IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 153 of 2005

BETWEEN	:	**YOGESH CHANDRA**
		PLAINTIFF
AND	:	**STEPHEN PATRICK WARD**
		DEFENDANT
Appearances	:	Mr. V. Mishra for the Plaintiff Mr. C.B Young for the Defendant
Date of Ruling	:	Thursday 23 May 2013

R U L I N G

INTRODUCTION

[1]. Ward had reneged on an agreement to sell to Chandra Lot 18, Marina Port, Denarau Island (**"Lot 18"**). They had agreed on the price of $595,000. After reneging, Ward then, on 27 August 2008, sold Lot 18 to Adrenalin (Fiji) Proprietary Limited. The price he received from Adrenalin was $1.1 million. The sale to Adrenalin happened after he obtained a High Court Order to remove a caveat that Chandra had placed on Lot 18. Meanwhile, Chandra had been pursuing a High Court action in Lautoka seeking specific performance against Ward. Madam Justice Phillip's ruling against Chandra was appealed to the Fiji Court of Appeal. On 18 November 2010, the FCA held that Chandra is entitled to equitable damages in lieu of specific performance pursuant to the "Judicature Act". This was to be assessed as at 18 November 2010. And this assessment of equitable damages is what is before me now.

[2]. Mr. Young insists that Fiji has no "Judicature Act" to empower the courts to assess and award equitable damages. Mr. Mishra argues that this court is hardly the forum to second guess the wisdom of the Fiji Court of Appeal[1].

[3]. If I may, the High Court of Fiji does have jurisdiction to award equitable damages in addition to or in lieu of specific performance. That jurisdiction is conferred by section 22(1) and (2) of the High Court Act. These sections provide as follows:

> 22.-(1) The common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875, shall be in force within Fiji subject to the provisions of section 24 of this Act.
> (2) For the removal of doubt, it is hereby declared that the provisions of **sections 24 and 25 of the Supreme Court of Judicature Act, 1873**, are in force in Fiji notwithstanding that the commencement of that Act was postponed in England until after the said second day of January, 1875 (my emphasis).

[1] The Fiji Court of Appeal has already decided the question in the affirmative at paragraphs 43 to 44 of its Judgment:

> 43. ....**since the enactment of the Judicature Act**, this court, like most courts in the common law jurisdictions has concurrent jurisdiction at law and in equity. I am of the view that this is an appropriate case for this court to award the Appellant equitable damages in lieu of specific performance.
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> 44. Equitable damages can only be given if the court would have granted that remedy see **Harvey v. Powell (1888) 39 Ch D. 508**. In my view, had specific performance been possible, I would have granted that remedy to the purchaser (my emphasis).

[4]. A third subsection to section 22 was later inserted by the **High Court (Amendment) Decree No. 43 of 2011**. The addition of this new subsection does not change the above position[2]. I believe that the Fiji Court of Appeal's reference to the "Judicature Act" in its judgment was a reference to the English Supreme Court of Judicature Act 1873 to the extent that it applies in Fiji by virtue of section 22(2) of the High Court Act. As stated, sections 24 and 25 of the 1873 Act apply in Fiji by virtue of section 22(2).

EFFECT OF 1873 JUDICATURE ACT

[5]. In England, section 24(1)[3] of the 1873 Act enabled a plaintiff for the first time to assert an equitable claim, and obtain an equitable remedy, in the English High Court and Court of Appeal. Previously, equitable remedies were the exclusive province of the Chancery Courts. Amongst the equitable relief that were caught under section 24(1), was the discretionary relief of equitable damages in lieu of specific performance. This discretionary remedy was, hitherto, created by the **Chancery Amendment Act 1858** (Lord Cairn's Act)[4].

[6]. The application of section 24(1) in Fiji by virtue of section 22 of the High Court Act means that our High Court has a fused equitable and common law jurisdiction. Professor Don Patterson, in his article **The Application of the Common Law and Equity in Countries of the South Pacific**[5], referring to section 35 of Fiji's Supreme Court Ordinance 1875 (the precursor to section 22 of the High Court Act of Fiji), said at page 8 that in Fiji, common law and equity are automatically in force[6].

