IN THE MAGISTRATES' COURT
AT BA
CIVIL JURISDICTION

Civil Case No. 7 of 2020

BETWEEN: **JAMES CHANEL** and **FAREENA CHANEL**

PLAINTIFFS

AND: **PARMODH KUMAR** trading as **PARMODH CONSTRUCTION (FIJI)**

DEFENDANT

Counsel: Mr. V. Chandra with Ms. S. Singh for the Plaintiff
Defendant unrepresented and absent.

Date of Hearing: 18 September 2025
Date of Judgment: 7 November 2025

RULING
(for Formal Proof)

Introduction

1. The Plaintiffs have filed a claim against the Defendant alleging that on 8 April 2019, parties had entered into an agreement wherein the Defendant would provide construction work for the consideration of $34,000.00. It was further agreed that the Defendant would complete all works within 3 months from the date of entering into the agreement.

2. The Defendant failed to complete said works as such parties entered into a Variation of Agreement on 3 August 2019.

3. The Plaintiffs paid the Defendant a total of $35,937.50 from 4 April 2019 to 15 September 2019. Further, as part of the Variation of Agreement, the Defendant agreed to pay a fixed penalty of $500.00 per day from 1 November 2019.

4. The Plaintiffs now alleges that the Defendant failed to complete the works agreed to in the Agreement dated 8 April 2019 and seeks an order for the monies advanced to the Defendant.

5. The Plaintiffs also seek $6,000.00 being the fixed penalty of $500.00 per day computed from 1 November 2019 to 13 November 2019.

6. It is important to highlight that the Defendant through his counsel filed a Statement of Defence and Counterclaim on 6 July 2020. A Reply to Defence and Defence to Counterclaim was filed by the Plaintiffs' counsel on 24 July 2020.

7. On 17 March 2023, the counsel for the Defendant in the Defendant's presence sought leave to withdraw due to the Defendant providing varying instructions. This Court's first predecessor allowed the application. Thereafter, on 14 April 2023, the Defendant failed to appear in Court.

8. Thus, this matter proceeded to Formal Proof before this Court's second predecessor on 18 September 2023 with the Plaintiffs' counsel filing an Affidavit Evidence in Chief on the same date.

9. Thereafter, the matter was adjourned for Ruling and when this Court took over proceedings, the Ruling was still pending. Given that the counsel who had conducted Trial for the Plaintiffs before this Court's second predecessor had resigned, Mr. Chandra appeared before this Court and informed that after perusing the Affidavit filed by the First named Plaintiff, it was apparent that they would need to call a further witness.

10. As such, on 18 September 2025, it was agreed by Mr. Chandra, that this matter could be heard afresh with the Plaintiffs relying on the First named Plaintiff's Affidavit filed on 18 September 2023 and with evidence being adduced by the Plaintiff's witness, Mohammed Haseem.

11. Having considered the pleadings filed as well as the evidence on behalf of the Plaintiffs, I now pronounce my Ruling.

Plaintiff's case

12. In the matter herein, the Plaintiffs and the Defendant had entered into an Agreement ('initial Agreement') dated 8 April 2019 wherein the Plaintiff would engage the services of the Defendant with respect to certain works in exchange for $34,000.00. As per the Agreement, the Defendant was to complete the works within 3 months.

13. Unfortunately, the Defendant failed to complete the contracted works within the 3 months' timeframe, as such, the Plaintiffs and the Defendant entered into a Variation of Agreement on 3 August 2019 ('Variation Agreement').

14. It was acknowledged by the Defendant under the Variation Agreement that he had received $32,032.12 as per the initial agreement and that he had not completed the works therein. The Plaintiffs thus agreed to pay the Defendant the remaining amount owing under the initial Agreement and a further $19,551.87 for the further works the Defendant would undertake as per the Variation Agreement and the Defendant agreed to complete the works as stated in the Variation Agreement.

15. It is after this that relations between the parties broke down. The Defendant failed to complete the works that he had agreed to undertake even though he had been paid a total of $35,937.50 by the Plaintiffs.

16. The Plaintiffs are now seeking an order for the monies paid to the Defendants which alludes to their claim being one of restitutionary claim founded on unjust enrichment.

