IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 232 of 2016

BETWEEN: **HABIBUL RAHIMAN** of Harvestor Road, Vitogo, Lautoka, Businessman
PLAINTIFF

A N D: **NIYAZ ASHAD ALI** and **REHAN AZIM KHAN** of Vitogo, Lautoka
DEFENDANTS

Appearances: Ms. Veitokiyaki for the Plaintiff
Mr. Yunus for the Defendants
Date of Hearing: 15 February 2022
Date of Ruling: 05 May 2023

JUDGEMENT

(Under Slip Rule - Order 20 Rule 10 High Court Rules 1988)
(this amends minor errors in earlier Judgement handed out today at paragraphs 9,14,18, 21, 35, 40, 42, 49, 50, 51, 53, 57, 59 and 66)

INTRODUCTION

1. This is my judgement following the trial of this case on 15 February 2022. The plaintiff called the following witnesses:

   PW1 Habibul Rahiman

   PW2 Fred Charlie Robinson

   PW3 Alesh Verma

2. The defendants called the following witnesses:

   DW1 Rukhmani Kumar

   DW2 Niaz Ashad Ali

3. By his claim, the plaintiff seeks compensation from the defendants for the cost of some items of personal effects which he (the plaintiff) lost, allegedly, as a result of a breach of contract by the defendants.

4. The items of personal effect in question are listed in paragraph 8 of the statement of claim. I reproduce the said list further below (see paragraph 21).

5. The contract in question was a sale and purchase agreement dated 12 July 2016 (**"agreement"**). By that agreement, the plaintiff had agreed to sell, and the defendant had to purchase, a certain property. That property is all comprised in Instrument of Tenancy No:

6365 C/N139 situate in the Tikina of Vitogo in Province of Ba, containing an area of 3.2994 h.a. The property is covered under Cane Contract No: 00139 – Lovu Sector (**"property"**).

6. The plaintiff alleges at paragraph 9 of the statement of claim that the defendants breached the agreement:

   (a) by prematurely taking over possession of the property

   (b) by entering the property and locking the gate before settlement

   (c) by transferring and registering the said property into their names when settlement was yet to be completed and when vacant possession was yet to be given to them by the plaintiff

   (d) by failing to allow the plaintiff to remove his personal belongings, motor vehicles and vehicle parts with other accessories from the property

7. At paragraph 10 of the statement of claim, the plaintiff prays for the following relief:

   (a) General Damages
   (b) an Order that the defendants breached the sale and purchase agreement dated 12 July 2016.
   (c) an Order to direct the defendants to allow the plaintiff to enter and remove all his belongings, motor vehicles and vehicle parts and accessories from the property.
   (d) costs on an indemnity basis
   (e) interest
   (f) further or any other relief the Court deems just

THE UNCONTROVERTED FACTS

8. The agreed sale and purchase price for the property was $200,000 – 00 (two hundred thousand dollars). Clause 2.1 of the agreement provides that the full purchase price was to be paid to the vendor (plaintiff) upon settlement through a Fiji Development Bank Cheque.

9. Clause 4.1 provides that the vendor (plaintiff) will then hand over the original duplicate Instrument of Tenancy No. 6365 to the purchasers (defendants) together with the discharge of all mortgages, charges and/or encumbrances registered thereon. Clause 7 requires the plaintiff (vendor) to give vacant possession to the purchasers on settlement date. Clause 4.2 provides that settlement shall be effected within ninety (90) days from the date of execution. As I have stated above, the agreement was executed on 12 July 2016. Clause 8 stipulates that the sale is on an **"as is where is basis"**.

10. The parties did engage Natasha Khan & Associates (**"NKA"**) as their common solicitor in this transaction.

11. Settlement was effected on 11 October 2015. This was exactly ninety (90) days following the date of execution. It is also not in dispute that the defendants did pay the settlement sum of $200,000 – 00 on settlement date in the manner stipulated.

12. The evidence of the plaintiff in chief was, *inter alia,* that the defendants actually moved onto the property some three weeks or so prior to settlement. He said that the defendants did so after

arranging a "swap" with the then sitting tenants. The swap was, that the defendants would vacate a house which they had been renting nearby from a different landlord and move into occupation of the property. In exchange, the sitting tenants would vacate the property, and then move into the house which the defendants would be vacating.