[7]. I need only add here that, by virtue of the **Existing Laws Decree 2009**[7], section 22[8], and ultimately, sections 24 and 25 of the 1873 UK Judicature Act, all continue to remain in

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[2] Section 22(3) which came into being by virtue of the High Court Amendment Decree 2011 says as follows:

Section 22 of the High Court Act (Cap 13) is amended by inserting the following new subsection after subsection (2) –

"(3) For the removal of doubt, and notwithstanding anything contained in subsection (1), any amendment made on or after the 2nd of January 1875, to the statutes of general application which were in force in England on the 2nd day of January 1875, shall not apply to Fiji and shall not be in force in Fiji".

[3] Section 24(1) of the Supreme Court of Judicature Act 1873 says as follows:

24. In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following:

(1) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in any such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every judge thereof shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

[4] section 2 of this Act gave the Court of Chancery a discretion to award (equitable) damages in lieu of specific performance if the contract in question is specifically enforceable.

[5] **The Journal of Pacific Studies, Volume 21, 1997, 1–31 (USP).**

[6] Professor Patterson observes: "In these countries, i.e. Cook Islands, Fiji, Nauru, Niue, Papua New Guinea, Tokelau and Samoa, it is very clear that the common law and equity are automatically in force in these countries".

[7] The **Existing Laws Decree 2009** states as follows:

force in Fiji to this day. Recent pronouncements of the Supreme Court of Fiji in **QBE Insurance (Fiji) Ltd v Ravinesh Prasad**[9] and in **Shell Fiji Ltd v Chand**[10] reaffirm this position.

EQUITABLE & COMMON LAW DAMAGES – PRINCIPLES

[8]. Damages awarded at law for breach of contract are based on the need to protect the innocent party's expectation interest and to give him the benefit of the bargain by placing him, so far as money can do so, in the same position as if the contract had been performed[11].

[9]. Mr. Young argues that, without any specific guideline in section 22, this court cannot proceed to assess equitable damages.

[10]. As stated above, section 22(2) of the High Court Act and sections 24 and 25 of the Judicature Act 1873 and ultimately, Lord Cairn's Act, establish the legislative base which creates, and then confers to this Court, jurisdiction to award equitable damages in lieu of specific performance. Under the Lord Cairn's Act, the jurisdiction conferred was a **"discretionary jurisdiction"**[12]. That discretion is preserved in Fiji as evident in the very fact that, whilst section 22 creates and confers jurisdiction, that jurisdiction has not come with legislative "instructions" on when and how it should be exercised. Hence, this area of the law will just have to develop and evolve by judicial innovation in Fiji, drawing inspiration from relevant accumulated case law around the common law world.

[11]. I get the impression from my own research that *lack of specific legislative guideline* is, nowadays, not as often a point of argument as it used to be when the courts were still

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2. Subject to the provisions of this Decree or any other Decree made in accordance with the powers vested in me as President and Commander in Chief of the Republic of the Fiji Military Forces, the Existing Laws in force immediately before the 10th day of April 2009 shall continue in force and shall be read with such modifications, adaptations, qualifications and exceptions as may be necessary.

3. "Existing Laws" means all written laws (other than the Constitution Amendment Act 1997) in force in the Republic of the Fiji Islands immediately before the 10th day of April, 2009, and shall include all Promulgations, subsidiary legislation, and other Decrees or Declarations made between 5th December 2006 and 10th April 2009.

[8] High Court Act of Fiji 1988.

[9] **Civil App No. CBV0003.09** 18th August 2011.

[10] **[2012] FJSC 16; CBV0003.2011 (7 August 2012).** In this case, Gates P, the President of the Fiji Supreme Court, observed as follows:

[9] By virtue of section 22 of the High Court Act, Cap 13 section 17 of the (Imperial) Judgments Act 1838 remains in force in Fiji. This section provides that "every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment until the same shall be satisfied". The interest accrues automatically and no order of the Court is necessary. It runs from the date of pronouncement of judgment in Court **Parsons v Mather & Platt Ltd (1977) 2 All ER 715** approved in **Erven Warnink B.V. v J. Townsend and Sons (Hull) Ltd. (No.2) (1982) 3 All ER 312**.

