15] For Plaintiff its Director Magan Lal gave evidence and marked Plaintiff's documents. He stated that the Defendant took occupation the Property and was not in Fiji at that time and was not involved with Plaintiff at that time. Some concession were made, and lease negotiations were conducted by his brother.

[16] He was not privy to any dealings prior to his appointment as a director of Plaintiff. He agreed that he would not know the condition in which the Property was originally given, as it was his brother who managed the property at that time.

[17] He stated that negotiations for rental increase commenced in October, 2015 and basis of that were two valuations obtained prior to that for revaluation of the Property. He stated that Defendant had taken delaying tactic and he was frustrated and this was shown in his communications.

- [18] These negotiations were ultimately unsuccessful. Despite this, the Defendant remained in occupation, and the Plaintiff continued to issue monthly invoices on a "without prejudice" basis.
- [19] In support of the Plaintiff's claim for outstanding monies, Mr. Lal produced an Excel spreadsheet. Under cross-examination, he accepted that the sums actually invoiced to and paid by the Defendant at the time were lower than the amounts now claimed. He explained that the rent previously charged was based on "interim" payments. He admitted that the higher figures now claimed were previously not invoiced or demanded from the Defendant.
- [20] It is not disputed that Defendant had substantially improved the property including removable structures and this had increased the commercial rental.
- [21] Defendant had removed such additional structures that provided additional area for its business before handing over to the Property.
- [22] Plaintiff is also claiming that the structure be restored to original state it was in 1997 November, but neither party could submit a plan or written evidence to determine exact position at that time, other than it was in 'rundown' condition.
- [23] Defendant in the counter claim sought an amount of \$189,650.07 as special damages for the improvements to the Property.
- [24] Defendant's witnesses were unable to prove the cost of improvements.
- [25] It is also not disputed that substantial improvements to the Property that increased the rental area, were removed by Defendant and practically it would be a waste to reinstate the 'rundown' status of the Property.
- [26] From the Lease parties had entered in to conditions knowing the condition of the Property and also requirement to improve it substantially. Defendant as an entity involved in the sale of hardware items must be aware of the cost of such improvements. So the term of the Lease and amount of monthly rental must factored in to such improvements required and the removal of such improvements at vacation of premises.
- [27] So the terms were negotiated at commercial or business scenes. There was no agreement to reimburse for ANY improvements on the property in the lease.

- [28] Plaintiff had negotiated with Defendant in good faith to come to an amicable position regarding a new lease agreement from 15.11.2015.
- [29] These negotiations had taken more than usual time period as Plaintiff had already with them two valuation reports where estimated rental of the Property were assessed by two private Valuation Firms conducted in August and September, 2015.
- [30] Defendant had never objected to increase of the rentals but the amount of rental and the term of new lease was not agreed. Plaintiff asked for \$11,000 from 15.11.2015 and according to draft new lease dated 12.3.2016 marked P6, the period of the lease was two years from 15.11.2016.
- [31] Plaintiff had on 22.11.2016 requested increase of rental to \$11,000 in document marked P5 and stated that it 'would seem to favour Defendant more than Plaintiff. As such Plaintiff had suggested \$11,000 as initial amount where both parties could come to an agreement.
- [32] Letter of 22.1.2016 addressed to Managing Director of Defendant with heading of '*Re Valuation and the Rental Assessment /4 Ross Street Nausori,*' further stated that parties '*should not be limited by this figure (\$11,000) and consider if upwards of this figure should be considered.*'. This indicated that Plaintiff was seeking a rental more than \$11,000 and VAT for a month from 15.11.2015 and this was based on the two valuations obtained prior to request for increase of the rentals.
- [33] For Defendant three witnesses gave evidence. Nilesh Ashish Prasad's Evidence proved that substantial improvements were done and he was involved in the said improvements. He also stated that improvements to the property started prior to the Lease.
- [34] Ajay Kumar who was the branch Manager of Defendant in evidence stated that when invoices were issued he paid them in full he stated that additional payments were not agreed from 15.11.2015. He stated that the Property was returned to Plaintiff in good order. He stated that repairs to the property were done as and when required.
- [35] He admitted that the invoices were issued on a without prejudice basis. According to him without prejudice did not mean and was never understood to mean that a even more higher rent would be charged.
- [36] Monish Raju was the Property Manager of the Defendant and had directly communicated with Magan Lal and in his evidence he stated the Property required significant improvements as it was in dilapidated or rundown

condition. He stated that he had negotiated the Lease and was also involved in the negotiations for long term lease in 2015

[37] He stated that the valuations are only estimates so the parties can use them to negotiate and no final agreement on new rental amount reached by the parties as evidenced from the documents marked at hearing.

[38] He stated that Plaintiff sought a rent of \$11,000 but defendant offered only \$5,700 and this was rejected by Plaintiff and a notice to vacate was issued.

[39] He stated that throughout the period of occupation rental were paid, and all of which were invoiced and paid.

Effective Date for Claim for Damages for Occupation.

[40] Plaintiff claimed from 15.11. 2015. When Plaintiff sought increase of rental from \$1,000 Defendant had not objected to the said request.

[41] It was evidenced more than once Plaintiff had informed 15.11.2015 as the effective date and prior to that Plaintiff sought increase of rent.

[42] During the negotiations and there was no objection to applicable date, at that time and the dispute arose mainly regarding the amount and term of the proposed lease.

[43] It is not disputed that Plaintiff and Defendant entered into a long-term lease of ten years with fixed monthly rental at \$1150 from November, 1997 but *'owing to economic stipulation the rental for the first five years (had) been reduced to \$1,000 VEP per month'*. The lease agreement was executed on 27.11.1998 with retrospective effect. So parties through conduct had previously acted in similar manner and they by conduct had acted similarly.

[44] Prior to litigation at no time Defendant objected to application of increased rental from 15.11.2015.

[45] The term of the Lease expired uneventfully and Defendant did not seek renewal of it but continued occupation and continued to pay the same rental and Plaintiff accepted payments, without seeking increase till October, 2015, when the parties commenced negotiations for increase of rental.

[46] This was after Magan Lal became Director of Plaintiff and also obtaining two Valuations for the Property. The basis of the valuation of the property was the estimated rental for the Property and having seen the potential rental for the Property Plaintiff had requested from Defendant an increase on or around October, 2015. (see agreed fact g)

[47] In terms of clause 5(f) of the Lease entered by conduct of the parties from 15.11.2007, Defendant became 'a *monthly tenant*' and monthly rental was the amount paid which was accepted without requesting an increase till October, 2015. So Plaintiff is estopped from claiming for increase during this time

[48] Defendant vacated the premises on its own accord on 30.11.2021. It was evidenced that Defendant had no suitable place to move and later moved to a nearby property on the same street, occupied by Defendant under different type of retail business.

[49] Plaintiff had also submitted a draft lease agreement to Defendant on 12.3.2016 (P6) with the increased rental from 15.11. 2015 for a period ending 15.11.2017 (approximately two-year period).

