

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 189 of 2022

**BETWEEN:** BAUMANN INVESTMENT PTE LIMITED a private company incorporated in Fiji and having its registered office at Lot 49/3, Makasoi Road, Pacific Harbour.

PLAINTIFF

**AND:** AUCKLAND JOINERY FIJI PTE LIMITED a private company incorporated in Fiji and having its registered office at Suva.

DEFENDANT

**BEFORE :** Hon. Justice Vishwa Datt Sharma

**COUNSEL :** Mr. Parshotam S with Mr Kumar for the Plaintiff  
Mr Kumar P. for the Defendant.

**DATE OF DECISION:** Thursday 16<sup>th</sup> March 2023 at 9-30am.

JUDGMENT

*[For Possession of Property and other ancillary orders]*

**Introduction**

[1] The Plaintiff filed an Originating Summons on 06<sup>th</sup> June 2022 and sought for the following relief:

- (A) *An order that the Defendant to give immediate vacant possession of the property comprised in Certificate of Title No. 14956 being Lot 13 on deposited plan no. 3896 to the Plaintiff.*
  
- (B) *The Defendant pay general damages for breach of the Sale and Purchase Agreement dated 19 August 2020 and/or general damages to reinstate the property to the condition that it was when possession was given to the Defendant.*
  
- (C) *The Defendant pay mense profits at the rate of \$5,000.00 per month from the 1 March 2022 till possession of the property comprised in Certificate of Title No. 14956 is delivered to the Plaintiff.*
  
- (D) *The Defendant pay all utility bills of the property comprised in Certificate of Title No. 14956 till possession is delivered to the Plaintiff.*
  
- (E) *That the costs of this action be paid by the Defendant on an indemnity basis.*
  
- (F) *Such further or other relief as seems just and equitable to this Honourable Court.*

On the grounds that:

- (A) *The Defendant has failed to fulfil its obligations and has failed to pay its monthly repayments to the Plaintiff under the Sale and Purchase Agreement dated 19 August 2020.*

- (B) *The Defendant continues to possess the property comprised in Certificate of Title No. 14956 without paying any form of rent.*
- (C) *The Defendant has damaged the property comprised in Certificate of Title No. 14956 and the Plaintiff will incur costs in repairs and maintenance to restore the property to its former condition.*

- [2] The Defendant filed his Affidavit in Response on 06<sup>th</sup> September 2022.
- [3] Subsequently, the Plaintiff filed its Affidavit in Reply on 13<sup>th</sup> September 2022.
- [4] Both parties to the proceedings furnished court with their Respective Written Submission and argued the matter orally.

#### *Background to Case*

- [5] The Plaintiff and the Defendant entered into a Sales and Purchase Agreement on 19<sup>th</sup> August 2020.
- [6] The possession of the property in question is the Certificate of Title No. 14956 Lot 13 DP 3896 at Villa 265 Viti Levu Drive, Pacific Harbour was given to the Defendant on 01<sup>st</sup> December 2021.
- [7] The purchase price of the property was \$688,073.39 and to be paid as follows:-
  - (a) \$20,000 has been paid as a non-refundable deposit prior to signing of the Agreement.
  - (b) \$55,000 to be paid as a non-refundable deposit to the vendor on or before 31<sup>st</sup> July 2023.
  - (c) Balance of \$625,000 shall be paid by the purchaser to the vendor within 3 years of the date of possession of the property together with 4.0% per annum interest on the balance owing by making:

- (i) *Monthly payments of \$4,000 on the 1<sup>st</sup> day of each month for the First 12 months from and including 1<sup>st</sup> August 2020.*
- (ii) *Monthly payment of \$5,000 on the First of each month for the Second 12 months from and including 1<sup>st</sup> August 2021.*
- (iii) *Monthly payments of \$6,000 on the First day of each month for the third 12 month from and including 1<sup>st</sup> August 2022.*
- (iv) *Payment of \$633,016.86 on or before 31<sup>st</sup> July 2023.*
- (v) *Date of Settlement shall be on 31<sup>st</sup> July 2023 or within 7 days of the vendor confirming it holds CGT Certificate and a settlement notice.*

[8] The Agreement provided that in the event the Defendant defaulted in the payments, then the sum that the Defendant had paid to the Plaintiff would be converted to rent and the Defendant would be required to continue making payments for period that the Defendant remained in possession of the property.