[10] This interpretation has been applied in several cases in Fiji including **Charan v SCC Civil App 12 of 1989, 27th October 1989**; **Charan v SCC [1994] FJHC 3**; **Byrne v J.S. Hill & Associates Ltd (unreported) Civil Appeal 33 of 1993; 19th August 1994**;**Warner v Hagerman HBC425.09S 13th August 2010**; **Koya v Dominion Finance Ltd HBC193.09L 9th March 2012**.

[11] In **QBE Insurance (Fiji) Ltd v Ravinesh Prasad Civil App No. CBV0003.09 18th August 2011** Calanchini JA in the Supreme Court pointed out that there was no specific provision in the Law Reform (Miscellaneous Provisions) (Death and Interest) Act to cover interest after judgment. **Section 22(1)** of the **High Court Act** provided for the statutes of general application in force in England on 2nd January 1875 to be in force in Fiji. **The Judgments Act 1838 was held to be such an Act**.

[11] see **Wertheim v Chicoutimi Pulp Co. [1911] A.C. 301 at 307**.

[12] Jolowicz, **Damages in Equity - A Study of Lord Cairns' Act**, 34 CAMD. L.J. 224 (1975); Harris, Ogus & Phillips, Contract Remedies and the Consumer Surplus. 95 L.Q.R. 581 (19791; Note, 42 MOD. L. REV. 696(1979).

questioning whether or not equitable damages really differ from common law damages. **Edward Veitch**[13] reflects on this point thus:

> Equitable damages are distinct in that by statute they can be awarded only where the court has jurisdiction to entertain applications in equity. The enabling legislation gives no aid to their assessment. However, insofar as they are statutory, equitable damages are of a different genus since the principles and rules of assessment of common law damages have been judicially determined and refined over centuries. This distinction has been blurred since the courts have conveniently overlooked the threshold criterion of jurisdiction to achieve the just remedy. (my emphasis)

[12]. In most common law jurisdictions, (except Australia[14]), the view is that equity and common law have merged. The New Zealand[15] attitude is that the full range of remedies should be available no matter where they originated[16]. **I.C.F. Spry**[17] at 649 observes that:

> ……where the plaintiff has no right to legal damages it is often appropriate to apply in equity similar rules to those that are applicable at law both as to measure of damages and as to remoteness of damage. This is so in particular if, for example, the inability to recover damages at law is attributable merely to the absence of a sufficient writing for the purposes of a Statute of Frauds provision, although once again special equitable considerations, such as laches or unfairness, may render a different course more appropriate (see generally **Johnson v Agnew** and **Madden v Kevereski**) …… (my emphasis).

[13]. Spry adds that, where the plaintiff has a right to damages at law, and the court is considering equitable damages in lieu of specific performance, the measure of equitable damages will often be the same as the measure of damages at law[18], **"not because the court is obliged to apply legal criteria",** but because the application of equitable principles will often yield a measure of damages similar to one that would be awarded at law[19].

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[13] Dean of Law. University of New Brunswick. **AN EQUITABLE EXPORT – LORD CAIRNS' ACT IN CANADA** Ottawa Law Review [Vol. 12:227.

[14]For an excellent insight on the Australian attitude, see **Michael Kirby's speech: Equity's Australian isolationism** (http://www.theaustralian.com.au/business/legal-affairs/equitys-australian-isolationism/story-e6frg97x-1111118084379)

[15]see for example New Zealand High court decision in **Aquaculture Corp v NZ Green Mussel Co Ltd (1990)**. See also **PRINCIPLES OF EQUITY AND TRUSTS – Samantha Hepburn, 1997 – at pp 31-36** for a review of case law supporting this trend. See also **New Zealand Land Development Co Ltd v Potter [1992] 2 NZLR 462, 468).**

[16] Tipping J in **New Zealand Land Development Co Ltd v Porter [1992] 2 NZLR 462, 468** argued that there is no longer any value, except for historical purposes, in seeking to distinguish or keep conceptually separate common law damages and damages in equity, whether under Lord Cairns' Act or otherwise. The court, he said, should now award such damages as are a proper and fair reflection of what the plaintiff has lost by reason of the failure of the defendant to perform the contract. It no longer matters whether the damages are called common law or equitable damages. Any residual distinction has now gone and perhaps serves more to confuse than to assist. Let us, the learned judge enjoined, carry the fusion of law and equity into the area of damages. Further judicial approval of the principle was forthcoming from Fisher J in **Newmans Tours Ltd v Ranier Investments Ltd [1992] 2 NZLR 68, 96** (see discussion of other cases in **An Endorsement of a More Flexible Law of Civil Remedies** By Rt Hon Justice Thomas **[1999] WkoLRev 2.**

[17] (2001) **The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages** Sweet & Maxwell (6th ed).