[50] Draft new lease marked P6 which was replied by P8 of Defendant indicated the date of increase of rental was from 15.11.2015 this was reiterated in letters marked P9, and also in P10, both letters were from Magan Lal. Letters marked P9, and P10 were after Defendant had counter proposed to the proposed new lease agreement and increase of rental proposed (See Documents marked as P5, P6, P9 and P10)

[51] On 22.6.2016 Defendant had replied in its letter (P8) where it had stated as follows

“We have come to a final decision that we would like to renew the agreement based on the following terms and condition which can be further included in the lease agreement by our solicitors, kindly refer below for the conditions of the agreement;

Option 1

Outright purchase of property based on Market valuation.

Option2

Long terms tenancy of 30 years for which land lord provides full consent for alteration and development of the said property. All developments to be carried out with proper approval from relevant authorities.

Rental per month \$5,720 VIP prior to development and after development is completed market rental for land only will be paid for the period as the term of tenancy

Current caveat on the property to be still be enforced till the end of tenancy term.

Development on the property will be handed over to the land lords after expiration of the tenancy term

Option 3

Term of the agreement 10 years plus further renewal of 10 years after expiration of initial term of the agreement

Rentals per month \$5,720 VIP base on current rental valuation of the existing shop space submitted by Fairview valuation and in addition to this Vinod Patel is willing to pay for rental of land only for the portion which has been developed by Vinod Patel. This rental value can be determined through a rental valuation assessment through a vacation company.

Rental review on every 3rd anniversary base on 10% or CPI percentage rate increase whichever is lower.....

- [52] From the above detailed options it can be deduced that there was no objection from Defendant as to the applicable date for rental increase being from 15.11.2015
- [53] Date of 15.11.2015 is equitable considering that Plaintiff had requested increase of rental from October,2015.
- [54] Plaintiff had also emailed again on 19.9.2016 (P14) reiterating that increase of rental should be from 15.11.2015 and there was no reply to objecting to this position which Plaintiff maintained throughout.
- [55] Form the above there was no objection by Defendant, as to the application of rental from 15.11. 2015 but the dispute was the amount and other terms such as duration and method of increase of the rentals.
- [56] Plaintiff's claim is for damages for loss of income from 15.11.2015 and both parties were aware that Plaintiff was estopped from claiming damages prior to this date as it had passively accepted rental agreed eighteen years ago.
- [57] Both parties are '*assumed to act reasonably*' in order to resolve the issues but Plaintiff had clearly indicated to Defendant the effective date for such negotiations and retrospective effect. So it is reasonable to consider 15.11.2015 as the effective date for increase of rental despite Defendant's objection at hearing.

- [58] In order to encourage parties to resolve the issues themselves, there should not be undue advantage for any party due to time taken, irrespective whose fault it was.
- [59] Plaintiff had unequivocally stated the effective date as 15.11.2015, to Defendant and it had opportunity to object to it as it had objected to other terms. So Defendant had also not acted unreasonably, in this regard, prior to litigation.
- [60] There was no objection for application of increased rental retrospectively, and the objections was mainly to the amount of rental. This was mainly due to Plaintiff's lack of interest of the Property, hence not seeking an increase of commercial rental for eighteen years and Defendant had benefitted from this unusual windfall and was reluctant to reasonable increase proposed based on two Valuation Reports. ,of the Property. In these reports, there where rental value was assessed.
- [61] In UK Privy Council decision *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd & Ors (Rev 2)* [2009] UKPC 45 (26 November 2009) [2011] 1 WLR 2370, [2010] BLR 73, [2011] Bus LR D1, [2009] UKPC 45, [2010] Bus LR 73Held,

“ 49. Several of the recent cases have explored the nature of the hypothetical negotiation called for in the assessment of Wrotham Park damages. It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. **Both parties are to be assumed to act reasonably.** The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: Wrotham Park at p815, *Jaggard* at pp282-283. This point is material in the present case since on the concurrent findings of the courts below Dr Frischmann, the directing mind of PFE, was a very determined (even a recklessly determined) negotiator (see especially the judgment of the Royal Court at paras 110-111 and 411-412).

50. Another issue is **how far the court is entitled, in its assessment** of Wrotham Park damages, to take account of events occurring after the time at which the hypothetical negotiation takes place (and in particular, to take account of how profitable the outcome has been for the contract-breaker). This issue sometimes tends to get confused with the wider issue of whether the court is awarding

compensatory or restitutionary damages. Their Lordships consider that the right approach is that of the Court of Appeal in *Lunn Poly*, in which Neuberger LJ observed, after citing the judgment of Mr Anthony Mann QC in *AMEC Developments Ltd v Jury's Hotel Management (UK) Ltd* (2001) 82 P & C R 22 BAILII: [2000] EWHC Ch 454 , paras 11-13:

“27 It is obviously unwise to try to lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events that have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts. Further, the point before us today was not before Brightman J or before Lord Nicholls in the cases referred to by Mr Mann.

28 Accordingly, although I see the force of what Mr Mann said in [13] of his judgment, it should not, in my opinion, be treated as being generally applicable to events after the date of breach where the court decides to award damages in lieu on a negotiating basis as at the date of breach. After all, once the court has decided on a particular valuation date for assessing negotiating damages, consistency, fairness, and principle can be said to suggest that a judge should be careful before agreeing that a factor that existed at that date should be ignored, or that a factor that occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which they would arrive.

29 In my view, the proper analysis is as follows. Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant. However, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that

a specific post-valuation-date event be taken into account."

- [62] The above case was not decided in a case where mesne profit was awarded as damages, but when parties were negotiating on without prejudice basis for a lease of a property, such negotiations should be encouraged, though one party may have hidden agenda for delay or buy time till the time is opportune to move out. This can happen in commercial rental of premises dealing with large number of retail customers who become loyal to the place of business due to convenience and other factors. so moving out within a short period may cause loss of such customers thus loss of revenue.
- [63] Defendant had remained in the premises for nearly eighteen years and from that ten years was under the Lease at fixed rate of rent which required revision .
- [64] Defendant's manager said that it was difficult to find a suitable premises and finally it moved to a nearby premises occupied by another different type of retail business occupied by Defendant. When asked from Defendant's witness why this was not done earlier, he stated that they did not have a suitable place to move said entity. This proves that Defendant stayed in the property, until it had got an alternative premises to move business conducted in nearby premises.
- [65] This supports payment of reasonable rental, which it had done lately where rental of \$10,900 from 2020 and further increased rental of \$19,075 paid from 2021 till Defendant vacated on 30.11.2021. These payments were made, on without prejudice basis.
- [66] Plaintiff had allowed Defendant to remain in the premises in good faith from 15.11.2015 but, at the same time informed that Defendant should pay an increased rental from that day. Plaintiff had in writing informed Defendant that increase of rental was to be applied from 15.11.2015 irrespective of the date of entering into a new lease agreement.
- [67] Defendant cannot take advantage of its own delaying of negotiations to remain in the Property till a suitable alternative premises found.
- [68] Both parties relied on Section 100 of Property Law Act 1971 states;

“[PL 100] Restriction on effect of waiver

100 (1) Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor or his or her personal representatives, or assigns is proved to have taken place on or after the commencement of this Act, in any one particular instance, that actual waiver shall not be deemed to extend to any instance or any breach of covenant or condition other than that to which the waiver specially relates, or to be a general waiver of any such covenant or condition, unless an intention to that effect appears.