13. While the statement of claim pleads that this was a premature act of taking possession of the property – which constituted a breach on the part of the defendants, the plaintiff said in chief that the defendants and the sitting tenants only executed their swap after having sought and having obtained the prior approval of the plaintiff.

14. Hence, by the plaintiff's own admission, it is now uncontroverted that the defendants did not breach the agreement when they took possession of the property three weeks prior to settlement.

15. Furthermore, certain interlocutory concessions made by the defendants on 04 November 2016 (see below) now establish beyond question that (i) at the time of settlement, the plaintiff had various items of personal belongings, motor vehicles, parts and other accessories (**"chattels"**) at the property and (ii) that immediately after settlement on the same day, the plaintiff did instruct his men to enter the property in question for the purpose of removing the said chattels, and (iii) that the defendants' men however did not allow the plaintiff's men to enter the property.

16. Notably, the agreement does not say that the sale and purchase in question was to include any of these chattels.

HOW THE PLAINTIFF REACTED

17. Upon being told by his men that they were being barred from entering the property, it appears that the plaintiff immediately went into panic mode. He said he then tried to get a special answer for the cheque. He managed to get clearance on the same day.

18. The plaintiff said he then tried to call the first defendant but to no avail. The first defendant was not at the property and was unreachable by phone. The plaintiff said he also went to NKA to see if they could assist. Ms. Khan did go to the property at some stage. There, Ms. Khan conveyed to the second defendant that she and the first defendant should release to the plaintiff the chattels in question.

19. It appears that the rest of the day was marked by panic, desperation and anxiety. The plaintiff said he kept trying to contact the first defendant but to no avail. He (first defendant) was out of contact for the rest of the day, and over the next few days. The plaintiff said he had to rearrange and postpone his return to Australia as a result. He said he only flew back to Australia two (2) days later after NKA assured him that they would do their best to sort things out with the defendants.

PLAINTIFF INSTITUTES LEGAL ACTION

20. Two weeks after settlement, on 26 October 2016, the plaintiff filed the Writ of Summons and Statement of Claim in the High Court in Lautoka. As I have said, his main aim is to seek orders to allow him to recover the chattels in question.

21. The chattels in question are set out in two separate lists in paragraph [8] of the statement of claim. The first list (**"List A"**) comprises items of personal effects which were inside the buildings on the property. The second list (**"List B"**) is of the vehicles, parts and machineries which were in the yard. I reproduce these lists below:

List A

	Item	Estimated Value	Returned (R) Not Returned (NR) – Plaintiff's Evidence
1.	Queen bed base and mattress	$ 2,000 - 00	Can't recall (XM)
2.	42 inch sonic television	$ 1,000 - 00	R (XM)
3.	Sink and cabinet	$ 900 - 00	N/R (XM)
4.	Floor mat large	$ 200 - 00	N/R (XM)
5.	Samsung 2 door fridge with ice/water maker renewal model	$ 4,000 - 00	R (XM)
6.	Dressing drawer	$ 1,400 - 00	N/R (XM)
7.	TV table	$ 700 - 00	N/R (XM)
8.	Lounge 2 pieces	$ 1,000 - 00	N/R (XM)
9.	Outdoor tarp	$ 500 - 00	N/R (XM)
10.	Curtains upstairs and downstairs	$ 900 - 00	N/R (XM)
11.	Camera/surveillance set swan brand	$ 1,500 - 00	N/R (XM)
12.	Bedside cabinets x 2	$ 700 - 00	N/R (XM)
13.	Samsung 2 door fridge with ice/water maker older model	$ 2,000 - 00	R (XM)
14	All kitchen utensils	$ 1,000 - 00	
15.	Wooden show cabinet	$ 300 - 00	N/R (XM)
16.	12 outdoor chairs	$ 720 - 00	N/R (XM)
17.	2 outside tables	$ 600 - 00	N/R (XM)
18.	Tucker box deep freezers x 2	$ 1,600 - 00	R (XM)