Legal Provisions and Analysis

17. Todd on Torts (2019, p. 6-7) discussed unjust enrichment as follows:

> *"Outside contract and tort there is a further source of civil obligation based on the idea of unjust enrichment. The principle presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he or she has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust for him or her to retain that*

benefit.In these circumstances the plaintiff can make a claim for the restitution of the unjustly gained benefit. The sums recoverable are not damages. They are measured by the amount of the gain made by the defendant rather than by the loss suffered by the plaintiff.

Examples of restitutionary claims include: claims for the return of money paid to another under the influence of a mistake, or by compulsion, or in pursuance of a transaction wrongly believed to be a binding contract; claims for the recovery of benefits acquired in breach of a fiduciary relationship, such as by the purchase by the fiduciary of a beneficiary's property or the acceptance by the fiduciary of a secret commission; and claims for benefits acquired by a person in breach of another's confidence or, exceptionally, in breach of contract.[1]

18. The case of ***Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd*** *[2018] FJHC 1012; Civil Action 180 of 2013 (19 October 2018)* explains restitutionary claim as a cause of action. It is stated:

> *"**The Plaintiff's claim for repayment is** not based on the contract which is void as being illegal from the start, but **on the fact that the Defendants had received the money and has in the events which have supervened (illegality) no right to keep it. The payment was conditional. The deposit money is paid for a consideration which is to be performed after the payment. The condition of retaining money is eventual performance of the consideration.***
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> ***The consideration was not performed** (viz, no document of title was delivered to the Plaintiff) **and the consideration totally failed because the contract is void as being illegal from the start. When the condition and consideration fails, the Defendants right to retain the money also simultaneously fails.***
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> ***It is the failure of consideration** (viz, no document of title was delivered to the Plaintiff) and not the illegality of the contract **which enables money paid as deposit to be recovered.***
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> *Lord Mansfield rationalized the action for money had and received in Moses v Macferlan(1760) 2 Burr 1005, 1 Wrn Bl 219, 12 Digest 539, 4478 at page 1012 as follows:*
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> > *"It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word **the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.**"*
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> ***The gist of the action before me is an action for money had and received. The action for money had and received is an action outside the contract. The action for money had and received is not based on the contract. The action is not dependent on the illegal contract but solely on the unjustifiable detention by the Defendant of claimant's money.** There is no turpis causa in the matter. **The restitution is regarded as a separate principle of law independent of contract. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. A remedy in unjust enrichment is not claim of damages. Nor is it a contractual remedy.***

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[1] Todd, S, Hawes, C, Atkin, B & Cheer, U 2019, 'Chapter 1: introduction' in *Todd on torts*, 8th edn, Thomson Reuters New Zealand Ltd, New Zealand, pp. 7-8.

See; (1) Restitution, Present and Future, Essays in Honour of Gareth Jones (1998), Misnomer, p1, Professor Birks.

(2) Andrew Burrows, The Law of Restitution, 2nd Edition (2002)

(3) Jacques Du Plessis, "Towards a Rational Structure of Liability for Unjust Enrichment: Thoughts from two mixed Jurisdictions" 122 South African Law Journal 143.

(4) The work by Sir William Evans entitled "An Essay on the Action for Money Had and Received". It was published in 1802 and dedicated to Sir Edward Law (later Lord Ellenborough). It is reprinted in (1998) RLR3. In its opening paragraphs, Sir William Evans identified the subject-matter of his study as "the action for money had and received, as enforcing an obligation to refund money which ought not to be retained." Sir Evans quoted as "proper introduction" to the subject the famous passage from the judgment of Lord Mansfield CJ in Moses v Macferlan (1760) 2 BUR 1005 (at p 102);

> ***"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the Defendant ought to refund; it does not lie for money paid by the Plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law;*** *as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the Defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But* ***it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation****, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money."*
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> (my emphasis)

19. Thus, where a party has been enriched by receiving a benefit at another party's expense and it would be unjust for the first party to retain that benefit, this is unjust enrichment and such an unjustifiable detention then calls for restitution.

20. In ***Daydream Cruises Ltd v Myers*** *[2005] FJHC 316; HBC0291.1997L (17 February 2005)*, His Lordship Justice Connors (as he then was) considered the issue of unjust enrichment and stated:

> *The* ***remedy for unjust enrichment is restitution*** *which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff.* ***The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff.*** *A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have* ***been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.***
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> *In Pravery & Mathews Pty Ltd v Paul [1987] HCA 5, [1987] 162 CLR 221, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum merit."*

The three elements of a claim for unjust enrichment are – National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR:

[i] ***Proof of enrichment by receipt of a benefit;***
[ii] ***Enrichment at the expense of the plaintiff****; and*
[iii] ***That retention of the benefit is unjust.***

(my emphasis)

21. Thus, to prove unjust enrichment, the following needs to be proven:

    i. proof of enrichment by receipt of a benefit;
    ii. enrichment at the expense of the plaintiff; and
    iii. the retention of the benefit is unjust.