(2) After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy.”

[69] The above statutory provision also supports and covers time after notice to quit was issued, irrespective of parties were aware of their actions were ‘*without prejudice*’, basis. Section 100(2) of Property Law Act 1971 applies when there were no express indication by parties that they were acting on without prejudice basis after ‘*giving of a notice to quit*’.

[70] This statutory provision does not precluded right of the parties to negotiate ‘without prejudice’ basis from a date prior to issuance of notice to quit. In such instance applicable date for claim for damages is not the date of notice to quit as parties were aware of the effective date of the increase. Parties were negotiating for a commercial lease and the negotiations had taken a considerable period but they were aware of the effective date for such increase if settled.

[71] In this case both parties were legal entities acting in commercial interest had negotiated to enter into new lease agreement with effect from 15.11.2015. Parties had also accepted ‘without prejudice’ basis expressly by stating that in receipts issued after negotiations for a lease agreement failed, but again both parties had acted ‘without prejudice’ in order to minimise the damage to Plaintiff by increase of the rentals on without prejudice basis.

Damages for Wrongful Occupation

[72] Halsbury's Laws of England¹ Damages (Volume 29 (2024)) (ii) Torts Affecting Land, states,

¹ Halsbury's Laws of England > Damages (Volume 29 (2024)) > 7. Measure of Damages in Tort > (2) Torts other than Those Involving Personal Injury > (ii) Torts Affecting Land

“421. Trespass to land; wrongful use and occupation.

Where a defendant has been in wrongful occupation of the claimant's land, the claimant has a specialised action for trespass known as the action for mesne profits. The **normal measure of recovery in an action for mesne profits**, savouring more of restitution than damages for loss, is the market rental value of the property for the period of wrongful occupation, without any deduction (save perhaps as is taken into account in the court's assessment of the realistic market rental value) for the fact that the claimant might not have been able to let the property or otherwise profit from it had the defendant not been there. But this may be varied if the occupation is against the background of a previous or contemplated agreement for a concessionary rent at below the market value, or if for some other reason the accommodation is worth less to the defendant.

The claimant suing for wrongful occupation is not bound to claim on this basis: it always remains open to them to elect to prove loss in a greater amount (for example, by showing that property originally let at a concessionary rent would otherwise have been successfully let on the open market.

Where there has been trespassory use (as opposed to occupation) of land, a similar principle applies. As an alternative to suing for actual damage done or loss suffered, damages can be claimed on the basis of the benefit gained by the defendant from their use of the claimant's land. The benefit is normally reckoned by what would have been a reasonable charge, taking some account of the relative position of the parties and of the possibility of obtaining compulsory rights.”(foot noted deleted and emphasis added)

[73] It is not in dispute that Defendant remained in possession of the Property on ‘*monthly basis*’ on 15.11.2015 and remained in occupation despite being issued a notice to quit and also institution of action for eviction. It vacated the premises at its convenience on 30.11.2021. So the Defendant was in wrongful occupation, as it could not vacate the premises without making a significant loss to its retail business.

[74] Plaintiff was required to give only one month notice to Defendant and Plaintiff had given more than ninety days to vacate and had informed that the occupation is as trespasser (see P 18).

- [75] Again on 13.3.2017 reiterated that despite discussions for settlement through solicitors the eviction notice remained and requested Defendant to dismantle removable improvements to the Property prior to the time provide in the said notice. (see P19)
- [76] Letter of 13.3.2017 also reiterated that rentals were received on '*without prejudice*'. This was always so even prior to this as evidenced from the receipts issued by Plaintiff for the rentals (see P25 receipts)
- [77] The Property is commercial property hence, parties negotiated for rental in commercial or business manner. As parties never agreed for a rental there was no lease entered between the parties.
- [78] So the occupation of Defendant on the premises was without consent of Plaintiff and this remained so after issuance of notice for vacation 28.08.2018, till vacated the premises on 30.11.2021. This was a breach of the Lease where Defendant could occupy "on monthly basis" with consent of Plaintiff.
- [79] Defendant's contention is that it was not in occupation of the Property as trespasser and mesne profit can be claimed when the Defendant becomes a trespasser. This position cannot be accepted in this action due to the conduct of the Defendant.
- [80] In this action Plaintiff had repeatedly asked Defendant to vacate and Plaintiff was sympathetic towards Defendant considering the nature of the business it had conducted and also being a long terms tenant for over eighteen years, but Defendant had abused the said leniency of Plaintiff.
- [81] So the occupation of Defendant after eviction notice was issued was unlawful, despite acceptance of rental on '*without prejudice*' basis. This was to reduce the loss from unable to come to an agreement between the parties. Both parties agreed that there should be increase of rental as rental amount remained unchanged for eighteen years.
- [82] It is not in dispute as stated earlier in this judgment that Plaintiff was seeking increase of the rentals from 15.11.2015 and this was stated in the draft lease marked P6 which was replied by Defendant on 22.6.2016, but no objection was raised for the retrospective application of it.
- [83] It was clear from the evidence that Defendant had taken more than reasonable time to reply on several occasions. It can be deduced from the conduct, that Defendant had delayed eviction, which was inevitable as the improvements to the property were done in terms of the Lease for them to

conduct its commercial activity. In such a situation the improvements cannot create a right to occupation even on equitable ground on the evidence.

- [84] Defendant's own conduct of delay had resulted frustration of Megan Lal, this was clear from his communication, but he had allowed Defendant, to remain, subject to payment of a minimum rental where both parties could agree on '*without prejudice*' basis.
- [85] This was a purely commercial transaction between two commercial entities and the approach by Plaintiff makes business sense. This approach also reduced the damages claim significantly while allowing parties to mediate among themselves and later with solicitors involved on '*without prejudice*' basis. This had benefited Defendant to delay vacation of the premises, and to move at its convenience irrespective of not having a lease agreement, for a fixed term.
- [86] So payment of rental by Defendant on *without prejudice* basis cannot be the detriment of Plaintiff who had acted reasonably in business sense, considering the long-term relationship between the parties and also type of business and difficulty in moving.
- [87] Megan Lal had was aware of the consequences of negotiations and he had given notice as early as 19.3.2016 to Defendant of the importance of having '*written evidence in support of (our) discussion*'. (P7).
- [88] So both parties knew that payment and acceptance of monthly rentals '*on without prejudice*' basis could not bind or release a party from their respective legal obligations.
- [89] From the evidence it proved that Defendant remained on the premises after notice to quit given by Plaintiff. Defendant had even taken legal action for eviction but due to delay in that process Plaintiff had accepted rentals without prejudice basis. So the occupation of Defendant remained wrongful despite acceptance of rental on without prejudice basis.
- [90] UK Court of Appeal decision *Javad v Aqil* [1990] EWCA Civ 1 (15 May 1990) [1991] WLR 1007, [1991] 1 WLR 1007, [1991] 1 All ER 243, [1990] EWCA Civ 1, [1990] 41 EG 61, 61 P & CR 164;

I shall consider first the position in principle. A tenancy, or lease, is an interest in land. With exceptions immaterial for present purposes, a tenancy springs from a consensual arrangement between two parties: one person grants to another the right to

possession of land for a lesser term than he, the grantor, has in the land. The extent of the right thus granted and accepted **depends primarily upon the intention of the parties.**

16. As with other consensually based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. **In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms** the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. **But I emphasise the qualification 'failing more'. Frequently there will be more.** Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so however large or small may be the amount of the payment.