List B

	Item	Estimated Value	Returned (R) Not Returned (NR) – Plaintiff's Evidence
1.	Mazda van bt50 (engine, cab, tray, gearbox)	$30,000 - 00	R (XM)
2.	2nd had diff with wheels bogie drive	$40,000 - 00	R (XM)
3.	Front axle with tyres	$ 5,000 - 00	R (XM)
4.	Gear box 10-speed re-con	$20,000 - 00	N/R (XM) R (Chief)
5.	Engine head	$10,000 - 00	R(XM)
6.	Harvester elevator	$20,000 - 00	R
7.	Leg base cutter harvester	$20,000 - 00	R
8.	Chopper blade complete harvester	$10,000 - 00	R(XM)
9.	20 tonne tipping hoist	$20,000 - 00	N/R
10.	Vice and bench	$ 1,000 - 00	N/R
11.	Hino old cab	$ 1,000 - 00	R
12.	Steel tubing 7 lengths	$ 300 - 00	N/R (XM)
13.	Heavy duty extension wire 12mm x 50mtre	$ 500 - 00	N/R (XM) –but not sure
14.	Hose pipe	$ 100 - 00	Not sure (XM)
15.	Felt coils x 3	$ 1,500 - 00	Not sure (XM)
16.	Engine block	$10,000 - 00	Not sure (XM)

Note: where (XM) appears above, this denotes that the evidence was confirmed by the plaintiff in cross-examination.

22. The plaintiff only took legal action when the defendants continued to refuse the plaintiff access to the property to remove the chattels in question.

23. The plaintiff also filed on 26 October 2016 an *ex-parte* Notice of Motion seeking *inter-alia*, orders that his (plaintiff's) agents or servants be allowed to enter the property to remove the items in question and/or that the defendants' agents or servants be restrained from transferring or disposing these items.

24. After hearing the application *inter-partes* on a **Pickwick** basis, I granted an injunction to restrain the defendant from transferring or disposing of the chattels. I then timetabled the filing of affidavits and then adjourned the application to 04 November 2016 for hearing.

The 04 November 2016 Hearing

25. On 04 November 2016, Ms. Naidu of Qoro Legal, who was then acting for the defendants, advised the Court that the defendants had agreed to let the plaintiff and/or his agents/servants into the property for the purpose of removing all the materials outside the house. These were the items pleaded in **List B**.

26. Ms. Naidu also informed the Court that the defendants had already demolished a particular building on the property sometime in mid-October 2016. No exact date was given. I accept as fact that this would have occurred shortly after settlement on 11 October 2016. I also accept as fact that this occurred at a time when the plaintiff had been trying to get into the property to secure the chattels.

27. According to the plaintiff, some of the items of personal effects which he is trying to recover were in that building. In chief and in cross-examination, the plaintiff said that most of these items are the ones pleaded in **List A**.

28. Hence, by the time this case went to trial, the plaintiff had already recovered most of the items in **List B**.

THE EVIDENCE AT TRIAL

29. At trial, the plaintiff said that he and his solicitors made a rough calculation of all the items in List A and List B. He said they arrived at a total estimate of $200,000 - 00 (two hundred thousand dollars only). He appears to suggest in chief that the said figure was arrived at after taking into account the depreciable value of the chattels and their estimated useful life.

    Q: Now are you aware as to the total worth of those items as per the list? What was the full amount? The worth?

    A: I think we made it up to $200,000. We didn't go $300,000 as I said before. We made it to $200,000 and we valued some of the stuff second hand, some of the new, some of the second hand and would be 100% correct but 99% or 95% would be right. Just close to second hand value and new value.

30. The plaintiff also said in chief that he has, pursuant to the 04 November 2016 Orders, managed to recover $160,000-00 worth of items from both Lists A and B and that he was not able to recover about $40,000-00 worth of items from both Lists.

31. The plaintiff said he is seeking to recover the cost of $40,000 – 00 being the total value of unrecovered items as well as $20,000 – 00 for general damages.

32. The plaintiff also did tender a bundle of invoices (Plaintiff's Exhibit No. 2) which pertain to the items which he says were not recovered by him or his bailiffs.

33. The plaintiff said he had engaged a bailiff plus some workers and even with the Police assisting to try and retrieve the items even following the Court Order but the defendants still resisted.

Q: Were all those items returned to you Mr. Rahiman?
A: No, we have tried numerous times. I had a Bailiff with the Court Order. My boys from Ba came four days in a row. Mr. Robinson engaged a registered Bailiff and a Court Order was issued. They waited all day there. Three or four days. My actual caretaker was locked out of the gate. Could not identify anything inside the gate. What is mine what is not mine? They only let Frank in there plus the boys from boy which they were not aware of what is what here.

....

