

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

Civil Action No. HBC 21 of 2020

BETWEEN: SISILIA MEREKULA of Taveuni Estates, Soqulu

PLAINTIFF

AND: TAVEUNI MANAGEMENT SERVICES PTE LIMITED a duly incorporated company having its registered office at PricewaterhouseCoopers 8<sup>th</sup> Floor, Civic House, 262 Victoria Parade, PO Box 200, Suva.

DEFENDANT

BEFORE: Honourable Mr. Justice Vishwa D. Sharma

COUNSEL: Mr. Sharma D with Mr Deo - for the Plaintiff  
Mr Naidu R. - for the Defendant

Date of Ruling: 7 December ,2023 @ 9.30 am

DECISION

[Legal status and effects of Deed of Covenant entered between parties]

INTRODUCTION

- [1] The Plaintiff is a joint Tenant on Certificate of Title No. 20176 which land is located in Taveuni Estate, Soqulu.
- [2] The Defendant pursuant to a Deed of Covenant signed with certain lot owners is obliged to provide services benefits to certain lot owners at Taveuni Estates, Soqulu, Taveuni.
- [3] That following disputes with some lot owners, the Defendant has terminated the provisions of services to those lot owners who now no longer receive or pay for such services benefits.
- [4] Wherefore, the Plaintiff now filed the current Writ of Summons coupled with a Statement of Claim and seeks the following relief:
  1. A Declaration that the Plaintiff was entitled to terminate the Deeds of Covenant for her Vacant Lands.
  2. A Declaration that Defendant has not provided services benefits under the Deeds of Covenant to the Plaintiff's Vacant Lands
  3. An Order that the Deeds of Covenant between the Plaintiff and the Defendant are forthwith terminated in relation to the Plaintiff's Vacant Lands i.e.  
CT 19098 being Lot 128 on DP 4395  
CT 20971 being Lot 2 on DP 4713  
CT 21413 being Lot 84 on DP 4395  
CT 21415 being Lot 85 on DP 4395  
CT 22155 being Lot 1 on DP 4805  
CT 28247 being Lot 127 on DP 4395  
CT 28492 being Lot 22 on DP 4805  
CT 28493 being Lot 8 on DP 4718
  4. An Order that the Defendant pay costs on an indemnity basis.
  5. Such other or further relief as the Honourable Court may deem just.
- [5] The Defendant filed its Statement of Defence and a Counterclaim and stated:
  - (1) That the Plaintiff is bound by the conditions contained in the Deed of Covenant:

- (2) That the Defendant is entitled to charge for the Services in terms of the Deed of Covenant and Contribution towards the Costs of maintenance operation and regulations of Taveuni Estates.
  - (3) That the Plaintiff cannot both approbate and reprobate.
  - (4) That the Plaintiff has chosen to take the benefits under the Deed of Covenant.
  - (5) That the Defendant in the premises denies that the Plaintiff is entitled to the reliefs claims or any relief for the reasons alleged or at all.
- [6] By way of the Counterclaim, the Defendant is seeking:
1. For a Declaration that the Defendant is entitled to charge the Plaintiff rates over Certificate of Title Numbers: 20176, 19098, 20971, 21413, 21415, 22155, 28247, 28492 and 28493 pursuant to the Deed of Covenants;
  2. A Declaration that the Plaintiff remains liable to the Defendant for rates for all that properties owned by the Plaintiff on Taveuni Estates;
  3. Judgement in the sum of \$11,793.60 for the year 2020;
  4. Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the amount found to be due to the Plaintiff at such rate and for such period as the court shall think fit;
  5. Costs on an indemnity basis;

#### Brief Background

- [7] This case is about the legal status and effect of deeds of covenant entered into between the plaintiff and the defendant over vacant residential lots in Taveuni Estates in Soqulu, Taveuni. This litigation is aimed at vacant lots on Taveuni Estates.
- [8] The parties to this case are (1) owner of 9 freehold lots on the Taveuni Estates on the Island on Taveuni and (2) Taveuni Management Services Limited (formerly known as Taveuni Estates Limited), a company that manages Taveuni Estates. The defendant is a service provider to the lands within Taveuni Estates, including the plaintiff's lots. The Defendant operates and managed the entire 4000 acre estate including some 240 kilometres of water pipes to over 860 locations and some 20 kilometres of road verges, public open spaces and massive water reticulation system. The defendant had entered into deeds of covenant with most of the lot owners on Taveuni Estates which includes the

plaintiff for the provision of certain services. The defendant also sells vacant lots it owns to interested buyers.