So in this case there is evidence to prove on balance of probability there is evidence that Plaintiff had allowed Defendant to remain in property subject to increase of rental from 15.11.2015 if not agreed this amount needs to be determined by court on the basis of damages for the landlord for deprivation of the Property.

Further held,

18. Of course, when one party permits another to enter or remain upon his land on payment of a sum of money, and that other has no statutory entitlement to be there, almost inevitably there will be some consensual relationship between them. It may be no more than a licence determinable at any time or a tenancy at will. But when and so long as such parties are in the throes of negotiating larger terms, caution must be exercised before inferring or imputing to the parties an intention to give to the occupant more than a very limited interest, be it licence or tenancy. Otherwise the court would be in danger of inferring or imputing from conduct, such as payment of rent and the carrying out of repairs, whose explanation lies in the parties' expectation that they will be able to

reach agreement on the larger terms, an intention to grant a lesser interest, such as a periodic tenancy, which the parties never had in contemplation at all.

19. I turn to the authorities. Of the earlier cases I refer first to the decision of the Court of King's Bench, in Doe d Cheny v Batten (1775) 1 Cowp 243, for a much-quoted observation of Lord Mansfield. There a tenancy at will of some warehouses was determined. After proceedings had been brought to recover possession, and while they were still pending, the landlord accepted payment of a quarter's rent. Lord Mansfield said (at p 245):

The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was? If the truth of the case is, that both parties intended the tenancy should continue, there is an end of the plaintiff's title: if not, the landlord is not barred of his remedy by ejectment: . . .

20. Next I can go straight to the decision of the Court of Common Pleas in Doed Lord v Crago (1848) 6 CB 90. There Wilde CJ reviewed some of the earlier authorities. He did so in the context of an argument that from the payment of rent on a yearly basis the law presumes a tenancy from year to year, in the absence of evidence referring such payment of rent to some other contract. Thus the decision is of particular relevance having regard to the defendant's arguments in the present case. There a lease had been granted for a term of 99 years or until the earlier death of the survivor of three named persons. The assignee of the lease remained in possession for many years after the death of such survivor, paying the annual rent reserved by the lease. The assignee of the lease claimed that the lessor had known of the death for some years, that a new yearly tenancy had been created by the payment and acceptance of rent after the termination of the lease, and that the new tenancy had not been determined by notice to quit. Delivering the judgment of the court, Wilde CJ said (at p 98):

We are of opinion that the learned judge acted correctly in leaving to the jury the question of fact, whether the premises had been occupied by the defendant as under the old lease, in ignorance of its determination, or under some new agreement. And we think that it would not have been proper to have directed the jury that the law implied from the receipt of rent under the circumstances proved some agreement creating a yearly tenancy, which could not determine without notice to quit.

It is clear, that, upon proof of the payment of rent in respect of the occupation of premises ordinarily let from

year to year, the law will imply that the party making such payments holds under a tenancy from year to year; and it was so ruled in Bishop v Howard. But it is equally clear that it is competent to either the receiver or payer of such rent to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the receipt of rent, unexplained.

The principle, that the payment of rent may be explained, for the purpose of protecting parties from the legal consequences which would otherwise follow from such payments, is recognised by *Buller J*, in Williams v Bartholomew, and was allowed in Rogers v Pitcher, and it is consistent with the general principles of the law.

In this case, if the receipt of rent by the lessor of the plaintiff had been unexplained, a tenancy from year to year ought to have been presumed, according to the decision of Bishop v Howard. But the plaintiff did not leave the receipt of rent unexplained; but gave evidence for the purpose of shewing that such receipt of rent had taken place under a mistake of fact in respect of the determination of the lease, which had improperly been concealed from him. Upon that explanation, the question in the cause was no longer, what was the legal presumption from the unexplained payment of rent; but, whether the evidence offered to explain the receipts on the part of the plaintiff did establish, that, in point of fact, the rent had been received in relation to the old lease, and not upon a new agreement. That was a question of fact, which we think was properly left to the jury. And we think that the jury were properly directed, that, if such rent had been received in relation to any new agreement, the verdict should be for the defendant; such direction being in conformity with the principle, that, from the payment of rent, unexplained, the law will imply a tenancy from year to year, with the incidents attached to it, namely, the necessity of a regular notice to quit, before the defendant's possession could be disturbed.

21. That case is clear authority for the proposition that regard must be had to the particular circumstances, whatever they may be, in which the rent payments were made. So far as I can see from the authorities, that principle, expressed well over a century ago, has never been doubted. That decision is inconsistent with the defendant's submissions in the present case. Of course, the circumstances in which the principle falls to be applied have much changed since those early Victorian days. But those changes have not invalidated the underlying principle. The shift in emphasis discernible in judicial observations in this field in recent

cases is no more than a reflection of the same approach applied in the different circumstances which come before the court today. Because of the widespread intervention of statute in the landlord-tenant area, a typical case today invariably involves more than the simple facts of possession and an unexplained payment of rent.” (emphasis added)

[91] So the argument that Defendant was not a trespasser hence no damage can be claimed for the time period it remained in the property cannot be accepted on the evidence before the court. Defendant was allowed to stay on the Property and conduct its business as usual despite not having a lease agreement on conditions agreeable to parties. Defendant had benefitted from payment of lower rental.

[92] Plaintiff was a landlord of commercial premises and did not increase rental for eighteen years. From that first ten years was for a fixed rate of \$1150 having considered the ‘*rundown*’ status of the building and requirement of Defendant to make improvements in order to make it suitable for its purpose. The period of the Lease was ten years and after expiration of said term without seeking renewal of a new lease agreement Defendant continued another eight years on the same rental, as Plaintiff did not seek increase for this period and it sought an increase of rental from 15.11.2015.

[93] Plaintiff could demand a rent from Defendant as the Property was commercial property and the tenancy of Defendant was on monthly basis. It is proved that Defendant could not move with one month notice, which was the legal requirement. Plaintiff had acted reasonably and granted ninety days to vacate, but it failed to vacate.