[9] Both parties to the Agreement were bound by the terms of the Agreement and any party in non-compliance with the terms of the Agreement would then tantamount to be in default of the same.

#### *The Plaintiff's Case*

[10] The Plaintiff's Contention is that on or about 3 March 2022, the Defendant's director Javis Singh, informed the Plaintiff, Russell Baumann that the Defendant could not continue to make its repayments under the said Agreement.

[11] The Defendant was informed by the Plaintiff that both parties to the proceedings are bound by the terms of Agreement and that the Defendant should comply with those terms therein.

- [12] The Plaintiff solicitor by letter dated 10<sup>th</sup> March 2022, put the Defendant on notice to comply with the terms of the Agreement otherwise the default provision in the Agreement would be applied and enforced.
- [13] On 29<sup>th</sup> April, 2022 the Plaintiff wrote again to the Defendants Counsel and brought to his attention paragraph 18.1 (c) of the Agreement and informed him that this clause comes into effect where the purchaser (Defendant) default in Payment, and in that instance the deposit and any payment is forfeited to the vendor (Plaintiff) and converted to rent for the period that the property is occupied by the Defendant.
- [14] Since the Defendant refused to vacate the said property, the Plaintiff proceeded to file this substantive action seeking for Vacant Possession together with other orders therein as enumerated at paragraph I [A] to [F] inclusive hereinabove in my Judgment.

#### *The Defendant's Case*

- [15] The Defendant admits entering into a Sale and Purchase Agreement for the Sale of the Property Comprised in Certificate of Title No. 14956 being Lot 13 on DP No. 3896.
- [16] Settlement was to take place in 31<sup>st</sup> July 2023 on or within 7 days of the Plaintiff obtaining a Capital Gains Tax Certificate.
- [17] Possession of the Property was given to the Defendant on 01<sup>st</sup> December 2020 and occupation took place on 16<sup>th</sup> January 2021.
- [18] To date, paid \$76,000 to the Plaintiff.
- [19] Stayed in the property for total of 23 months.
- [20] The Agreement provides that in the event of Defendants default in payment, then the sums paid by the Defendant shall be converted to Rent. Therefore, a sum of \$57,500 was paid as Rent for 23 months since the Defendant occupation.

- [21] Defendant's Contention is that he has carried out improvements in the property with the Plaintiff's consent and cost Defendant \$23,000. Also paid Insurance of \$2,225.25 for the said property.
- [22] To date according to the Defendant, he has spent a sum of \$101,225.25 on the said property to date.
- [23] That the Defendant has overpaid a sum of \$43,725.25 to the Plaintiff.
- [24] That according to the Defendant, he should be allowed to stay on the property for additional 17 months for free or the Plaintiff should refund \$43,725 25.
- [25] The Defendant admits that he informed the Plaintiff that he will not be able to continue payments for the Property.
- [26] That the Plaintiff to refund \$23,000 since the Defendant carried out improvements on the property.
- [27] The Defendant admits paragraph 9,10 and 11 of the Plaintiff Affidavit i.e. the Defendant was put on notice to comply with the terms of Agreement, Defendant to give possession of property, Plaintiff's representative would be present and that Plaintiff was owed \$10,000 as rent as at 22/04/22.
- [28] By letter dated 21 April 2022, the Defendant's solicitor wrote to the Plaintiff's solicitor informing them of the following:
- (a) *That the Property has structural defects;*
  - (b) *The Defendant had sought consent from the Plaintiff's director and made improvements on the Property;*
  - (c) *The Defendant intended to rescind the Agreement due to the structural defects on the property;*
  - (d) *The Defendant would not be vacating the property.*