Q: Now Mr. Rahiman let me just take you there. Contents from inside the house that would be on the listing at the back. It would be the first few items on the top and then at the bottom you would have contents from outside. Now from your understanding and knowledge the contents from inside the house. Was all of that returned to you?
A: None. We did not get access in either of the three flats at all in any days our Bailiff and Police went with the orders. We were not accessed in the house at all. Even Police were available and registered Bailiff available. Even Court Order were resisted. It very clearly says that inside the house. It is not listed there but inside the house is lot of stuffs. All the personal belongings inside.

....

Q: Now this is specific order Mr. Rahiman that is actually pleaded in your claim. It's an order that is relating to your belongings on the property. What do you have to say to those orders? That's also pleaded in relation to certain items. Belongings are still on the property?
A: Yeah I have replaced most of them. I have bought it because it's been last three or four years and I could not wait any longer. I did send one more Bailiff after three months of initial. Bailiffs went four times there. I sent another Bailiff after three or four months later with the Police to see if I can recover my personal stuff again. It was denied access in the house again and he was sent out again. Then I started replacing all the stuffs and with the money value that I would like to be compensated what I have spent from my pocket.

34. Notably, Mr. Yunus did not raise any objection to the admission into evidence of these invoices. However, he questioned their relevance given that the plaintiff's claim only pleads general damages and not special damages.

35. In cross-examination, the plaintiff admitted that the agreement was dated 12 July 2016 and that he received a payment of $200,000 – 00 on 11 October 2016 from the defendants in his ANZ Account Number 5237836. This was within the time stipulated in the agreement. It was put to the plaintiff in cross-examination (see below) that the defendants therefore had complied with all the terms of the agreement dated 12 July 2016.

Q: And can you show me one breach what you meaning?
A: It very clearly says, "*On the date of settlement he walks in I walk out with all my personal stuff*".

Q: Where is that?
A: Hand vacant possession is very clearly says hand vacant possession. Vacant possession means!

Q: Okay I stop you there. But you earlier just earlier seconds earlier you agreed with me that you allowed them 3 weeks prior to the settlement to go and enter the premises?
A: Yes.

Q: So there was, then you cannot come back and now are you on that vacant possession thing, isn't it?
A: Yes.

Q: Okay it's entirely your thinking but what the court will think.
A: Yeah it is.

………………

Q: But you agree with me that there was no breach of the sale and purchase agreement by my client. Isn't it?
A: Yes there was definitely breach of sale and purchase agreement. There is no doubt about that.

Q: Okay. I will take you through each clause then of the sale and purchase agreement. Because I want to see and the Court also wants to see which clause specifically they breached? So you agreed to sell and he agreed to buy. Clause 1 – point one. And that happened isn't it?
A: Yes.

Q: Then the sale price was $200,000?
A: Yes for the land and the house only.

Q: I am reading the clause?
A: Yes.

Q: And you were selling a property, Native Lease described *as "Instrument of Tenancy No. 6365 Vitogo C/N139 situated in the Tikina of Vitogo in the province of Ba containing an area of 3.2994 hectares which is covered under Cane Contract No: 00139 – Lovu Sector together with all improvements thereon on a "as is where is" basis*"?
A: Yes.

Q: So you have signed this. Isn't it?
A: What we have shown him. What he has seen it and that's what I am selling.

Q: '*As is where is basis*'?
A: Yes.

Q: Thank you. And then (B) is that you agreed to sell this property where is as it basis with all the improvements therein and he agreed to buy?
A: Yes.

Q: So there is no breach. Isn't it? So far no breach?
A: So far no breach.

Q: Thank you. Then the price was $200,000 which you agreed. You received it. And then the original lease was transferred to my client on the 8th of October?
A: Yes.

Q: So there is no breach again. Next page. The date of settlement shall be effected within 90 days. You received the money on the 11th of October?
A: Yes.

Q: So it is within the 90 days again?
A: Yes.

Q: No breach?
A: No.

Q: *"The Vendor shall be entitled to all cane proceeds for 2016"*. You received the cane proceeds for 2016?
A: Yes.

Q: No breach again. Then the debts you were supposed to pay?
A: Yes.

Q: There was no debts so neither of you paid. No breach again? Come to (6).
A: (6) is fine.

Q: Okay (7) – "*The Vendor will give vacant possession to the Purchaser"?*
A: (7) is totally breached. It is totally.

36. The plaintiff also admitted in cross-examination that he prepared Lists A and B after settlement and that they were not part of the sale and purchase agreement.

37. Furthermore, he said he did not go personally to the property with his team to retrieve the items. Rather, his workers did. He believes whatever they reported back to him.