[18] Spry, supra footnote 11.

[19] Spry makes this point as follows:

> "As nothing is said in the material statutory provisions as to the measure of damages in equity, the power of the court extends not only to deciding whether damages should be awarded but also to determining on their quantum and on questions of remoteness of damage. But if there is a right to damages at law and it appears to a court of equitable jurisdiction that it is appropriate under a Lord Cairn's Act provision to award damages either in lieu of or in addition to specific performance or an injunction, the application of general equitable principles commonly gives rise to the result that the measure of damages in equity is the same as the measure of damages at law; and again, commonly gives rise to the result that the measure of damages in equity is the same as the measure of damages at law. This is so, however, not because the court is obliged to apply legal criteria, but because the amount of compensation which is found to satisfy

[14]. **Sir Anthony Mason** applauds the increasing convergence of common law and equity thus:

> Equity and common law are converging and will continue to converge, so that the differences in origin of particular principles should become of decreasing importance…The recent decade might be regarded as a period of legal transition in which we have been moving from an era of strict law to one which gives greater emphasis to equity and natural law. As Roscoe Pound said, the endeavour to make morals and law coincide will be an important future goal[20].

[15]. In this case before me, the Fiji Court of Appeal has found that Chandra is not entitled to common law damages but is entitled to equitable damages in lieu of specific performance to be assessed to the date of its judgment (i.e. 18 November 2010). The Court cites **Johnson v Agnew**[21] with authority. In that case, Lord Wilberforce, after acknowledging that Lord Cairns' Act damages may arise in cases where damages are not recoverable at common law, and that the Act created a power to award damages which did not exist at common law, and after reviewing various cases on the point[22], said:

> ..there is sound authority for the proposition that the Act does not provide for the assessment of damages on any new basis.
> …….
> On the balance of these authorities and also on principle, I find in the Act no warrant for the court awarding damages differently from common law damages, but the question is left open on what date such damages, however awarded, ought to be assessed (my emphasis).

[16]. I take cue from **Johnson v Agnew**. Accordingly, I say that there is no warrant in Fiji to award equitable damages any differently from common law damages.

THE RULE IN HADLEY v. BAXENDALE

[17]. If there is no warrant to award equitable damages differently from common law damages, then does the common law rule in **Hadley v Baxendale**[23] and the common law duty to mitigate damages, then apply automatically in a case for assessment of equitable damages?

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the loss or damage that has been suffered or is expected to be suffered, and which the court considers is just and equitable to be paid, is commonly found to be the same as the amount of legal damages that are appropriate".

[20] Sir Anthony Mason **The Place of Equity and Equitable Remedies in the Contemporary Common Law World** (1994) 110 Law Quarterly Review.

[21] **[1980] AC 367.**

[22] **Wroth v Tyler [1974] Ch 30; Grant v Dawkins [1973] 1 WLR 1406; Horsler v Zorro [1975] Ch 302 at 316; Malhotra v Choudhury [1980] Ch 52.**

[23] the principle in **Hedley v Baxendale (1854) 9 Exch, at p 354 (156 ER, at p 151)**:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Loss under the so called first limb is that which arises naturally in the usual course of things as the probable result of the breach. To establish the second limb the plaintiff must prove that the defendant knew or ought to have known that such loss would be a probable result of the breach. (see, **G C Cheshire, Fifoot, C H Stuart, N Seddon and M P Ellinghaus, Cheshire and Fifoot's Law of Contract, 9th Australian ed, LexisNexis Butterworths, Sydney, 2008 at [23.34]**).

[18]. In law, only damages which are not too remote are compensable. Hence, damages which, according to principles of fairness and reasonableness, arise naturally from the breach, or which parties might reasonably have contemplated at contract time to be the probable result of a breach, are allowed in accordance with **Hadley**.