22. As per the evidence of the First named Plaintiff, the Plaintiffs engaged the service of the Defendant to carry out construction/renovation works on their property located at Varadoli, Ba. They had entered into the initial Agreement with the Defendant.

23. They had agreed to pay the Defendant the sum of $34,000.00 for the work that the Defendant would carry out in the Scope of Works which formed part of the initial Agreement. The Defendant agreed to carry out the Scope of Works within 3 months in consideration of the $34,000.00. The Scope of Works were as follows:

    i. Demolition of stairs (front & rear) and part of toilet walls.
    ii. Existing roof to be replaced with new structures and sheets as per drawings to engineer standard.
    iii. New stairs to the front and rear of building and railing all around.
    iv. New columns 8 x Nos
    v. New beams 400 x 150, 13 200 x 2 Nos
    vi. New walls to staircase area and new flooring front and back
    vii. Nogs for ceiling as per drawings.
    viii. Plastering all damaged areas.
    ix. Painting whole building (inside out)
    x. Plumbing to certain areas
    xi. Tiling top floor and bottom floor inside and out
    xii. Front and rear fencing with concrete driveway and tiling
    xiii. Replace all supplied door to adjust and fit
    xiv. Plaster remaining building
    xv. Raise window level for new window in front
    xvi. Re-do structures inside out together with new toilets
    xvii. Install burglar bars.

24. The Agreement between the parties formed part of the First named Plaintiff's Affidavit in Annexure marked 'JC-1'.

25. The Plaintiffs and the Defendant then had to enter into a Variation Agreement dated 3 August 2019 when the Defendant failed to complete the Scope of Works within the agreed 3-month timeframe as stated in the initial Agreement and because the Plaintiffs had requested further variations.

26. The Variation Agreement between the parties formed part of the First named Plaintiff's Affidavit in Annexure marked 'JC-2'.

27. From the Variation Agreement, it was agreed by the Defendant that he had been paid a total of $32,032.12 out of the $34,000.00, the initial consideration amount. After entering into the Variation Agreement, the Defendant failed and/or neglected to complete the Scope of Works that he had agreed.

28. The Plaintiffs paid the Defendant a total of $35,937.50 and the receipts highlighting these payments form part of the First named Plaintiff's Affidavit in Annexure marked 'JC-3'. For the purposes of this Ruling, following details are captured from the receipts:

Receipt No.	Receipt Date	Receipt Amount
51451	04/04/2019	$3,000.00
51452	11/04/2019	$1,870.00
51453	18/04/2019	$1,750.00
51454	25/04/2019	$1,758.00
(Illegible)	02/05/2019	$2,152.00
51455	10/05/2019	$2,284.00
51456	17/05/2019	$1,497.50
51457	23/05/2025	$1,860.50
51458	30/05/2019	$1,984.90
51461	02/06/2019	$2,500.00
51459	07/06/2019	$2,084.40
51460	13/06/2019	$1,866.30
(Illegible)	20/06/2019	$1,666.90
(Illegible)	04/07/2019	$2,101.00
51466	11/07/2019	$1,962.00
51467	19/07/2019	$1,700.00
(Illegible)	03/08/2019	$1,500.00
(Illegible)	15/09/2019	$ 400.00
(Illegible)	23/09/2019	$2,000.00
TOTAL		**$35,937. 50**

29. Thus, the evidence so far highlights that the Plaintiffs paid the Defendant for consideration which was to be performed after the payment of monies. The consideration being that the Defendant would complete the Scope of Works in the initial Agreement and Variation Agreement.

30. The Plaintiffs paid the Defendant a total of $35,937.50 as evident from the receipts provided.

31. Moreover, as the Defendant failed to complete the works, the Plaintiff's engaged the services of Mohammed Haseem ('Mr. Haseem') who is a carpenter/foreman by profession. He testified that he had met the Plaintiffs during COVID to complete works at their residence in Varadoli.