38. When suggested to him that his workers could have lied about unrecovered items and that they could have kept these or disposed of them – the plaintiff said he trusted the workers. Notably, the plaintiff admitted that he was not sure as to whether or not certain items were recovered or not. He agreed that this was because he was not at the site with his workers to recover the items.

ISSUES

39. The main issue raised in this case is whether or not the defendants did breach the sale and purchase agreement at all? If the answer to that question is *"No"*, then, of course, the plaintiff cannot recover any general damages at all.

40. If the answer to the above question is - *"Yes, the defendants did breach the sale and purchase agreement"* - then, considering that the plaintiff has only pleaded general damages and not special damages, the question to ask next is – whether or not the costs of replacing the chattels in question are recoverable as general damages.

41. If the answer to the above question is – *yes, the costs in question are recoverable as general damages* – then the following questions will then be raised:

(a) what items were not recovered? Is the plaintiff able to identify them with precision? Are his Lists reliable?

(b) if, assuming I were to hold that the Lists are reliable as an account of chattels which were left behind on the property – is the plaintiff's account and estimate of their true value reliable also?

DID THE DEFENDANTS BREACH THE SALE & PURCHASE AGREEMENT?

42. *Prima facie*, it does appear that the defendants were fully compliant with the sale and purchase agreement dated 12 July 2016. They did pay the full purchase price on the date of settlement as stipulated. Furthermore, settlement happened within ninety-days of execution of the agreement - as stipulated.

43. However, what both counsel failed to consider in their respective submissions is the fact that the parties did vary the agreement slightly – albeit verbally.

44. The variation happened when the plaintiff agreed to the defendant's proposal to move into early occupation three weeks before settlement. That "arrangement" modified the 12 July 2016 agreement in the following ways.

45. The 12 July 2016 agreement had anticipated that the plaintiff (vendor) would give vacant possession to the defendants (purchasers) on settlement date. This is because, at settlement, after the defendants pay the full purchase price, a right to vacant possession would then accrue to them. This right includes the freedom to enjoy the property for the intended purpose without hindrance from any physical or legal impediment.

46. For the vendor, the obligation to give vacant possession entails removing any such physical or legal impediment. In this case, this includes the obligation on the part of the plaintiff to take steps to ensure that all goods which are not sold together with the property - are removed from the property.

47. When a sale and purchase agreement requires the vendor to give vacant possession, as clause 7 of the agreement does in this case - it means two things. Firstly, it means that the purchaser is then entitled to exclusive possession, that is, that the property is free from occupation by other people. Secondly, it means that the property must be free of any "impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property"

48. In **Cumberland Consolidated Holdings Limited v Ireland** [1946] KB 264 at 270-271 the English Court of Appeal described the principle of vacant possession as follows:

> Subject to the rule *de minimis* a vendor who leaves property of his own on the premises on completion cannot... be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment. ...
>
> ... [the] right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment

to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment, we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser...."

(see also discussion in **Berrell v Combined Pastoral Pty Limited** [2015] NSWSC 1334 (11 September 2015), as per Lindsay J)

49. As I have said, in this case before me now, the parties' arrangement modified the 12 July 2016 agreement when the plaintiff agreed to give the defendant possession three weeks before settlement. However, what the plaintiff gave the defendant at that time was not vacant possession. I say this because the plaintiff's goods were still on the property. The defendants were in no position to object to that because the right to vacant possession had yet to accrue to them. That right would crystalize at settlement when they paid the full purchase price.

50. Hence, at settlement, the plaintiff became obliged to remove all his belongings from the property and finally give the defendants vacant possession. Had the defendants not taken possession of the property three weeks before settlement, it is unlikely that this would pose such a problem. All that the plaintiff was to do was ensure that he remove all his belongings from the property as swiftly as possible before he gave the defendants the keys to move in.

51. However, in this case, the defendants already had the keys well before settlement. So, at settlement, armed with the realization that they now own the property, and the knowledge that they have an entitlement from that point onwards to allow or disallow anyone from entering the property – they decided to lock the gates and prevent the plaintiff access into the property to remove his goods. They took this attitude, despite the fact that the chattels in question clearly were not part of the sale and purchase agreement, which means that the defendants had no right whatsoever over them (chattels). The fact also remains that most of the items in question were valuable.

52. The question I ask is, while the plaintiff had a right to the chattels in question – did he have any right to enter the property for the purpose of recovering the chattels in question?