- [9] The defendant and its predecessors established the Taveuni Estates in Soqulu, Taveuni. The plaintiff purchase 9 residential lots in Soqulu, 4 directly from the defendant and 5 from third parties between the period November 2016 and February 2019. The plaintiff has her residence on one lot and 8 lots are vacant land.
- [10] As a condition of the sale, the plaintiff was required to sign 9 deeds of covenant with the defendant over the 9 residential lots. The plaintiff is obligated to pay service charges to the defendant for services provided by the defendant to the lots of land purchased by the plaintiff. Pursuant to the deeds of covenant the services the defendant has to provide include (1) maintaining in an orderly condition all areas designated as public open spaces (2) installing a water supply system brought to a boundary of the property for the supply of water sufficient for domestic purposes, (3) providing for the property a domestic rubbish collection for the disposal of household refuse and in some cases (4) the right to clear undergrowth and cutting grass on the lot as long as the same remains unoccupied.
- [11] On 06 November 2019 the plaintiff wrote a letter to the defendant giving notice of termination of the deeds of covenant between the plaintiff and the defendant for the 8 vacant lots effective from 31 December 2019 which the defendant did not accept. The plaintiff's case is because she does not require service benefits for the 8 lots that are vacant she should not pay the defendant service charges for those 8 lots.
- [12] The Plaintiff is asking the court to terminate the deeds of covenant for the 8 vacant lots.

#### Evidence

- [13] The case proceeded to trial and the Plaintiff called 2 witnesses where the Defendant also called 2 witnesses, a total of 4 witnesses testified in the proceedings. The evidence is intact on the court file and its entirety has been taken into consideration for determination of the substantive matter at hand.

#### Determination of the Issues

- [14] The Plaintiff is a joint tenant on Certificate of title No. 20176 which land is located in Taveuni Estate, Soqulu.
- [15] The Defendant pursuant to a Deed of Covenant signed with certain lot owners is obliged to provide services benefits to certain lot owners at Taveuni Estate, Soqulu, Taveuni.

- [16] The Plaintiff has a residence on CT 20176 at the Development and has received and paid for services benefits from the Defendant at the residence under a Deed of Covenant dated 5<sup>th</sup> December 2018.
- [17] The Plaintiff has also paid in advance for such services benefits to be provided by the Defendant to the residence on CT 20176 during the calendar year 2020.
- [18] Prior to the purchase of CT 20176 the Plaintiff purchased eight separate pieces of vacant land at the Development and subsequently purchased another lot from the Defendant in exchange for a lot sold by the Defendant to the Plaintiff in error. Thereby the Plaintiff purchased eight separate pieces of vacant land with the following Certificate of Title:
- CT 19098 being Lot 128 on DP 4395
  - CT 20971 being Lot 2 on DP 4713
  - CT 21413 being Lot 84 on DP 4395
  - CT 21415 being Lot 85 on DP 4395
  - CT 22155 being Lot 1 on DP 4805
  - CT 28247 being Lot 127 on DP 4395
  - CT 28492 being Lot 22 on DP 4805
  - CT 28493 being Lot 8 on DP 4718
- [19] The Plaintiff purchased four pieces of the Vacant Land from the Defendant as Vendor and the Plaintiff purchased four pieces of the Vacant Land from third parties with whom the Defendant claimed to have a Deed of Covenant for services benefits for each of the four pieces.
- [20] The Plaintiff was required by the Defendant to enter into a Deed of Covenant with the Defendant for each of the pieces of Vacant Land at the time of purchase of each piece of Vacant Land.
- [21] The Plaintiff sent a letter dated 6<sup>th</sup> November 2019 by email to the Defendant providing notice of termination of the Deeds of Covenant for the Vacant Land with effect as of and from 31<sup>st</sup> December 2019.
- [22] At all material times it was a requirement that the payment required to be made under the said Deeds of Covenant is in consideration of the services benefits provided by the Defendant.
- [23] The Deeds of Covenant for the Vacant Land are contracts for the provision by the Defendant of services benefits to the Plaintiff in consideration for payment by the Plaintiff for the services benefits provided by the Defendant.
- [24] The Defendant and its related company owns 110 lots at the Development.

- [25] All employees of the Defendant are not charged service fees during their period of employment as part of their remuneration packages. If an employee is gifted a freehold lot by the Defendant, such employee does not pay for service charges until the said lot is sold to a third party.
- [26] The Plaintiff has not paid the Service Charges for the Calendar year 2020 for the Vacant Land being those lots with Certificate of Title No's: 19098, 20971, 21413, 21415, 22155, 28247, 28492 and 28493.
- [27] The parties to the proceedings have identified the issues in the Pre-Trial Conference Minutes and thus will be determined as hereunder.