32. Mr. Haseem testified that he had visited the site and that because the material was not in the right way, he had to stop work and re-do the existing work. When taken through the Scope of Works that the Defendant had agreed to undertake within the initial Agreement, Mr. Haseem stated the following:

i. The stairs had been done in the wrong position with the entry to the lounge was going towards the kitchen as such he had to re-do this.
ii. Given that the structure was done with C-purlin (roof iron was screwed on), the roof had to be re-done to allow the roof to align. The roof had not been up to engineer standards.
iii. The new stairs in the front had to be re-done and the stairs at the back had been done by Mr. Haseem as the Defendant had not done it.
iv. Columns and beams at the back verandah had not been done.
v. New walls to staircase area and new flooring front and back was not done by the Defendant. Mr. Haseem had to undertake this work with his workers.
vi. The nogs for ceiling which were to be done as per the drawings had not been done given that the Defendant had not completed the roof.
vii. Plastering of all damaged areas was never done by the Defendant, Mr. Haseem had undertaken this work with his workers.
viii. The painting of the whole building (inside out) was never done because as per Mr. Haseem, the plastering had to be done first.
ix. Plumbing to certain areas was not done by the Defendant. Mr. Haseem had undertaken this work after they had finished.
x. Mr. Haseem testified that he did not tile the top floor and bottom floor inside and out and that it was done by another contractor.
xi. Front and rear fencing with concrete driveway and tiling was never done by the Defendant. It was done by another contractor and not Mr. Haseem.
xii. With respect to replacing all supplied door to adjust and fit, Mr. Haseem testified that another contractor had done it but he stated that when he was on site, the building was still being constructed and if it had not been painted then the supplied doors could not be replaced and adjusted to fit.
xiii. The Defendant never raised the window level for new window in the front. This was done by Mr. Haseem.
xiv. With respect to Re-doing structures inside out together with new toilets, Mr. Haseem testified that this was done by another contractor and it was done after the Defendant left.
xv. Mr. Haseem testified that someone else installed the burglar bars.

33. Mr. Haseem further testified that the existing work which he had taken over from the Defendant had not been to industry standard.

34. The evidence of Mr. Haseem highlights that the Defendant did not perform the consideration that was required of him when the Plaintiffs had paid him the monies. Further, the evidence of Mr. Haseem shows that Mr. Haseem had to undertake the work that was expected of the Defendant.

35. Consequently, on the unchallenged verbal and documentary evidence adduced, the Court finds that the Defendant has been enriched and his retention of the monies paid by the Plaintiffs is unjust. The Plaintiffs in this case are within their right to have the amount of $35,937.50 paid to the Defendant recovered.

36. Turning to the penalty clause in the Variation Agreement, the Plaintiffs are seeking to invoke the penalty clause as stipulated in the Variation Agreement wherein the Defendant had agreed to be liable for payment of a fixed penalty of $500.00 per days to the Plaintiffs from 1

November 2019. The Plaintiffs are seeking $6,000.00 under the penalty clause for the duration of 1 November 2019 to 13 November 2019.

37. The Court needs to determine whether the penalty clause in the Variation Agreement is enforceable and whether the Defendant is liable for damages in the sum of $6,000.00.

38. Her Ladyship Justice Wati in ***Wellsford Ltd (trading as Fuji Xerox Business Centre Fiji) v Sharma***; *Case Number: ERCC 10 of 2013 (22 November 2021)* discussed liquated damages and penalty clauses and how to determine the same. She stated:

> 69. *The terms of the bond clause will determine its enforceability. When is the provision a penalty according to the law?* ***The law governing the enforceability of penalty clauses is stated in the 1915 House of Lords decision in Dunlop Pneumatic Tyre Company v. New Garage and Motor company [1914] UKHL 1; (1915) AC 79.***
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> 70. ***Even though this decision is more than a century old, it remains good law. This law is also followed in Singapore and was adopted in a recent Singapore case of Xia Zhengyan v. Geng Changqing [2015] 2 SLR 731. The decision stated that when the contract provides for liquidated damages to be paid in the event of a breach, it will be enforceable if the amount of damages is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract.***
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> 71. ***The Court further stated: If the obligation or damages sought is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach, the provision is a penalty clause and thus unenforceable.***
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> 73. ***I will determine the issue in reference to the Dunlop test. I need to ask two questions. The first is whether the sum of $25,000 is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract and the second is whether the sum of $25,000 extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach.***
>
> (my emphasis)

39. Thus, a penalty clause is not enforceable in law especially when it is proven that it is not a genuine pre-estimate of the loss flowing from the breach and that the amount is extravagant and unconscious in comparison with the loss that could conceivably be proved to have followed from the breach.

