

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 146 of 2024

BETWEEN: **ORCHID FLAT INVESTMENT PTE LIMITED** a limited liability company having its registered office at 84 Ragg Avenue, Suva

PLAINTIFF

AND: **CONSTRUCTION EQUIPMENT HIRE LIMITED** a limited liability company having its registered office at Wailada Industrial Subdivision

DEFENDANT

For the Plaintiff: Mr. Savou. J

For the Defendant: Mr. Singh. N

Date of Hearing: 15th November 2024

Date of Ruling: 19th February 2025

RULING ON APPLICATION

1. This is the Ruling on the remaining application before the Court – an application for Summary Judgment filed by the Plaintiff on the 21st of May 2024 seeking the following orders: -
 - i. Summary judgment against the Defendant in accordance with the Plaintiffs Statement of Claim for mesne profits at the rate of \$80, 000 (eighty thousand dollars) per annum for the period of 5 years from the 1st of September 2018 to 18th September 2023 being a total sum of \$400, 000 (four hundred thousand dollars) plus interest on the Judgment sum from the date of Judgment until payment.
 - ii. Costs against the Defendant.
2. The Plaintiff relies on the affidavit of Sophia Khan deposed on the 1st of February 2024 and filed on the 21st of May 2024.

The Grounds for the Summary Judgement application

3. The Plaintiff submits the following grounds in support of the application for summary judgment: -
- a) The Plaintiff is the registered proprietor of all that land comprised and described in Certificate of Title No. 42542.
 - b) The Defendants have occupied that property since September 2018 and the Plaintiff sent a Notice to vacate the land to the Defendant on the 9th of November 2020.
 - c) The Defendant did not vacate the property as demanded and legal action for vacant possession was initiated against the Defendant (HBC 377 of 2020.)
 - d) At the hearing, counsel for the Defendant did not contest giving up vacant possession and the Learned Master granted vacant possession to the Plaintiff and execution was stayed for 6 months. The ruling was handed down on the 16th of March 2023.
 - e) The Plaintiff obtained a Ground Rental Valuation of the land by Rolle Valuers and valued the annual ground rental at \$80, 000 per anum.
 - f) The Plaintiff then served the Defendant with a Demand Notice on the 15th of December 2023 seeking Mesne Profits of \$400, 000 (four hundred thousand dollars.)
 - g) The Plaintiff verily believes that the Defendant has no defence to the claim and seeks an order for Summary Judgment.

The Opposition to the Application for Summary Judgment

4. The application for Summary Judgment is opposed and the Defendant filed the affidavit of Hansel Pillay deposed on the 20th of August 2024 and filed on the 21st of August 2024. The application for summary judgment is opposed on the following grounds: -
- (i) On the 16th of March 2023, the Master entered consent orders, inter alia that the Defendant give vacant possession of CT 42542, being Lot 2 on DP 11132.
 - (ii) On the 15th of March 2024, Justice Amaratunga dismissed the appeal against the Master's Order for vacant possession.

- (iii) The Defendant have now appealed that decision to the Court of Appeal and the Notice and Grounds of Appeal was filed on the 25th of April 2024. The Defendants submit that they have meritorious grounds of appeal and security of costs have been fixed at \$3, 000. The security of costs has been paid and they are now in the process of compiling the record of the High Court.
 - (iv) The Defendant contends that the Plaintiff, in particular Sophia Khan has not disclosed material facts and has deliberately hidden these relevant factors from both the Master and later, Justice Amaratunga on appeal.
 - (v) These material non disclosures are set out from paragraphs 12 to paragraph 88 of the affidavit of Hansell Pillay.
 - (vi) The Defendant submits that there is a good and bona fide defence and counterclaim to the Plaintiff's claim.
 - (vii) The Defendant submits that the facts as set out and the allegations of fraud on the part of Sophia Khan and/or the Plaintiff establish that this matter ought not be summarily decided by granting the Plaintiff's application for summary judgment but raise triable issues that must be decided after a viva voce trial and not on the affidavit evidence alone.
 - (viii) The Defendant seeks that the Plaintiff's application for summary judgment be dismissed with costs on an indemnity basis.
5. The Hearing of the Application for Summary Judgment was on the 12th of November 2025.
6. At the hearing both parties prepared legal submissions and also presented oral arguments.
7. I am grateful to counsel for the extensive and well researched submissions.

The submissions for the Plaintiff

8. The Plaintiff applies pursuant to Order 12 Rules 1, 2 and 3 of the High Court Rules 1988. Order 14 enables a Plaintiff to obtain a summary judgment without Trial and it is meant to prevent delay in the determination of cases where there is clearly no defence (European Asian Bank vs Punjab & Sindh Bank [1983] 2 All ER 508 at 516 per Goff LJ.)