**Is the Defendant entitled to charge the Plaintiff Service Charges for 8 vacant lots?**

- [28] The Plaintiff's contention all along has been that the Defendant is not entitled to charge the Plaintiff service charges for the 8 Vacant Lots because there is no development on the land and the Plaintiff does not require any services from the Defendant for those 8 Vacant Lot. The Plaintiff is seeking orders for the termination of the Deed of Covenant for the 8 Vacant Lots as per paragraph 3 of the Agreed Facts within the Pre- Trial Conference Minutes.
- [29] The Plaintiff [PW1] in her evidence admitted signing the Deed of Covenant [Exhibit - P2].
- [30] Therefore, the Defendant's power and entitlement to charge the Plaintiff service charges arises out of the Deed of Covenant that the Plaintiff had Executed/Signed with the Defendant. This Deed governs the provisions of certain services that the Defendant has agreed to provide to the owners of the Lots on Taveuni Estate and the Lot owners have an obligation and pay for those services rendered to them.
- [31] Altogether, the Plaintiff has signed 9 Deed of Covenant over 9 properties as reflected hereunder:

1. CT 28493 - 21<sup>st</sup> November 2016
2. CT 22155 - 21<sup>st</sup> November 2016
3. CT 21415 - 14<sup>th</sup> December 2016
4. CT 21413 - 14<sup>th</sup> December 2016
5. CT 28247 - 06<sup>th</sup> February 2017
6. CT 28492 - 24<sup>th</sup> January 2017
7. CT 19098 - 13<sup>th</sup> October 2017
8. CT 20176 - 05<sup>th</sup> December 2018
9. CT 20971 - 11<sup>th</sup> February 2019

[32] The Deed of Covenant Executed over Certificate of Title No. 20176 provides the following background:

- A. The Buyer is acquiring the freehold land from STEPHEN KENNETH PAUL NOBLE of Lot 105 on Deposited Plan No. 4395 within the residential community at Soqulu, Taveuni, Fiji, more particularly described in the Schedule hereto subject to existing obligations which must continue;
- B. TMSL is the current Service Provider to the lands within Taveuni Estates, including the Lot;
- C. TMSL enter into Deeds of Covenant with owners of lots for the provision of certain Services, relevant to the lot and Taveuni Estates, for the benefit of the owner of the lot for the time being;
- D. The Owner has an obligation to deliver a Deed of Covenant in the same substance and form to this Deed and signed by the Buyer to ensure that the Services continue to be provided by the Service Provider and are paid for by the Buyer and any subsequent owner of the Lot; and
- E. The Parties hereby mutually covenant with each other according to the provisions which follow".

[33] The Plaintiff has agreed to pay Service Charges to the Defendant for the provisions of those services set out in the Deed of Covenant.

[34] The Relevant parts in the Deed of Covenant needs consideration are provided for at clause 2(a), 2(b), 2(c) and 2 (d) respectively.

[35] The Plaintiff submitted that Clauses 2(a), (b), (c) and (d) are all services that the Defendant must provide if any part of the service charges are to be paid to the Defendant. The evidence in this case is has established that the defendant does not provide the services in clauses 2(a) and (d). If the Defendant is not providing any part of the services, than the service charges cannot be payable.

*Clause 2(a): [Exhibit P2]: States that:*

[36] The Defendant Covenants to maintain all areas designated as public open space (not defined in the Deed). There is no universal definition of open space. Open spaces provide recreational areas for residents and help to enhance the beauty and environmental quality of neighbourhood. Defence Exhibit 2 shows Evidence of gardens, shrubs, trees, beach areas, green reserves accessible to the residents of the Taveuni Estate. Therefore, there are public open spaces on the Taveuni Estate. However, it is admitted by Defence that the Golf Course and Club House are no longer serviced and maintained by the Defendant.

Clause 2(b) provides:

[37] The Defendant Covenants to install a water supply system brought to the boundary/ Lot of the property for the supply of water sufficient for domestic purposes, witnesses Manasa Baba (DW1) and Mr Peter Knight's (DW2) evidence was clear with regards to the installation of underground water pipes to the boundary of each Lot for the supply of water to individuals.

[38] Mr Peter Knight [DW2] in his evidence stated:

*"The Defendant was to install a reticulation system on the estate for delivering of water. A water pipe was installed to the boundary of each lot but does not include specifically the supply of water. He is told there is a underground water pipe installed to the boundary of each lot. Maintenance of the reticulation system is carried out by staff of the defendant, so if a pipe breaks the defendant will get it repaired. Reticulation system was installed by the defendant including pipes and water tanks."*

[39] No doubt water is connected to the house the Plaintiff lives in which she admitted in her evidence to Court. However, the Plaintiff does not require water for her 8 Vacant Lots.