- [29] The Defendant states that he was proposed to purchase the property in Question, however, after seeing the cracks on the cement wall, Defendant became suspicious and sought for the House Plan and full Engineers Report from the Plaintiff.
- [30] The Plaintiff failed to provide House Plan and Engineers Certificate and Defendant stopped making monthly repayments to the Plaintiff.
- [31] The Property was deteriorating and became very costly to carry out repair works.
- [32] The Agreement states that the money shall be converted to rent if Defendant was unable to make monthly repayments.
- [33] The Plaintiff is asking for the refund of \$43,725.25, payment of Insurance and Costs for carrying out the improvements and upgrading of the property.
- [34] That the Originating Summons be dismissed with Costs.

#### **Determination**

- [35] The Plaintiff is seeking for an immediate Vacant Possession of the Property Comprised in Certificate of Title No. 14956 being Lot 13 on DP No. 3896 to the Plaintiff, General Damages for breach of the Sale and Purchase Agreement dated 19<sup>th</sup> August 2020 and/or General damages to reinstate the property to the condition that it was when possession was given to the Defendant:
- [36] Further order sought by the Plaintiff against the Defendants are mense profit at the rate of \$5,000 per month from 1 March 2022 till possession of the property is delivered to the Plaintiff together with outstanding utility bills and Costs.
- [37] The substantive Question for this Court to determine is 'whether the Plaintiff is entitled to the immediate Vacant Possession of all that property comprised in Certificate of Title No 14956 being Lot 13 on Deposit Plan No. 3896?'

[38] The Substantive Action herein without doubt hinges on the Sale and Purchase Agreement Executed by both Parties to this proceedings on 19<sup>th</sup> August 2020.

[39] In this case, the Plaintiff must first comply with the requirement of Section 169 of the Land Transfer Act, which are stated as follows:

- (a) The First requirement or the First limb of Section 169 is that the Applicant must be the last registered proprietor of the subject Land.
- (b) The Second is that the Applicants be a Lessor with power to re-enter where the Lessee or Tenant is in arrears; and
- (c) The Third is where a Lessor against a Lessee or tenant where a Legal notice has been given or the term of the Lease has expired. The Second Limb of Section 169 does appear to apply in that the Defendant is not only the Purchaser, but the Plaintiffs Tenant as well in terms of the Sale and Purchase Agreement. However, the third Limb herein also applies.

[40] In this instance, the first limb of Section 169 applies.

[41] The Annexure marked 'C' within the Affidavit in Support of Russell Baumann confirms that, the Plaintiff Baumann Investment Limited in this action is the Last Registered Proprietor of the Certificate of Title No 14956 being Lot 13 Deposit Plan No. 3896.

[42] In this respect, the Certified True Copy of the Certificate of Title No 14956 being Lot 13 Deposit Plan No. 3896 clearly shows and confirms that the Certificate of Title of that Land and Property in Question was granted to the Plaintiff on 21<sup>st</sup> September 2016 via Folio no. 833602.

[43] Further, there is no issue by the Defendant as to the ownership of the said property.



- [44] The Plaintiff for the purposes of *section 169* application is the *Last Registered Proprietor* or the *Lessor* described under *Section 169 (a), (b), (c) of the Land Transfer Act*.
- [45] It is trite law that once the Plaintiff satisfies this court with the *first limb test of section 169* that he is the *Last Registered Proprietor* of the said property in Question, then the *burden shifts to the Defendant to prove that he has a right as to possession*.
- [46] However, in terms of *Section 172 of the Land Transfer Act*, the *Defendants is required to show cause why he refuses to give vacant possession of the Land and/or the property in Question*.
- [47] If the Defendant is able to prove to the satisfaction of the Judge or the Court a *Right to possession or can establish an arguable defence*, the Plaintiff's application will be dismissed with costs in his favour.
- [48] *The Defendant must show on affidavit evidence some Right in possession* which would preclude the gravity of an order for possession under *Section 169 procedure*.
- [49] That is not to say that final or incontrovertible proof of a *Right to remain in possession* must be addressed. *What is required is that some tangible evidence establishing a right or supporting an arguable case for such a Right must be addressed*.
- [50] In *Cadwell v. Morrison (1907) 3 FLR 58* and *Perrier Watson v. Venkat Swami (Civil Action 9 of 1967)* (wherein Supreme Court held 'that if the proceedings involve consideration of complicated facts or serious question of law, it will not decide the case on Summary Proceedings of this nature, but will dismiss the Summons without prejudice to the Plaintiff's Right to institute proceedings by Writ of Summons).
- [51] The Defendant filed his *Affidavit in Opposition* on 06<sup>th</sup> September 2022 and does not deny the fact that he had entered into a *Sale and Purchase Agreement* dated 01<sup>st</sup> November 2020 to purchase the said property comprised in *Certificate of Title No. 14956* being Lot 13 on deposit plan no. 3896.
- [52] The Defendant further deposed:

- (a) That he took possession of the property on 16<sup>th</sup> January 2021.
- (b) That he had paid a total sum of \$76,000 to the Plaintiff.
- (c) That he had been in possession and occupation of the property for 23 months and paid a sum of \$57,000 as rent.
- (d) That the Sale and Purchase Agreement provides that in event of default, the payment shall be conventional to rent.
- (e) That the Defendant has made improvements to the property with the Plaintiff's Consent as per paragraph 7 (f) and (g) of his Affidavit in Response, which costs approximately \$23,000 and paid \$2,225.25 towards insurance.
- (f) Total Sum spent on property is approximately \$101,225.25 and overpaid the Plaintiff \$43,725.25.

The Defendant therefore contends that the Plaintiff should refund a sum of \$43,725.25 and/or that the Defendant should be allowed to reside on the said property for additional 17 months for free.

- [53] However, the Defendant also admits informing the Plaintiff that he will not be able to continue payment for the property since Covid-19 had affected his business.
- [54] That he was informed that both parties are bound by the terms if the Sale and Purchase Agreement.
- [55] The Plaintiff solicitors wrote to the defendant on 10<sup>th</sup> March 2022 and put the Defendant on notice to comply with the terms of the Agreement otherwise the default provisions in the Agreement will apply.
- [56] That since the Defendant did not respond to Plaintiff's Letter of 10<sup>th</sup> March 2022, the Plaintiff again wrote on 20<sup>th</sup> April 2022 and required the Defendant:-
- (i) To give possession of the property back to the plaintiff
  - (ii) The Plaintiff was owed \$10,000 as rent at 22/04/22; and

(iii) *The Plaintiff's Representatives will be present on 22/04/22 at 9a to take possession of the Plaintiff's property.*

[57] It is also noted that the Defendant's solicitor wrote to the Plaintiff's Solicitor on 21<sup>st</sup> April 2022 and informed :-

- (i) *That the property has structural defects*
- (ii) *The Defendant had sought consent from the Plaintiff's director and made improvements on the Plaintiff's Property;*
- (iii) *The Defendant intended to rescind the Agreement due to the structural defects on the property and that*
- (iv) *The Defendant would not be vacating the Plaintiff's property.*

[58] According to the Plaintiff by letter of 29<sup>th</sup> April 2022, the Plaintiff's Solicitor responded to the letter of 21<sup>st</sup> April 2022 stating:-

- (i) *There was no communication made to the Plaintiff or with him regarding any structural defects on the property and*
- (ii) *No consent was given either by him or the Plaintiff to make improvements to the property.*
- (iii) *The Plaintiff's property was sold on 'as-is-where-is-basis'.*

[59] Mr. Russell Baumann in his Affidavit in Reply filed on 13<sup>th</sup> September 2022 to the Affidavit in Response of Javis Shaneel Singh confirms that the Defendant entered into a Sale and Purchase Agreement for the Sale of the Plaintiff's property on 19<sup>th</sup> August 2020, admits the Defendant has paid \$76,000 to the Plaintiff, but no monthly installments paid since March 2022, the Defendant under the currency of the Agreement was to make monthly loan repayments of \$5,000, which he failed to do and this Amount was converted to the rents, no prior consent was sought by Defendant for him to make improvements on the Plaintiff's property, the property was sold on 'as-is-where-is-basis', the Defendant is making excuses which clearly shows that he is unable to meet his financial obligations under the Sale and Purchase Agreement.