53. In my view, the plaintiff did have a right to enter the land for the purpose only of removing the goods in question. That right is based on the variation of agreement he had with the defendants. It is also grounded in equity. I say this based on the principle in **Kay's Leasing Corp Pty Ltd v CSR Provident Fund Nominees Pty Ltd** [1962] VR 429.

54. I do note that it appears to be common ground between the parties that none of the goods in question were fixtures.

55. At common law, the doctrine of fixtures is founded on the latin principle *quid planatur solo, solo cedit*. This means that whatever is affixed to the soil becomes part of the soil (see **Peter Butt – Land Law**, 6th edition, Law Book Co. 2010 at paragraph 301 to 302). Hence, a person who acquires land acquires also the chattels which are affixed to the land. A chattel owner's legal title to the chattel is thereby extinguished.

56. In **Kay's Leasing Corp Pty Ltd v CSR Provident Fund Nominees Pty Ltd** [1962] VR 429, the Court recognized that some heavy machinery attached to mortgaged land was a fixture, which then *prima facie* entitled the mortgagee Bank (CSR) to the machinery as it was technically part of the land under mortgage. However, that same machinery had been rented out by Kays to its customer who was the mortgagor on the land in question.

57. When the customer defaulted in the mortgage payment, CSR acted on its powers to possess the land including the machinery. The Court found that the machine was indeed a fixture. However, while this meant that CSR did own the fixture, the Court held that Kays had an equitable interest on the machinery. Kays interest arose from contract. That interest also gave it an equitable right to enter the land only for the limited purpose of removing the machinery. Kay's rights however will prevail only over the Banks rights as mortgagee. However, that right may not prevail over a claim by a subsequent *bona fide* purchaser for value (see also **Hobson v Gorringe** [1897] 1 Ch 182 at 192).

58. Admittedly, the case before me now does not concern a fixture. However, in my view, there is no reason why the principle in **Kays Leasing** should not entitle the true owner of chattels such as the plaintiff in this case before me, to enter land to remove goods. In this case, the 12 July 2016 agreement as varied by the parties arrangement, would be the source of that right.

59. In my view, at the very least, it was implied in the parties' arrangement, that the defendants would allow the plaintiff access to the property after settlement. When the defendants closed the gates to the plaintiff, they were then in breach of the agreement. As a direct consequence of this, the plaintiff was put to great inconvenience to hire counsel to institute legal proceedings to recover the items – most of which the plaintiff has since recovered.

IS THE PLAINTIFF THEN ENTITLED TO BE COMPENSATED IN GENERAL DAMAGES FOR THE RECOVERY OF THE ITEMS

60. Generally, under contract law, any damages, whether it be special damages or general damages, will only be recoverable if breach of contract is established. As I have said, the defendants did breach the arrangement they had with the plaintiff which slightly varied the agreement dated 12 July 2016.

61. In his statement of claim, the plaintiff has only pleaded breach of contract and general damages. He does not plead any special damages.

62. Are the cost of replacement for each item unrecovered by the plaintiff more appropriately categorized as general damages – or are they special damages?

63. I agree that these are only recoverable as special and not general damages. This means that the plaintiff cannot recover for the cost of replacement of items in question.

64. However, the plaintiff can still recover general damages for the breach of the arrangement in question when the defendant refused to allow him into the property to collect his goods.

65. In this regard, I would be inclined to award the plaintiff general damages for all consequential losses which are not special damages but which nonetheless arise from the breach by the defendants – while being mindful of the principles in **Hadley v Baxendale** 9 Exch. 341 (1854).

66. In my view, this would cover mostly the inconvenience and the anguish and anxieties which the plaintiff has had to suffer and endure in chasing after the defendants including the hiring of the bailiffs and counsel and the court applications to secure his valuables. The fact that the plaintiff acted rather swiftly in filing this court action shortly after settlement speaks volumes in that regard. Doing the best that I can, I would award the plaintiff $25,000-00 (twenty –five thousand dollars) for that.

COMMENTS

67. Having reached the above conclusions, it is not necessary for me to consider all the other issues.

ORDERS

68. The defendants are to pay the plaintiff $25,000 – 00 (twenty-five thousand dollars) for breach of the agreement as varied. In addition to that, I award costs to the plaintiff which I summarily assess at $2,000-00 (two thousand dollars only).

....

Anare Tuilevuka
JUDGE
Lautoka

05 May 2023