[40] The issue to deal here is not whether the Plaintiff does or does not require water for the 8 vacant Lots. The issue is whether pursuant to the signed Deed of Covenant between the Plaintiff and the Defendant, the Defendant has installed a water system, brought to a boundary of the property for the supply of the water.

[41] The answer to this is this is in the affirmative. It does not mean that because the Plaintiff's 8 Lots stands Vacant and therefore does not need the Water than that the Plaintiff is entitled to seek the termination of the signed Deed of Covenant over the Plaintiff's 8 Vacant Lots.

[42] In terms of clause 2(b), there is evidence before this court that the Defendant has installed a water supply system brought to a boundary of the Plaintiff's Lots. If the Plaintiff has chosen not to develop the 8 Vacant Lots for its residential purposes, than it is not the responsibility of the Defendant. It was a requirement under the signed Deed of Covenant that the payment required to be made to the Defendant is in consideration of the services benefits provided by the Defendant. Further, when the Plaintiff purchased the 8 Vacant Lots, she signed a Sale and Purchase Agreement and the Deed of Covenant with full disclosure of the required annual service charges, whether the Lot is developed or not.



[43] I find the Defendant has fulfilled his obligation under the Deed of Covenant by installing a water supply system brought to a boundary of the Plaintiff's 8 Vacant Lots for which services, the Defendant is entitled to a payment for services charges from the Plaintiff.

Clause 2 (c):

[44] The Deed of Covenant to provide a Domestic rubbish collection for the disposal of household refuse. There is no dispute that the domestic collection rubbish twice a week on Mondays and Fridays. The Plaintiff has not developed the 8 Vacant Lots and therefore there is no household rubbish and does not require the rubbish collection services from the Defendant. The issue here is not whether the Plaintiff requires rubbish collection service for the 8 Vacant Lots? The issue is very straight forward whether the Defendant in terms of the Deed of Covenant executed between the Plaintiff and the Defendant has provided a domestic rubbish collection for the disposal of the household refuse to the Plaintiff's 8 Vacant Lots? It is evident that the Defendant provided the 8 Vacant Lots of the Plaintiff with routine domestic rubbish collection for the disposal of the household refuse twice a week on Mondays and Fridays, whether the household refuse from the Plaintiff's 8 Vacant Lots were available or not for collection. Therefore, the Defendant is entitled to the Clause 2(d): Payment of service charges from the Plaintiff.

Clause 2(d)

[45] The Defendant under the Deed of Covenant has the Right to clear undergrowth and cut grass on the Lots as long as the same shall remain unoccupied but shall not be entitled to cut down any live trees thereon. The Defendant is not obliged to clear undergrowth and cut grass under this clause 2(d) but the defendant has the right to do so at his own will whenever the defendant thinks it is required to do so at his own judgment.

[46] Pursuant to the Deed of Covenant, the Plaintiff has covenanted to pay a proportionate cost of maintaining the open spaces including Estates gardens, greens, beach areas, road verges, V drains, water supply, pipe reticulation system, underground water pipes, domestic rubbish collection and clearing undergrowth and cutting grass. The Plaintiff has an obligation to contribute towards the lots of the provisions of these services. Therefore, the Plaintiff cannot dispute liability to contribute on the basis that she does not require the service because 8 of her Vacant Lots have not been developed. The Plaintiff cannot overcome the covenant to pay the services charges on this basis.

[47] The defendant owns the water pipe reticulation system and underground water pipes which are used for the common benefit of the Lot owners of the Estate and provide service for the benefit of the Lot Owners.

[48] No doubt there is evidence before this Court that the Defendant supplies water to all households on the Estate for consumption.

- [49] There is a scheme of contribution whereby those Lot owners who have signed the Deed of covenant are required to pay annual service charges to the defendant for these services.
- [50] Likewise, the Plaintiff as Lot owner whether Vacant or developed lots is bound to contribute a share of that total costs as provided in that Executed Deed of Covenant which is assessed by the defendant accordingly.
- [51] The service on the Estate are supplied for the benefit of the Lot owners and the Estate as a whole on which many different Lot owners own land from which they all stand to derive some benefit via the Estate.
- [52] I find that the Plaintiff being Lot owners within the Estate derives the benefit from the services supplied by the Defendant and therefore the Defendant is entitled to charge the Plaintiff service charges for the 8 Vacant Lots.