- [60] The Defendant cannot deny the fact that he had entered into a *Sale and Purchase Agreement* with the Plaintiff to purchase the Plaintiff's property *Certificate of Title No. 14956 Lot 13 on DP No. 3896 located at Villa 265 Viti Levu Drive at Pacific Harbour*.
- [61] The Defendants principal obligation under the *Sale and Purchase Agreement* is to make its loan repayments to the Plaintiff to which he has failed to do.
- [62] However, it is not in contention that the Defendant has paid a sum of \$76,000 as loan repayments under the Agreement.
- [63] The Defendant ceased making further loan repayments since March 2022 and as a result breached the terms of the *Sales and Purchase Agreement*.
- [64] I make reference to paragraph 4 [4.3] of the *Sales and Purchase Agreement* which deals with 'Payments':

Subparagraph 4.3 reads as follows:-

*If the purchaser fails to make payments of the price and any late payment fee within 30 days from the date that such payments are due then the Purchaser shall be considered to be in default. The Vendor may cancel this agreement in the event of default by the Purchaser and the Purchaser shall forthwith deliver possession of the Property to the Vendor. Any monies paid to the Vendor up to the date of cancellation shall be retained by the Vendor as liquidated damages.*

- [65] Further, Paragraph 18.1 (c) states:-

*"In case the purchaser defaults in payments of any part of the Price when due and/or refuses or fails to settle in accordance with this condition, then (without prejudice to any other right, or remedy available to the Vendor) the Deposit and any part payments of the Price shall be forfeited to the Vendor and converted*

*to rent for the Property and if the Vendor resells the property within six months of the expiration of the said period of five working day, it shall be entitled (upon crediting the deposit) to recover from the Purchaser the amount of loss occasioned to the Vendor by expenses of or incidental to such resale, or by diminution in the price.*

[66] Item 13 in the schedule within the *Sale and Purchase Agreement* deals with special conditions and states:-

*"Until Title to the Property passes to the purchaser, the Purchaser shall not make any alterations, additions and improvements to the Property or the Improvements, without the consent in writing of the Vendor. Any such alterations, additions and improvement that require approval from the Director of Town and Country Planning shall be submitted only with the approval and enclosed in a letter from the Vendor!*

*Items 4 and 5 deals with the Price of the property and the Deposits (non-refundable).*

[67] The issues that has been raised by the Defendants in his Affidavits in Response at *paragraph 7 (e) to (k) and paragraph 8, 10, 11, 12, 13, 14 inclusive* are all an *after-thought* and are *out of the scope of the Sale and Purchase Agreement* Executed by both parties to this proceedings.

[68] Further, I find that it is the Defendant who has breached the *Sales and Purchase Agreement* dated 19<sup>th</sup> August 2020.

[69] I also find that the Defendant has breached the terms of the *Sales and Purchase Agreement* dated 19<sup>th</sup> August 2020 by failing and/or neglecting to pay its monthly *installments* under the currency of the Agreement.