[94] In *Javad v Aqil* [1991] WLR 1007, [1991] 1 WLR 1007, [1991] 1 All ER 243, [1990] EWCA Civ 1, [1990] 41 EG 61, 61 P & CR 164

28. To the same effect is the decision of the Court of Appeal in *Sopwith v Stutchbury* (1985) 17 HLR 50. That was a case of entry into possession of a dwelling-house while terms were being finalised. Of the several issues in that case the only one material for present purposes concerned the status enjoyed by the first defendant in the property between March 15 1975, being the date when he entered, and April 21 1975, when a lease was executed. The Court of Appeal held that he was a licensee. Stephenson LJ (at p 74) summarised the issue and the court’s approach today in these words:

The question, of course, is, taking into account all the circumstances, what is the right conclusion to draw? Under what right, in what legal relationship, was this occupation of A’s land by B? Many recent cases are opposed to a too

facile assumption that because something called 'rent' is accepted, or even accepted as rent, by the party owning the land, that necessarily implies a tenancy. It is always a question of the intention of the parties, and in these days, where owners of property are unable to evict those who occupy their property under the statutory protection to which I have referred, it is not at all easy to infer, by the acceptance of rent from the protected tenant, the creation of a new tenancy: see Longrigg, Burrough & Trounson v Smith (1979) 251 EG 847, [1979] 2 EGLR 42. That, of course, is a consideration strongly applicable to the payment of rent by persons who are let into property and then staying on in it; it is not so strongly applicable to persons who are let into property for the first time. Nevertheless, it is something to be borne in mind in a case where, as here, a person is let into property for the first time, and let into property by a businessman acting through an obviously experienced manager.

Kerr LJ (at p 78) commented upon the **surprising results which could follow if a party let into possession during a negotiation were to be held to have become a tenant.**

29. Finally, I must mention Cardiothoracic Institute v Shrewdcrest Ltd [1986] 1 WLR 368*. This was another holding-over case. The landlord hoped to redevelop a site. The defendant was in possession of the site as a business tenant pursuant to three successive leases in respect of which orders had been made under section 38(4) of the 1954 Act excluding the operation of sections 24 to 28 of the Act. The last of the three leases expired on October 31 1983. Thereafter the parties were involved in a succession of negotiations for a series of extensions. The defendant paid rent, mostly monthly in advance, in general accordance with the terms of the successive extensions. In September 1985 the defendant advanced a claim that he was protected by Part II of the Act. Knox J rejected that claim, and accepted the plaintiff's submission that after the expiry of the third lease the defendant was a tenant at will. He held that once one took into account the parties' knowledge of the operation of the 1954 Act, it was clear that they did not intend to create a periodic tenancy pending the grant, which both sides anticipated, of a tenancy approved by the court under section 38. Nor was there any compelling reason why the court should impute such an intention to them if, as was factually perfectly possible, they gave no serious thought to the legal repercussions of the payment and acceptance of rent.

30. Mr Harvey submitted that that case was wrongly decided. I reiterate that, for present purposes, what alone is material is identifying the underlying principle applied in the particular case being considered. As to that, I can see no sign that Knox J

departed from the established principle I have mentioned."
(emphasis added)

[95] Plaintiff had claimed for breach of contract in paragraph nineteen of the statement of claim. Plaintiff had claimed for damages for loss of income. The basis for loss or damage is the mesne profit.

[96] UK House of Lords in Attorney General v Blake (Jonathan Cape Ltd, third party) [2000] 4 All ER 385 in determining damages for breach of contract held that fixed rules could be prescribed and the court should have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which had been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief was sought even if there was no agreement as to the rental both parties have to seek legal redress and the damages will be assessed for occupation on the basis of mesne profit for depriving landlord the possession of the Property.

[97] In Blake(supra) held,

“A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a **reasonable person would pay for the right of user**: see Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538, and the 'wayleave' cases such as Martin v Porter (1839) 5 M & W 351, 151 ER 149 and Jegon v Vivian (1871) LR 6 Ch App 742. A more recent example was the non-removal of a floating dock, in Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359.”

[98] Defendant remained on the Property till it was convenient to move to a nearby premises occupied by them, and for this period the reasonable commercial rental was due to Plaintiff. So *ordinary letting value*² is assessed from the evidence provided to the court. Plaintiff had sought \$11,000 as the basis of negotiations but had settled for the said value but Defendant had not agreed to that in 2016, but in 2020 and 2021 without prejudice basis had paid \$10,900 and \$19,075 respectively. This shows that the Property in 2020 and 2021 could attract at least said rentals irrespective

² Swordheath Properties Ltd v Tabet [1979] 1 WLR 285

of assessments, and to Defendant the Property worth more than what was paid by them. If not it makes no commercial sense to occupy the Property at the said rentals.

[99] Halsbury's Laws of England ³Landlord and Tenant (Volume 62 (2022), 302. ***Mesne profits*** stated

Recovery of Rent and Related Sums, Recovery of Rent etc; In General

“The landlord may recover in a claim for **mesne profits the damages which he has suffered through being out of possession of the land** or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as **mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation**. In most cases, the rent paid under any expired tenancy is strong evidence as to the open market value. 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. The landlord is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost. (emphasis added and footnotes deleted)

[100] Accordingly ‘*value of the premises to the defendant for the period of the defendant's wrongful occupation*’ includes all the improvements Defendant had carried out in order for its commercial activity. Defendant did not vacate as wrongful occupation benefitted its retail business.

[101] In this case Plaintiff and Defendant had entered into a long terms lease for ten years at monthly rental of \$1150 having considered the run-down condition of the property and the requirement for the Defendant to improve substantially, it in order to conduct its commercial activity. So the rental for ten years was fixed and this cannot be considered as open market value in 2015. There was no dispute on that fact considering the circumstances of this case.

[102] Defendant's position is that it is liable to pay rental without improvements it had done to the property. This is not the basis of mesne profit when Plaintiff had made improvements in terms of the Lease.

³ Landlord and Tenant (Volume 62 (2022), paras 1-595; Volume 63 (2022), paras 596-1219; Volume 64 (2022), paras 1220-1957)

[103] Halsbury's Laws of England⁴ Landlord and Tenant (Volume 62 (2022) (6) Alterations and Improvements (i) Position at Common Law states,

“395. Position at common law regarding alterations etc.

It is *prima facie* a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them, **unless he is expressly or impliedly given power to do so by the lease.** Further, if the pulling down or alteration changes the nature of the demised premises, the tenant may also be guilty of waste.

In order to determine whether the pulling down or alteration constitutes a breach of the covenant, regard must, however, be had in each case to the user of the premises which is permitted by the lease. It may be that the demised property may be used for a variety of purposes, and that **alteration and adaptation is required to make it suitable for any such use, in which case a right on the part of the tenant to adapt the premises is to be inferred.**” (emphasis added) (footnotes deleted)

[104] There are express provisions in the Lease granting Defendant to improve the Property as it was in ‘rundown’ condition and this was at the discretion of Plaintiff. Plaintiff had not objected to the improvements done by Defendant for more than eighteen years and by implication had approved all such visible improvements to the property. Having acted so Plaintiff is estopped from denying such approval by conduct.

[105] In this action Plaintiff had expressly allowed Defendant to erect additional structures at ‘lessor’s discretion’. This can be implied from the conduct of the parties and circumstances. Plaintiff had allowed Defendant to conduct its commercial activity through erection of additional area.