[19]. However, because **Hadley** espouses a common law rule, it (**Hadley**) is traditionally regarded to be not applicable in cases of equitable damages. As Sir Anthony Mason said:[24]

> ……the equitable obligation is to make restitution and is not confined by the concepts of foreseeability and remoteness.

Whether or not the Mason view is peculiarly an Australian attitude, I will save for another day.

DUTY TO MITIGATE LOSSES

[20]. Again, I pose the question, if there is no warrant to award equitable damages differently from common law damages, then does the common law duty to mitigate losses apply automatically when assessing equitable damages?

[21]. Mr. Young argues that Chandra could have mitigated his losses by purchasing another property in the same location at The Marina in Denarau Island. Was Chandra under a duty to cancel his contract with Ward and to purchase a substitute property?

[22]. The duty to mitigate losses is a duty imposed at common law. Had Chandra been pursuing common law damages, the duty would undoubtedly apply. However, in this case, Chandra was pursuing an equitable action for specific performance and was awarded equitable damages instead. Based on the traditional view, no obligation to mitigate could therefore be imposed on Chandra.

[23]. The right to specific performance is an equitable right which has always been available to a purchaser in any *breach-of-sale-and-purchase-agreement-over-real-property* case. Why this is so, according to Berryman[25], is because the law regarded each piece of land as unique.

> The difficulty with specific performance as a presumptive remedy in real estate contracts is that upon breach it obviates the need for the plaintiff to mitigate. The plaintiff must simply continue to be ready and willing to perform his or her contract.
> …….

[24] The Mason Papers Selected Articles & Speeches (2007) Federation Press at page 314.
[25] Jeff Berryman, **Recent Developments in the Law of Equitable Remedies: What Canada Can Do For You**" (2002) 33 VUWLR 51 at page 78 and 79.

> The common law always sought to limit a promisee's damages by requiring certainty, foreseeability, and denying recovery for avoidable losses. Specific performance frustrates all three limitations, but particularly that relating to avoidable losses or the obligation to mitigate.

[24]. Applying the above reasoning, Chandra, who has been unable to clinch the *"unique"* land he had contracted to purchase[26], would be insulated from any obligation to look for another property because there is no other similar property on the market (it is not clear to me whether or not that reasoning applies to common law damages as well).

[25]. I sense Mr. Young's fretting that Chandra would get an undue windfall if he is insulated from mitigating his loss (es). But the cases appear to persuade against deductions when it comes to equitable damages. In **Ridley v De Geerts**[27] for example, Lord Greene M.R. who delivered the main judgment, said as follows:

> *Prima facie* …… the measure of damages would be the difference between the two prices, £200. But **counsel for the respondent suggests that there should be deducted from that the costs which the appellant would have been put to, including stamp duty, in the event of the transaction going through.** It may very well be that in some cases that may be an appropriate deduction, but on the facts of this case, I do not think it would be right to deduct those costs. My reason is this: at practically the very moment when this contract was made and within a very few days of its being made the respondent repudiated and broke the contract by accepting an offer of £1,600. We may take it, therefore, that when the appellant entered into the contract to buy the house she was buying a house for £1,400, the market value of which was £1,600, and she could then and there have resold the house at a profit before even she had investigated the title, much less completed the contract……**It is no answer to say that the appellant was buying for her own occupation. The question of what she intended to do with the house cannot affect the question of damages, which must be fixed in relation to the pecuniary loss which she has suffered, having regard to the market value of the subject-matter of the contract.** I therefore do not think in this case it would be proper to make any such deduction as counsel for the respondent asks for and the proper measure of damages is in my opinion £200 (my emphasis)

[26]. In the case of **Semelhago v. Paramadevan**[28], the Canadian Supreme Court opined that if the purpose of equitable damages are to substitute for the decree of specific performance, then deductions not related to the value of the property should not be entertained.

> 19……..Damages are to be substituted for the decree of specific performance. I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.
>
> 20 This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique.

[26] due to Ward's advertant reneging.

[27] **[1945] 2 All ER 654.** Lord Greene, M.R, du Parcq and Morton L.JJ had to consider what proper measure of damages to award in a purchaser's action where the vendor, before completion of contract, had sold the land to another at a higher price. The court at first instance took the view that there was no contract of sale between the parties. It then dismissed the action for specific performance. But the English Court of Appeal allowed an appeal.