- [70] It is notable that the Defendant had paid a sum of \$76,000 to the Plaintiff as a Deposit and monthly installments and no monthly installments have been paid since March 2022.
- [71] The Plaintiff confirms to suffer loss as a result of the Defendants breaches and continuing to be in occupation of the Plaintiff's property and refusing to vacate the premises.
- [72] Hence, the Defendant cannot rely on the date of the settlement to arrive on 31<sup>st</sup> July 2023 since the Defendant has failed to comply with the terms of the Sales and Purchase Agreement to meet his monthly Payments to the Plaintiff.
- [73] Further, there is no evidence before this court for the Defendant to substantiate the fact that the Plaintiff's prior consent was sought by the Defendant to carry out the improvements on the Plaintiff's property, as he did and there is flimsy and/or no evidence of monetary costs involved.
- [74] The Defendant deposed in his Affidavit that he had made improvements to the Plaintiff property at a cost of \$23,000 and paid insurance of \$2,225.25 towards insurance.
- [75] However, he goes on further to state and submit that the Plaintiff should refund a sum of \$23,000 to the Defendant for carrying out the improvements to the Plaintiffs property or allow the defendant to continue occupation of the property rent free for 17 months.
- [76] I find that the Defendant is contradicting its own evidence that cannot be relied upon by this court.
- [77] I find that the Defendant is making excuses to continue to reside on the Plaintiff's property without repaying its monthly loan repayments in terms of the Agreement and is now evident that the Defendant is unable to meet its financial obligations.
- [78] On the other hand, the Plaintiff is seeking an order for Immediate Vacant Possession against the Defendant, together with general damages and /or damage to reinstate the Plaintiff's property to the condition that it was when possession was given to the Defendant and other orders.

[79] *The Plaintiff has not provided any monetary evidence of damages caused by the Defendant to the Plaintiff's property and/or to reinstate the same to its original status when possession was taken by the Defendant. Therefore, this court cannot grant and/or accede to the orders sought by the Plaintiff for General Damages.*

[80] *In terms of mense profits, the Defendant has remained in occupation and in possession of the Plaintiff's property, refusing to vacate. Accordingly, I accede and grant the order for mense profit against the Defendant until the Vacant Possession is delivered by 16<sup>th</sup> April 2023.*

[81] *Although the Defendant has paid a total sum of \$76,000 to the Plaintiff, but he ceased to make further loan repayments since March 2022 as was required of him under the Sale and Purchase Agreement. As a result the Defendant has breached clauses 18.1 (c) and (d) of the Sales and Purchase Agreement accordingly.*

[82] *Therefore, this Court has no alternative but to accede to the Orders sought by the Plaintiff in his Originating Summons with the Exception of the General Damages to reinstate the Plaintiff's property to the condition prior to Defendant's possession.*

#### *Costs*

[83] *The Action proceeded to full hearing with parties furnishing Court with written Submission and arguing the matter in Court orally.*

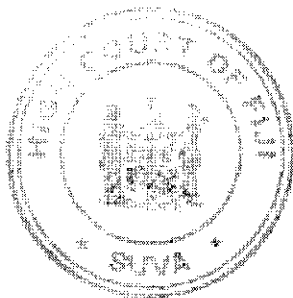
[84] *It is only appropriate that I grant a sum of \$1,000 as Summarily Assessed Costs against the Defendant.*


[85] *Following are the orders of the Court.*

ORDERS

- (i) The Defendant is hereby ordered to give *Vacant Possession of the property Comprised in Certificate of Title No 14956 being Lot 13 on Deposit Plan No. 3896* to the Plaintiff.
- (ii) Execution is hereby suspended until the 16<sup>th</sup> April 2023 at 4pm.
- (iii) The Defendant is ordered to pay mense profit at the rate of \$5,000 per month from 1 March 2022 till possession of the property is delivered to the Plaintiff on or before 16<sup>th</sup> April 2023 at 4pm.
- (iv) The Defendant to pay all outstanding utility bills due for the said property of which he is well aware of.
- (v) There will be no order for *General Damages* for breach of the *Sale and Purchase Agreement* or in the *Alternative for General Damages* as sought by the Plaintiff to reinstate the property to the condition that it was before the Defendant's possession at the Discretion of this court.
- (vi) The Defendant's claim for the refund of \$23,000 spent on the Plaintiff's property to carry out repair and improvement work and/or allow him to continue occupation of the property for a period of 17 months is refused and dismissed accordingly

Dated at Suva this 16<sup>th</sup> day of March, 2023.



  
Vishwa Datt Sharma  
JUDGE

CC: Parshotam Lawyers, Suva  
Patrick Kumar Lawyers, Suva.p