9. In Carpenters Fiji Limited vs Joes Farm Limited Ltd Civil Appeal ABU 19 of 2006S, the Court of Appeal stated the well-established principles relating to the entry of summary judgments as follows: -

- a) The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, bona fide defence or raise an issue against the claim which ought to be tried.
- b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.
- c) It is generally incumbent on a defendant resisting summary judgment to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defendant is and what facts are relied on to support it.

10. The Plaintiff submits that they have met the requirements of Order 14 as follows: -

- a) The Plaintiff has filed a Statement of Claim pleading an action for mesne profits and seeks judgment from the Defendant for \$400, 000, being mesne profits.
- b) The Plaintiff has filed a Summons and affidavit in support, which verifies the facts upon which the Plaintiff seeks summary judgment

11. The Plaintiff's claim is for mesne profits in respect of the occupation of their property without consent, by the Defendant for a period of 5 years. Where a property owner is denied the use of his property by a trespasser, he is entitled to seek damages (Penarth Dock Engineering Co Ltd vs Pounds [1963] 1 Lloyd's Rep 359.)

12. The principle is that when a property owner establishes that there is a trespasser on his property, he is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespasser, to have as damages for the trespass, the value of the property as it would fairly be calculated; and would be the ordinary letting value of the property that would determine the amount of damages (Swordheath Properties vs Tablet [1979] 1 All ER 241 at 242).

13. The Plaintiff has provided the Valuation report for the market rental of the property which the Defendant has trespassed on. The Valuation Report states that the market rental for the trespassed property is \$80,000 per annum.
14. The Defendant was in trespass for the past 5 years from 1st September 2018 to 18th September 2023, hence the total claim of \$400, 000 in mesne profits, because of the Defendant's trespass of 5 years.
15. The Plaintiff submits that the Defendant's affidavit does not disclose clear particulars of the fraud that is alleged against the Plaintiff. These unparticularised allegations do not have any legal nexus to the mesne profit claims.
16. The Plaintiff submits as follows: -
 - a) The Defendants' allegations about the shareholding structure of the Plaintiff and the issues over the Estate of Gopal Pillay, have no relevance to the issue of mesne profit that are the subject of this litigation between the Plaintiff and the Defendant in this matter. The Defendant is not a shareholder of the Plaintiff company, nor is the Estate of Gopal Pillay a party to this action.
 - b) Sophia Khan is not the Plaintiff in this matter. She is not a party to this action. The allegations made by the Defendant against Sophia Khan have n legal nexus to the mesne profits between the Plaintiff and the Defendant in this matter.
 - c) Hearsay in only admissible in an Order 14 affidavit if the sources and the grounds and basis for belief are particularised and disclosed (Re Young Manufacturing Company [1900] oh 753). The allegation of the Defendant that Sophia Khan and Gopal Pillay had an agreement, that the Defendant was to stay rent free on the premises of the Plaintiff, is unsupported by any evidence. It is a bare allegation made by Hansell Pillay, who has admitted that he was not involved in either the Plaintiff or Defendant Company at the time he alleges that the rent free agreement as made between Sophia Khan and Gopal Pillay. Sophia Khan has denied such an agreement was made.
 - d) The filing of an appeal is not a bone fide defence. Order 34 (1) of the Court of Appeal Rules 1949 states that an appeal does not operate as a stay on the decision of the Cort below and nor does it invalidate an intermediate act or proceeding.

17. The Plaintiff submits that for the reasons stated above, the Defendant has no defence to the Plaintiff's claim and seeks judgment in accordance with the Summary Judgment application.

The submissions for the Defendant

18. The Defendant's position has always been that there is substantial dispute as to the facts that requires viva voce hearing to be conducted rather than summary judgment being entered.

19. The Defendant additionally is alleging fraud against the Plaintiff and its Director shareholder Sophia Khan and as such summary judgment ought not be entered on affidavit evidence, but viva voce hearing to be conducted.

20. The principles relating to summary judgment can be stated to be as follows: -

- a) The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.
- b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or if there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.
- c) It is generally incumbent on a defendant resisting the summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.
- d) Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against each other and either extinguishes or reduces it (Hanak vs Green (1958) 2 QB 9 at page 29 per Sellers LJ).
- e) Likewise where the defendant sets up a bona fide counterclaim arising out of the same subject matter of the action and connected with the ground of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counterclaim but should be for unconditional leave to

defend, even if the defendant admit whole or part of the claim (Morgan and Son Ltd vs S. Martin Johnson Co (1949) 1 KB 107 (CA)).

21. The Defendant was lawfully in possession of CT 4252 and CT 43301 and there never was any agreement to pay any rent for unlawful occupation of CT 4252 and CT 43301 by the Defendant.
22. The Plaintiff cannot maintain an action for summary judgment and this application ought to be dismissed with costs.
23. The Defendant relies on this Court's own ruling on a related application filed by the Defendant for orders against the Plaintiff and against counsel for the Plaintiff, Mr. Savou.
24. In its ruling dismissing the Defendant's application, the Court found that there was a substantive dispute on the facts, therefore the matter could not be dealt with summarily and instead the matter ought to take its own course and factual disputes ought to be resolved at viva voce hearings.
25. The Defendant therefore prays that this application for summary judgment be dismissed and the Defendant be allowed to file their Statement of Defence and/or counterclaim and this matter takes its normal course.