[28] **(1996), 2 S.c.R. 415.**

[27]. The Canadian Supreme Court said the above in response to the argument that the difference between the contract price and the value of the property at trial (or at judgment time in this case before me) gives the purchaser such an undue windfall. Chief Justice Sopinka had declared that:

> I would not deduct from this amount the increase in value of the respondent's residence which he retained when the deal did not close.

[28]. However, having said that, Canadian courts would impose a duty to mitigate losses on a plaintiff like Chandra. But only so after a shift in their jurisprudence to remove the assumption that land is unique. In the same case of **Semelhago v. Paramadevan**, Mr. Justice Sopinka observed that:

> Under the common law every piece of real estate was generally considered to be unique. Black Acre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance.
>
> .....
>
> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases."
>
> .....
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available (my emphasis).

[29]. There are signs that New Zealand is treading the same path as Canada. As Mills[29] observes:

> In recent years, and working from the same legal history as New Zealand, the Canadian Courts have asked fundamental questions about the assumption that land is unique and damages an inadequate remedy. They have also revisited the assumption that a party seeking specific performance is largely free to ignore any prospect of mitigating its loss.

IMPRESSIONS

[30]. It may (or may not) be correct to say that law and equity "are merging" rather than "have fully merged". In so far as *equitable damages in lieu of specific performance* in a contract for sale of land contract is concerned, there is certainly a resolve to ensure that the measure of damages in one will nearly always be the same as the measure of damages in the other. However, no one (not even in Canada or New Zealand), has quite taken the next

[29] see for example **Mills: Specific Performance: Sale of Land ; NZLJ, June 2006** page 196.

step to say that the common law rule in **Hedley v Baxendale** and/or the common law **duty to mitigate** should also be applied to *equitable damages in lieu of specific performance*.

HOW DAMAGES ARE ASSESSED AT LAW & IN EQUITY[30]

[31]. Generally, at law, the measure of damages for breach of contract for the sale of land is measured by the difference between the market value and contract price at the contractual date. In **Hoffman v Cali [1985] 1 Qd R 253** (Supreme Court of Qld, Full Court), McPherson J commented as follows:

> …the principle adopted in **Ella v Wenham [1972] Qd R 9**0 [is] that damages for breach of a contract for the sale of land are ordinarily to be measured by the difference between market value and contract price at the contractual date for completion. After accepting the defendants' repudiation of the contract, the plaintiff here did not in fact re-enter the market and purchase another similar unit at a price which, having regard to the then prevailing state of the market, would have resulted in an actual loss to her equivalent to the damages awarded. There is no evident reason for her not taking that course. She admittedly did not intend herself to occupy the unit purchased, which she agreed was bought as an investment. Legally speaking, it possessed no special features distinguishing it from other units of similar kind; and it is also apparent from the evidence that such units, or contractual rights to them, were at the time in question being dealt with more like choses in action than as an estate in fee simple in the traditional mold of Blackacre.

[32]. The damages will include the return of any deposit paid by the purchaser with interest together with the purchaser's due diligence expenses incurred in investigating the title. The learned authors of **Halsbury's Laws of England 4th Edition**[31] at page 468 say:-

> Where it is the vendor who wrongfully refuses to complete, the measure of damages is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages included the return of any deposit paid by the purchaser with interest together with expenses which he has incurred in investigation title and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date repudiation was greater than the agreed purchase price, damages for loss of bargain.

And at footnote 7 on the same page, the learned authors said that damages:

> ….. will prima facie be the difference between the purchase price and the market price.

(see also **Ridley v De Geerts** (supra).

[33]. The same approach has been applied in relation to equitable damages in lieu of specific performance. In **Wroth v Tyler** for example, the purchaser had contracted to purchase a house for £6,000. The vendor defaulted. On the closing date, the property was worth £7,500.

[30] **FOR BREACH OF CONTRACT FOR SALE OF LAND**
[31] **Volume 12, paragraph 1183.**

At the date of trial, the property was worth £11,500. Equitable Damages was assessed as of the date of trial. Megarry J. said that the damages that are awarded must be a true substitute for specific performance. His Lordship stated, at page 58 as follows:

> On the wording of the section, the power "to award damages to the party injured, . . . in substitution for such . . . specific performance," at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Furthermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant. In the case before me, I cannot see how £1,500 damages would constitute any true substitute for a decree of specific performance of the contract to convey land which at the time of the decree is worth £5,500 more than the contract price.