[106] In *Restaurant EC3 Ltd v Tavor Holdings Ltd* [2024] EWHC 3104 (Ch) discussed the basis of payment for tenant overholding and discussed the relevant legal position as;

“20. One of the paradigm cases where mesne profits are payable is where a tenant wrongfully remains in possession of premises, as a trespasser, after the termination of a lease. The well-known case of *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 (“*Swordheath*”), decided that in such a case the landlord was entitled to damages which would normally be calculated by

⁴ Halsbury's Laws of England > Landlord and Tenant (Volume 62 (2022), paras 1-595; Volume 63 (2022), paras 596-1219; Volume 64 (2022), paras 1220-1957) > 8. Repair, Fitness and Alteration > (6) Alterations and Improvements > (i) Position at Common Law

reference to the **ordinary letting value of the premises**. The landlord did not have to prove that it would or could have let the premises to someone else had the defendant not remained in occupation. At p. 288 Megaw LJ said:

“It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages.”

21. In a later decision of the Court of Appeal, *Ministry of Defence v Ashman* (1993) 66 P&CR 195, there was a division of opinion about the nature of the remedies available to the claimant. Hoffmann LJ said that a claimant was able to elect between damages for trespass or to waive the tort and claim a restitutionary remedy based on the benefit accruing from the wrongdoing. Lloyd LJ disagreed. He held that damages of trespass were compensatory and that the court should follow the principle in *Swordheath*. Kennedy LJ said that the proper approach was somewhat analogous to quasi-contractual restitution. **The court held that the measure of compensation should be by reference to the benefit to the defendant.**

22. It was common ground between the parties that, in light of *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 (“*One Step*”), the remedy is properly analysed as compensatory rather than restitutionary and that *Ashman* was therefore of little assistance. I shall return to *One Step* below.

23. *Inverugie Investments Ltd v Hackett* [1995] 1 W.L.R. 713 was a decision of the Privy Council. That was a case where the defendant was the freeholder owner of a hotel. It had let 30 apartments in the hotel to the plaintiff. The defendants wrongly ejected the plaintiff from the use of the apartments and thereafter used them as part of the hotel; more than 15 years later the plaintiff recovered possession of the apartments and sued for

damages in respect of trespass by the defendant. The defendants argued that the damages should be assessed by it taking account of the occupancy rates for the rooms. The plaintiff argued that the defendants were liable to pay the plaintiff at a going rate for the use of the apartments for 365 days a year. The Privy Council found in favour of the plaintiff. Lord Lloyd of Berwick referred to a number of cases about damages for trespass, including *Swordheath*, and said:

“It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the “loss” which the plaintiff has suffered. As the Earl of Halsbury L.C. pointed out in *Mediana (Owners of Steamship) v. Comet (Owners of Lightship)* [1900] A.C. 113, 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

In *Stoke-on-Trent City Council v. W. & J. Wass Ltd.* [1988] 1 W.L.R. 1406 Nicholls L.J. called the underlying principle in these cases the “user principle.” The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a **reasonable rent** for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.” (emphasis added)

[107] Defendant in the written submissions relied on the case of *Knight v Khan* [2015] FJHC 45; HBC60.2009 (23 January 2015) this was a case where there was a renewal of first lease agreement and second lease agreement was also entered so there was no issue of mesne profit.

[108] Court of Appeal decision of *Natsun Pacific Ltd v Hansji* [2005] FJCA 59;

ABU0015.2005S (11 November 2005) was regarding an eviction of a person and what can constitute a right to remain possession. In that discussed the communications between the parties on without prejudice basis and held on affidavit evidence before the court that

some form of agreement entered but stated that there was no tenancy created even on that basis. In Natsun (supra) held, '.....49]. Otherwise, it would seem that any claim to compensation for that work would simply give rise to a separate cause of action for a monetary payment, but **not a basis for asserting a right to any form of tenancy**: Ram Chand & Others v. Hari Prasad (Civil Appeal No. 21 of 2002).

[50]. The issues thus raised, it seems to us, called for further evidence and investigation, involving the potential cross examination of the deponents of the affidavits which were filed. In summary, those issues concern:'

[109] In contrast after hearing all the evidence it is proved that there was no agreement at all, but eviction took time and parties had 'without prejudice' basis negotiated for rental and this had reduced the amount of damages and benefited both parties.

[110] Even if I am wrong, Natsun (supra), supports Plaintiff's position that there was '*no basis for asserting a right to any form of tenancy*' , based on without prejudice communicaitons.

[111] Plaintiff sought a rental of \$11,000 per month whereas Defendant had suggested few options but a lower rental of \$ 5,720 with different conditions as to the time period and also method of increments of rental. These were not accepted by Plaintiff, but without prejudice agreed to a payment of \$ 5,450.00 on *without prejudice* basis and later this was increased to \$10,900 and further increase to \$19,075 from January 2021 till 30.11., 2021 when it voluntarily vacated the premises and moved to nearby premises occupied by Defendant's business.

[112] From the evidence of the then Manager of Defendant, he admitted that there was another premises where Defendant conducted its business on the same street, the Property and it did not move to it when notice to quit was issued, as there was no suitable place to move said business.

[113] The importance of the business conducted on the Property was clear and in such an instance Defendant should be ordered to pay damages with the improvements it had done on the property.

[114] Defendant had also pleaded in the statement of defence at paragraph 28 that Plaintiff is barred or estopped from bringing this action. Plaintiff had earlier instituted an action for vacant possession and this cannot continue due to Defendant vacating the premises. This action is instituted for

damages for the loss due to occupation of Defendant in the premises as it neither agreed to pay rental requested nor vacated when notified.

Failure to Reinstate the Property

[115] Plaintiff had claimed for failure on the part of Defendant to reinstate the Property to original condition. This claim cannot succeed as Plaintiff failed to prove its original status. Without that no order can be made.

[116] Apart from that the Lease stated that the condition of the Property was poor, so it is waste to make the Property which was in a better condition that it was rented, as Defendant had conducted retail business. Defendant had also removed the additional structures made for storage of the items sold. So this claim for reinstatement is struck off.

ASSESSMENT OF RENTAL AND CALCULATIONS

[117] The basis of the mesne profit is calculated from the worth to the Defendant. Plaintiff is seeking increase of rental to \$ 7790.23 till valuation of Defendant 26.10.2010 and from that date the valuation \$9444.85 till payment of \$10,900. So the value to the Defendant from the property was more than \$10,900.

[118] Plaintiff had claimed \$7,790.23 monthly rental including applicable VAT but Defendant had paid only \$1253.50 as monthly rental including VAT till October, 2016 and from then paid an increased amount on '*without prejudice*' basis a sum of \$5450 including VAT.

[119] Plaintiff had claimed its rental based on the assessments of Rolle Associates and Fair valuations and taking the mean or average from the two assessments and applied the VAT.

[120] These two valuations are annexed to the letter of Magan Lal to Managing Director of Defendant marked P5

[121] Valuation of Rolle Associate in August , 2015 was for 'Valuation the subject Property' and one method employed in the said valuation is Income Approach for those three scenarios adopted. Scenario 2 (Market Rentals with Extensions) made an assessment of \$91,308 which is (\$7,609 pm)

[122] Scenario 3 was without extension and annual assessment was 47,390 (\$3,949 p.m.) . This cannot be accepted for the reasons given earlier.