40. In the case of ***Raj v Prasad***; *Civil Action No. HBC 280 of 2005 (29 August 2008)* Master Udit differentiated between liquidated damages and penalty and when discussing how to differentiate the two, he stated:

> *[42] The judgment in Commission of Public Works –v- Hills was delivered by Lord Dunedin. Later* ***Lord Dunedin considered this issue again in Dunlop Pneumatic Tyre Company -v- New Garage and Motor Company Ltd. [1914] UKHL 1; [1915] AC 79 at 86f. His Lordship offered a very helpful guide to differentiate between a payment for breach stipulated as 'in terrorem' thus a penalty and a "genuine covenanted pre-estimate of the damages". The question was one of construction of a particular contract. It is to be construed at the time of its making and not the time of breach of contract.*** *His Lordship said:-*

a. ***It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach...***

2. ***It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid****...This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but court never recover further damages for non-timous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable...is probably more interesting than material.*

c. ***There is a presumption (but no more) that is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'.***

4. It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost impossible. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties..."

[43] ***Normally parties do describe at the time of the making of a contract as to what constitutes liquidated damages or for that matter a penalty. The express statement in the agreement is not conclusive. At the end the Court must still decide whether the sum fixed was a genuine forecast of the possible losses thus liquidated damages; Turner -v- Superannuation and Mutual Savings Ltd [1987] 1NZLR 218 at 223. Further the onus of showing a certain sum of money being paid as liquidated damages and not penalty rests on the receiving party; Law v Redditch Local Board [1891] UKLawRpKQB 219; [1892] 1 QB 127 at 132. Ram Binod -v- see head note and page 227.***

(my emphasis)

41. Considering the case herein, the Court is required to look at the construction of the contract at the time of it being made and not at the time of the breach of the contract (vide ***Raj*** [supra]).

42. Turning to the two-step process as highlighted in ***Wellsford Ltd*** [supra], the first step being whether the sum of $6,000.00 or $500.00 per day is a genuine pre-estimate of the loss flowing from the breach. There was no evidence from the Plaintiff on how the sum of $500.00 was reached when Variation Agreement was contemplated. There was also no evidence why the sum of $500.00 per day was chosen. The Court is unable to ascertain whether this sum is a genuine pre-estimate of any loss flowing from the breach of the Variation Agreement.

43. The second step is whether the sum of $6,000.00 or $500.00 per day is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed. As stated by Her Ladyship Justice Wati in ***Wellsford Ltd*** [supra], the Court needs to have regard to what the sum represents.

44. There was no evidence offered by the Plaintiff as to what the sum represented. There was no evidence presented by the Plaintiff to show that the loss that followed the breach would have been within the range as stated within the written agreement between the Plaintiffs and the

Defendant. Thus, the Court finds that the sum of $6,000.00 is extravagant and unconscionable.

45. Consequently, the Court cannot find the Defendant liable for the sum of $6,000.00 as sought by the Plaintiffs.

46. Moreover, the Plaintiffs are seeking solicitors' cost in the sum of $4,425.00 due to the legal fees they have spent thus far. Annexed to the First named Plaintiff's Affidavit as Annexure 'JC-5' were copies of the invoices amounting to $4,425.00

47. The itemized invoices highlight the work undertaken by the Plaintiffs' solicitors in instituting and successfully prosecuting this matter to finalization.

48. Consequently, the Court grants solicitors' costs in the sum of $4,425.00

Defendant's Statement of Claim and Counterclaim

49. As stated in paragraph 7 herein, after the Defendant's counsel withdrew representation in Court, the Defendant had appeared in the matter and from 14 April 2023 stopped appearing in Court. Since no evidence has been provided to substantiate the Defendant's Statement of Defence and Counterclaim, the Court shall not make any orders regarding the same.

Determination

50. The Defendant is ordered to pay the Plaintiffs the sum of $35,937.50.

51. The Defendant is ordered to pay solicitors costs in the sum of $4,425.00.

52. Interest is granted at the rate of 3% from the date of institution of this action to the date of judgment, that is, 25 February 2020 to 7 November 2025.

MAGISTRATE'S COURT BA

N. Mishra
Resident Magistrate