[34]. At page 59 Megarry J. added:

> Yet on principle I would say simply that damage "in substitution" for specific performance must be a substitute, giving as nearly as may be what specific performance would have given.

[35]. In Canada, the Supreme Court had to consider a similar issue in assessing equitable damages in **Semelhago v. Paramadevan** (supra). The case background is stated as follows in the judgment:

> In August 1986, the respondent purchaser agreed to buy a house under construction in the Toronto area from the appellant vendor SP for $205,000, with a closing date of October 31, 1986. To finance the purchase, the respondent was going to pay $75,000 cash, plus $130,000 which he was going to raise by mortgaging his current house. The respondent negotiated a six-month open mortgage, so that he could close the deal on the new house and then sell his old one at an appropriate time in the six months following closing. Before the closing date, the appellant vendor reneged and in December 1986 title to the house was taken by the appellant BP. The respondent remained in his old house, which was worth $190,000 in the fall of 1986, and $300,000 at the time of the trial. The respondent sued the appellants for specific performance or damages in lieu thereof. At the time of trial, the market value of the property to be purchased was $325,000. The respondent elected to take damages rather than specific performance and the Ontario Court (General Division) awarded him $120,000, being the difference between the purchase price he had agreed to pay and the value of the property at the time of trial. The appellants appealed on the ground that the assessment was a "windfall" because the respondent was benefiting not only from the increase in the value of the new house, but also from the gain in the value of the old house. The Court of Appeal allowed the appeal, deducting from the amount awarded at trial the carrying costs of the $130,000 mortgage for six months, notional interest earned on the $75,000, and legal costs on closing. The respondent`s cross-appeal against the disallowance of legal and appraisal fees was also allowed.

[36]. The Canadian Supreme Court, after defining the ambit of its inquiry ("What principles apply to assessment of damages in lieu of specific performance and, further, how do those principles apply to the facts of this case?") and after retracing to the Lord Cairns' Act the origins of equitable damages, went on to reason as follows:

> 19 The difference between the contract price and the value "given close to trial" as found by the trial judge is $120,000. I would not deduct from this amount the increase in value of the respondent's

residence which he retained when the deal did not close. If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. **Damages are to be substituted for the decree of specific performance. I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.**

20 **This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique.** While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available. (my emphasis)

[37]. Relying on **Bain v Fothergill (1874) LR 7HL 158** [32], Mr. Young submits that Chandra should only be awarded nominal damages. But that case involved a vendor who could not complete because his title was defective. Hence, the purchaser was allowed only nominal damages. In contrast, Ward, in this case, had good title at all material times. He did not complete the conveyance with Chandra because he had found a better price on the market. As Lord Hatherley said in **Bain v Fothergill** (supra) at page 209, whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel, to concur in the conveyance.

FACTS EMERGING FROM EVIDENCE AT HEARING

[38]. Chandra is an engineer. He owns a residential property in Kennedy Avenue in Nadi and also some commercial property[33]. Lot 18 is a vacant seafront lot of 1600 square meters situated at the exclusive Marina Point at Denarau Island. It has room for a private marina. Chandra had planned to spend $1million to build a six bedroom residential class A property on Lot 18 and to sell it later after having rented it out for some five years or so at $10,000 to $12,000 per month. At that rate, he expected a profit of between $1.5 – $3.0 million from Lot 18 after five years. If he were not to get that return after that time, he would then just settle there at Lot 18 and rent out his Kennedy Avenue house instead.

[32] The rationale of this rule as explained by Lord Hatherly is:

> ..it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our good law, a good title can be effectively made by his vendor, and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title.

[33] He owns a six-bedroom house at Kennedy Avenue in Nadi where he lives. He also owns the MH building in Namaka which he acquired in 1995. The building is being rented out to Carpenters Limited at $400, 000-00 per annum. He also owns the Airport Central Building in Namaka which he built in 2005 at a cost of $7.5 – 7.8 million. His tenants here are: the *i*TLTB at $16,500.00 per month; Fiji Care at $2300.00 per month; BSP Bank at $21,275.00 per month and Tower Insurance at $4,000.00 per month. There is some office space still vacant at the top level.