Valuation of *Fairview valuations on 15.9.2015*

- [123] Potential market rental of the Premises at \$5,720 per month (VEP) in its original state and \$9,165 per month (VEP) inclusion of the tenants improvements. As stated earlier in this judgment market rental without improvements is not accepted for assessment of mesne profit.
- [124] Defendant had obtained a Rental Valuation from Rolle Associated on 10.1.2017 and according to that
- [125] Scenario 1 Original improvements and vacant section \$7,000- \$7700 per month and this cannot be accepted for the reasons given above
- [126] Scenario 2 assumed all the improvements provided by landlord \$9,000- \$10,100
- [127] After second valuation of Rolle Associate Defendant had paid \$ 5,450.00 including VAT at that time, on without prejudice basis, while Plaintiff sought 9,444.85 with VAT on monthly basis on the basis of Rental Valuations of Rolle Associate, obtained by Defendant marked D14 dated 10.1.2017
- [128] The calculation of the damages also included 3% interest. Plaintiff had included a higher interest of 8.75% in document marked P26 and this is not accepted. The interest rate of 3% is applied from the date of accrual of rent as it is a special damage. Calculation of the damage is attached as Annexed 1 to the damages.
- [129] Rental values paid by Defendant from 9.9.2020 were accepted as the value to Defendant.
- [130] Accordingly total damages was 226,571.30 and the interest is \$30,434.70.

COUNTER CLAIMS OF THE DEFENDANT

- [131] There was no evidence that Plaintiff and Defendant had promised for longer term extension of the Lease after expiration of initial ten years period. There was no clause for option to seek further fixed period.
- [132] The lease allowed a renewal with the consent of the Plaintiff for terms agreeable to parties if such request for renewal was made three months prior to expiration of ten year period. In the light of that that if Defendant desired for longer term it could have sought such a renewal, but had not done so.

- [133] The conduct of the Plaintiff was to take the advantage of lower rental for more than eight years on monthly tenancy and to remain in occupation without vacating. This conduct of the Plaintiff cannot raise equitable claim.
- [134] Defendant had counter claimed for improvements on the property. Defendant admitted that in terms of the lease agreement Defendant was required to conduct substantial improvements due to the condition of the Property at that time. This would have factored to the rental determined in 1997 and term of the lease was ten years without revision of rental during that time.
- [135] Defendant failed to prove the amount spent which is claimed through evidence. Apart from that Defendant also admitted that structures made to increase the floor area of the building including external storage were removed before vacation of the premises.
- [136] The Lease allowed Defendant to conduct substantial improvements and also indicated that cost of such improvements to be borne by Defendant and this was to use the Property for the intended use of the Defendant.
- [137] Defendant was required to hand over the property without such improvements at the end of the lease period. So any improvement to the Property was done by Defendant with an understanding that that it could not claim for that. That can be the reason for Defendant's inability to prove such expenditure. So Defendant cannot claim under equity.
- [138] Even if I am wrong on the above, Plaintiff had failed to prove the counter claim of \$ 189,659.07 and the counter claim accordingly dismissed.

Aggravated Damages

- [139] Defendant had continued occupation after expiration of the Lease from 15.11.2007 on monthly basis. This was a business risk Defendant had taken considering the nature of the business and importance of the location to its business. So Plaintiff could evict Defendant with one month notice.
- [140] Plaintiff had acted reasonably and Defendant had used delaying and evasive conduct. This was clear from letter of Megan Lal marked as D9 dated 9.9.2016 to Defendant. The conduct of Defendant was to delay and when this failed it had instituted an action for equitable relief and subsequently withdrawn it. These actions taken together shows that it had unduly advantaged from being in possession of a commercial property without a term fixed lease. It had benefited from its wrongful action.

[141] It was clear that conduct of the Defendant was to remain in possession of the Property till it suited them to move to a nearby property occupied by another commercial premises occupied by them.

[142] From the evidence it is proved that Defendant moved out on its terms and when the time suited them. Till then it had used various methods to delay eviction. This is a conduct that should not be encouraged when dealing with commercial entities where for pure economic gain due to delay in vacating premises not justified. Defendant had benefitted from its unlawful action so considering circumstances \$10,000 granted for aggravated damages.

CONCLUSION

[143] According to the Lease between Plaintiff and Defendant rent was fixed for ten years. It allowed substantial improvements to the Property to suit the business operation of the Defendant. The Lease expired on 15.11.2007 and tenancy continued on 'monthly basis' in terms of the Lease. Plaintiff requested increase of rental to \$11,000 from 15.11.2015 and Defendant did not agree or vacate the premises till 30.11.2021. For the said period Plaintiff is entitled for damages including aggravated damages due to undue benefit it had accrued.

[144] Cost of this action is summarily assessed at \$8,000 considering number of days and issues involved.

FINAL ORDERS:

- a. Defendant to pay Plaintiff a sum of \$226571.30 as arrears of rent and interest of \$30,434.70 as interest;
- b. Punitive damage of \$10,000 is ordered;
- c. Cost of this action is summarily assessed at \$8,000 to be paid within 21 days.



.....
Deepthi Amarātunga
Judge

At Suva this 11th day of September, 2025.

Solicitors

Solanki Lawyers

Patel Sharma Lawyers

ANNEXED 1

Blue Pacific (FIJI) PTE Limited											
Rent Account - 15 November 2015 To Current Day											
A	B	C	D	E	F	G	H	I	J	K	L
	Date Paid	Paid For	Our Claim per month	Rent Received	Rent Due	Balance	Interest	Daily Interest Factor	Days O/S	365 Base Factor	Daily Interest Rate %
1											
2						0					3%
3	09/11/2015	October	7790.23	1312.5	6477.73	6477.73	20.7642	0.003205479	39	365	0.03
4	04/12/2015	November	7790.23	1322.5	6467.73	12945.46	35.1123	0.002712329	33	365	0.03
5	07/01/2016	December	7790.23	1253.5	6536.73	19482.19	52.8421	0.002712329	33	365	0.03
6	10/02/2016	January	7790.23	1253.5	6536.73	26018.92	85.5417	0.003287671	40	365	0.03
7	04/03/2016	February	7790.23	1253.5	6536.73	32555.65	58.8678	0.001808219	22	365	0.03
8	11/04/2016	March	7790.23	1253.5	6536.73	39092.38	118.884	0.003041096	37	365	0.03
9	11/05/2016	April	7790.23	1253.5	6536.73	45629.11	112.51	0.002465753	30	365	0.03
10	01/06/2016	May	7790.23	1253.5	6536.73	52165.84	124.34	0.002383562	29	365	0.03
11	05/07/2016	June	7790.23	1253.5	6536.73	58702.57	164.046	0.002794521	34	365	0.03
12	04/08/2016	July	7790.23	1253.5	6536.73	65239.3	160.864	0.002465753	30	365	0.03
13	06/09/2016	August	7790.23	1253.5	6536.73	71776.03	194.68	0.002712329	33	365	0.03
14	04/10/2016	September	7790.23	1253.5	6536.73	78312.76	173.79	0.002219178	27	365	0.03
15	11/10/2016			16786	-16786	61526.76	192.166	0.003123288	38	365	0.03
16	26/10/2016	October	7790.23	5450	2340.23	63866.99	78.7401	0.001232877	15	365	0.03
17	01/12/2016	November	9444.85	5450	3994.85	67861.84	184.064	0.002712329	33	365	0.03
18	05/01/2017	December	9444.85	5450	3994.85	71856.69	206.711	0.002876712	35	365	0.03
19	06/02/2017	January	9444.85	5450	3994.85	75851.54	193.266	0.002547945	31	365	0.03