Analysis

26. This application for summary judgment is filed pursuant to Order 14 (1), (2) and (3) of the High Court Rules 1988, which provides as follows: -

“Application by plaintiff for summary judgment (O.14, r.1)

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than –

- (a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,
- (b) an action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies”

27. The application must be in the form set out at Order 14 Rule 2 as follows: -

“Manner in which application under Rule 1 must be made (O.14, r.2)

2.-(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent’s belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.”

28. The following facts are not disputed: -

- a) The Plaintiff, Orchid Flat Investments Pte Limited, is the registered proprietor of all that land comprised and described in Certificate of Title No. 42542.
- b) The Defendants have occupied that property since September 2018, and the Plaintiff sent a Notice to vacate the land to the Defendant on the 9th of November 2020.
- c) The Defendant did not vacate the property as demanded and legal action for vacant possession was initiated against the Defendant (HBC 377 of 2020.)
- d) At the hearing, counsel for the Defendant did not contest giving up vacant possession and the Learned Master granted vacant possession to the Plaintiff and execution was stayed for 6 months. The ruling was handed down on the 16th of March 2023.
- e) On the 15th of March 2024, Justice Amaratunga dismissed the appeal against the Master’s Order for vacant possession.
- f) The Defendant have now appealed that decision to the Court of Appeal, and the Notice and Grounds of Appeal was filed on the 25th of April 2024. The Defendants submit that they have meritorious grounds of appeal and security of costs have been fixed at \$3,000. The security of costs has been paid and they are now in the process of compiling the record of the High Court.

29. The parties to this action have always been the parties to this litigation. They are two separate legal entities, limited liability companies registered under the Companies Act

30. In the earlier action, HBC 377 of 2020, the Master of the High Court had granted vacant possession to the Plaintiff over two parcels of land namely CT 424542 and CT 43301.

31. The Defendant later appealed this Ruling of the Master, and the appeal was heard by Justice Amaratunga. In his appeal Ruling, Justice Amaratunga stated as follows: -

“[1] Plaintiff is a legal entity and the last Registered Proprietor of CT 43301. Defendant is a legal entity and it was issued a notice for eviction by the solicitor for Plaintiff-Respondent (Plaintiff) on 9.11.2020. Failure to vacate the land resulted filing of an action for eviction of Defendant from land described in CT 43301 and also from CT 42542. In the affidavit in opposition Defendant did not contest the eviction from CT42542.

[2] After hearing of originating summons for eviction, Master on 16.3.2023 handed down decision evicting Defendant from both parcels of land. This was in terms of extended jurisdiction of Master

[3] At the outset Defendant-Appellant (Defendant) informed that the appeal is only confined to land described in CT 43301 which is only one part of Master’s judgment as the eviction from CT42542 was never contested

32. The Plaintiff here is claiming summary judgment for mesne profits over CT 42542, assessed at \$400, 000 for the Defendant’s unlawful occupation over 5 years at a valuation of \$80, 000 a year rental.

33. The Plaintiff has established that it is the registered proprietor of CT 42542. The Defendant has challenged the shareholding values in the Plaintiff Company however they have not been able to dislodge the Plaintiff Company’s proprietorship over the land in question.

34. The Defendant has also not been able to set off or invalidate the valuation provided by the Plaintiff, the valuation being prepared by Rolle Valuation at an annual rental of \$80, 000 for the period of 5 years.

35. The decision to evict the Defendant from CT 42542 by the Master was not appealed therefore there is no viable defence to the application for summary judgment.

36. After considering all of the above factors, I find that the application for Summary Judgment shall succeed.

37. The Plaintiff, however its shareholding is currently constituted, is entitled to summary judgment of \$400, 000 for the Defendant company remaining in occupation of CT 42452

for 5 years despite consenting to vacate pursuant to HBC 377 of 2020; and later, not appealing the decision to grant vacant possession.

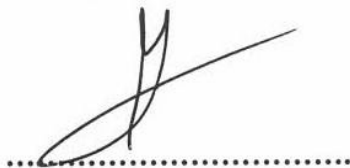
38. That decision is currently under appeal in the Court of Appeal however there is no stay order and the fact of the appeal itself does not automatically lead to a stay.

39. Costs follows the cause therefore I order the Defendant to pay costs to the Plaintiff summarily assessed at \$1, 000, one month to pay.

This is the Ruling of the Court: -

- 1. The Plaintiff Orchid Flat Investment Pte Limited is granted summary judgment in the sum of \$400, 000.**
- 2. The Defendant shall pay costs summarily assessed at \$1, 000, one month to pay.**

There is a right of appeal



Mr. Justice Usaia Ratuveli
Puisne Judge



cc: Jaoji Savou
Gordon & Co.