[39]. According to Chandra, properties in the Marina, in Denarau island ranged in price from $3 to $5 million on the market and Chandra expected Lot 18 to escalate exponentially in value over the years. The outlook of the building that he had in mind is shown in a scheme plan which Chandra had done himself. Colonial National Bank (now BSP Bank) had pre-approved $775,000-00 in finance. Considering the scale on which he would build (i.e. $1 million), Chandra would have to pay insurance for replacement value at between $6,000 to $7,000 per annum. He would also have to pay tax but he would expect tax depreciation and/or a tax break for 6 – 8 years. If he did not have that advantage, he suspects he would be taxed at the 22% tax bracket rate. Chandra was also cross examined in detail on the tax depreciation for other properties as well as Capital Gains Tax and Land Sales Tax. Property owners at Denarau Island are required to pay $3,000 to $4,000 per quarter to the Denarau Corporation Limited for utilities like garbage collection, drainage clearance and maintenance.

[40]. **Vinita Prasad** has been handling all conveyancing and litigation trust accounts for eight years now at Young & Associates. Immediately before joining Young & Associates, she had worked at the firm of J Lal Accountants for four years where she had handled financial accounts and profit and loss balance sheets for clients. Ward was a client of Young & Associates. Just before coming to court, Prasad had reviewed all trust account statements for Ward.

[41]. Ward had sold CT 36520 to Adrenaline Sports for $1.1 million. She referred to the transfer document and the land sales declaration. The declaration was sworn by Ward and was prepared by an Accountant. I did allow Prasad to tender the Land Sales Declaration after strong objection from Mr. Mishra. Prasad said Young & Associates paid $150,993.47 in Land Sales Tax which was receipted by FIRCA. After payments, Ward paid all other legal fees. There were a few bills for Supreme Court matter for which Ward had an arrangement with Young & Associates to the sum of $NZ 10,000.00. He did hire counsel BC Patel to represent him for the Supreme Court matter for NZ$20,000.00. I did let Prasad give evidence on deductions and depreciations based on her purported experience[34]. Under cross-examination, Prasad said she did not know who prepared the schedule of costs. There was no re-examination.

[34] Mr. Mishra objected on the ground that she is not an expert. Mr. Young said she is not an expert but is speaking from experience as she is an individual who had worked on account. The plaintiff himself had given evidence on depreciation and acceleration. He did not establish himself as a real estate agent. According to Prasad, depreciation for any particular year is always calculated in the following year. If a building is completed in 2011, depreciation is cleared in 2012.

ASSESSMENT

[42]. Chandra's equitable damages are to be assessed as at 18 November 2010. The price that Adrenalin Sports paid Ward in August 2008 was $1.1million. This is common ground between the parties. There was no formal valuation put before me in evidence to show what the market value of Lot 18 was at 18 November 2010. It might have escalated or depreciated from the 2008 value. However, I am prepared to take $1.1 million to be the value of Lot 18 as at 18 November 2010. Having done that, I then consider the difference between the market value of Lot 18 (i.e. $1.1 million as at 18 November 2010) and the contract price i.e. the sum of $505,000-00 (five hundred and five thousand dollars[35]).

[43]. The deposit has been returned. As for conveyancing costs, there is a view that this is not recoverable because it is something that would have been spent to necessitate the conveyance of title. In any event, it is not something that is associated with the value of the land. I make no award on this. As stated above, Chandra owes no duty to mitigate his losses. Nor does the rule in **Hadley v Baxendale** apply here in my view. I also make no deductions for conveyancing costs (including GST and other taxes) or for speculated depreciation taxes. These are not related to the value of the property. Interest is a matter of discretion. In this case, I am cautious that the interest awarded is not unduly harsh such as to result in a global windfall figure to Prasad that is unduly harsh to Ward. Hence, I award nominal interest at 2.5% on the judgment sum. In addition to that, I award costs at $3,500.00.

AWARD

(i) Damages in the sum of $505,000-00 (five hundred and five thousand dollars)
(ii) $12,625-00 (being 2.5% interest on the judgment sum only).
(iii) Costs of $3,500-00 (three thousand five hundred dollars only)

.....

Master Tuilevuka
23 May 2013.

[35] the agreed price between Chandra and Ward.