20	09/03/2017	February	9444.85	5450	3994.85	79846.39	203.444	0.002547945	31	365	0.03
21	04/04/2017	March	9444.85	5450	3994.85	83841.24	179.168	0.002136986	26	365	0.03
22	03/05/2017	April	9444.85	5450	3994.85	87836.09	209.363	0.002383562	29	365	0.03
23	05/06/2017	May	9444.85	5450	3994.85	91830.94	249.076	0.002712329	33	365	0.03
24	04/07/2017	June	9444.85	5450	3994.85	95825.79	236.283	0.002465753	30	365	0.03
25	04/08/2017	July	9444.85	5450	3994.85	99820.64	254.338	0.002547945	31	365	0.03
26	05/09/2017	August	9444.85	5450	3994.85	103815.49	273.049	0.002630137	32	365	0.03
27		September	9444.85		9444.85	113260.34	288.581	0.002547945	31	365	0.03
28		October	9444.85		9444.85	122705.19	302.561	0.002465753	30	365	0.03
29		November	9444.85		9444.85	132150.04	336.711	0.002547945	31	365	0.03
30		December	9444.85		9444.85	141594.89	360.776	0.002547945	31	365	0.03
31	08/03/2018	January	9444.85	27250	-17805.15	123789.74	366.282	0.002958904	36	365	0.03
32	21/03/2018	February	9444.85	5450	3994.85	127784.59	546.148	0.004273973	52	365	0.03
33	04/04/2018	March	9444.85	5450	3994.85	131779.44	140.805	0.001068493	13	365	0.03
34	22/05/2018	April	9444.85	5450	3994.85	135774.29	535.657	0.003945205	48	365	0.03
35	30/06/2018	May	9444.85	5450	3994.85	139769.14	448.027	0.003205479	39	365	0.03
36	11/07/2018	June	9444.85	5450	3994.85	143763.99	838.952	0.005835616	71	365	0.03
37	17/08/2018	July	9444.85	5450	3994.85	147758.84	449.349	0.003041096	37	365	0.03
38	05/09/2018	August	9444.85	5450	3994.85	151753.69	224.512	0.001479452	18	365	0.03
39	04/10/2018	September	9444.85	5450	3994.85	155748.54	371.236	0.002383562	29	365	0.03
40		October	9444.85		9444.85	165193.39	393.749	0.002383562	29	365	0.03
41	05/12/2018	November	9444.85	10900	-1455.15	163738.24	471.028	0.002876712	35	365	0.03
42	09/01/2019	December	9444.85	5450	3994.85	167733.09	496.306	0.002958904	36	365	0.03
43	28/02/2019	January	9444.85	5450	3994.85	171727.94	705.731	0.004109589	50	365	0.03
44	28/02/2019	February	9444.85	5450	3994.85	175722.79	722.148	0.004109589	50	365	0.03
45	27/03/2019	March	9444.85	5450	3994.85	179717.64	812.422	0.004520548	55	365	0.03
46	30/04/2019	April	9444.85	5450	3994.85	183712.49	513.388	0.002794521	34	365	0.03

47	30/05/2019	May	9444.85	5450	3994.85	187707.34	462.84	0.002465753	30	365	0.03
48	04/07/2019	June	9444.85	5450	3994.85	191702.19	535.716	0.002794521	34	365	0.03
49	05/08/2019	July	9444.85	5450	3994.85	195697.04	514.71	0.002630137	32	365	0.03
50	05/09/2019	August	9444.85	5450	3994.85	199691.89	508.804	0.002547945	31	365	0.03
51	01/10/2019	September	9444.85	5450	3994.85	203686.74	418.534	0.002054795	25	365	0.03
52	28/11/2019	October	9444.85	5450	3994.85	207681.59	955.904	0.00460274	56	365	0.03
53	13/12/2019	November	9444.85	5450	3994.85	211676.44	260.971	0.001232877	15	365	0.03
54	10/01/2020	December	9444.85	5450	3994.85	215671.29	496.339	0.00230137	28	365	0.03
55	05/02/2020	January	10900	5450	5450	221121.29	272.615	0.001232877	15	365	0.03
56	01/05/2020	February	10900	5450	5450	226571.29	651.78	0.002876712	35	365	0.03
57	13/05/2020	March	10900	5450	5450	232021.29	572.107	0.002465753	30	365	0.03
58	11/06/2020	April	10900	5450	5450	237471.29	585.546	0.002465753	30	365	0.03
59		May	10900		10900	248371.29	612.422	0.002465753	30	365	0.03
60		June	10900		10900	259271.29	639.299	0.002465753	30	365	0.03
61		July	10900		10900	270171.29	666.176	0.002465753	30	365	0.03
62		August	10900		10900	281071.29	693.052	0.002465753	30	365	0.03
63	17/08/2020			21800	-21800	259271.29	0	0	0	365	0.03
64	19/08/2020			32700	-32700	226571.29	0	0	0	365	0.03
65	09/09/2020	September	10900	10900	0	226571.29	577.291	0.002547945	31	365	0.03
66	03/11/2020	October	10900	10900	0	226571.29	558.669	0.002465753	30	365	0.03
67	17/11/2020	November	10900	10900	0	226571.29	577.291	0.002547945	31	365	0.03
68	22/01/2021	December	10900	10900	0	226571.29	558.669	0.002465753	30	365	0.03
69	22/01/2021	January	19075	19075	0	226571.29	577.291	0.002547945	31	365	0.03
70	10/02/2021	February	19075	19075	0	226571.29	577.291	0.002547945	31	365	0.03
71	17/03/2021	March	19075	19075	0	226571.29	465.557	0.002054795	25	365	0.03
72	14/04/2021	April	19075	19075	0	226571.29	577.291	0.002547945	31	365	0.03
73		May	19075		19075	245646.29	605.703	0.002465753	30	365	0.03

74	24/06/2021	June	19075	38150	-19075	226571.29	577.291	0.002547945	31	365	0.03
75	19/08/2021	July	19075	19075	0	226571.29	558.669	0.002465753	30	365	0.03
76		August	19075	19075	0	226571.29	577.291	0.002547945	31	365	0.03
77		September	19075	19075	0	226571.29	577.291	0.002547945	31	365	0.03
78		October	19075	19075	0	226571.29	558.669	0.002465753	30	365	0.03
79		November		0	0	226571.29	577.291	0.002547945	31	365	0.03
TOTAL			781727.29	555156	226571.29		30434.7				

Calculations	
Rent Due (F) =	Rent Claim per month - Rent Received (D - E)
Balance (G) =	Previous month balance + Rent Due for each month (G + F)
Daily Interest Factor (I)=	Daily Interest rate = $[3/365] \times \text{No. of overdue days}$ (L/K × J)
Interest (H) =	Balance × Daily Interest Factor (G × I)