#### Understanding the Legal Nature of the Deed of Covenant

- [53] The Plaintiff in her evidence told Court that the Deed of Covenant [Exhibit - P2] was never explained to her by solicitor Mr Peter Knight who acted for her as well as the Defendant. However, this was never pleaded in the Plaintiff's Statement of Claim that either she was never explained the Contents of the Deed and/or understood the nature and effect of the Deed of Covenant that the Plaintiff executed (1) The Plaintiff's evidence is that she relied on her boss PW2 Ian Menzies in terms of the Legal work. She had hereinbefore signed 9 standard Deeds of Covenant between the period of November 2016 to February 2019 on 9 different Lots. Therefore, having signed 9 separate Deed of Covenant, it will be fair to conclude that the Plaintiff understood and was aware of the Contents of the Deeds and agreed upon and then only she signed the Deed.
- [54] The Plaintiff also signed the Sale and Purchase Agreement for the purchase of 9 properties on the Estate which also included a Deed of Covenant at clause 28 and read:

*"The purchaser and the Vendor will on the sale of Completion sign a deed of covenant between the Purchase and the Vendor relating to the provision of services by the Vendor and the payment by the Purchaser of annual service charges assessed on the property."*

- [55] These Legal document, Sale and Purchase Agreement and the Deed of Covenant were signed by the Plaintiff and witnessed by PW2 Ian Menzies who financed the Plaintiff for the purchase of the 9 properties. Not only that Pw2 - Ian Menzies paid the Defendant all services charge for the properties until 2019 for the Plaintiff.
- [56] In the case of *Wilton v Farnworth (1948) 76 CLR 646* which stated:

"Where a man signs a document knowing that it is a legal documents relating to an interest which he has in property, he is in general bound by the act of signature. He may not trouble to inform himself of the contents of the document, but that fact does not deprive the party with whom he deals of the rights which the documents gives to him. In the absence of fraud or some other of the special circumstances of the character mentioned, a man cannot escape the consequences of signing a document nu saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was far him to protect himself by abstaining from signing the documents until he understood it and was satisfied with it. Any weakening of these principles would make chaos of ever-day business transactions."

- [57] The Plaintiff did not take any issued with the Deed of Covenant until 2019 when PW2 Ian Menzies wrote to the defendant on behalf of the Plaintiff requesting for the termination of the 8 Deeds of Covenants over the 8 Vacant Lots [Exhibit - P3 refers].
- [58] Further, the Plaintiff never complained of the position that she was induce to signed the Deed of Covenant at any time.
- [59] A plea *non est factum* is not lightly allowed when a person of full age and capacity has signed a written document embodying contractual terms: *Fiji Development Bank v Raqona* (1984) 30 FLR 151. The general rule is that a party of full age and understanding is bound by his/her signature to a document whether he/she reads or understands it or not: *Mary Maraia Peterson Hewitt and Another v Habib Bank Ltd* Civil Appeal No. ABY 7 of 2004.
- [60] A person who looks through an agreement and signs it, although he says he does not understand it, cannot avoid liability on a plea on *non est factum* because it does not carry out a prior verbal agreement: *Blay v Pollard and Morris* (1930) 1 KB 628, C.A.
- [61] The Plaintiff is deemed to be familiar with the obligations and liabilities under the Deed of Covenant.
- [62] The Plaintiff just cannot say that the Deed of Covenant she signed for the Certificate of Title No. 20176 is valid whereas for the 8 Vacant Lots that she signed are invalid, in that she did not understand the Content's of the Deed.
- [63] It is only a afterthought and nothing less.

#### Conflict of Interest.

- [64] Mr Peter Knight was a solicitor for the Plaintiff and Defendant in relation to the preparation and execution of the Deeds of Covenant. The Plaintiff told Court that it was not prudent for Mr Knight to Act for the Plaintiff.

- [65] The evidence before Court establishes the fact that PW2 - Ian Menzies engaged Mr Knight to represent the Plaintiff in the purchase of 9 properties. Ian Menzies paid all the Legal Fees. Ian Menzies witnessed the Plaintiff's signature on all 9 Deeds of Covenant.
- [66] The Plaintiff was not disadvantaged in one way or the other at the time of the Execution of the Deed of Covenant because:
- There is no complaint of under pressure or influence used.
  - the Deed was voluntarily signed.
  - Ian Menzies (PW2) was the witness to the Plaintiff's signature on the Deed.
  - Mr Knight did not give any advice to the Plaintiff nor to the defendant since it was a standard Deed.
  - The Plaintiff totally relied on PW2 - Ian Menzies in terms of all Legal work to be done by Mr Peter Knight.
  - Mr Knight did inform Ian Menzies of potential Conflict of Interest.
  - The Plaintiff in her evidence did not claim that she was not properly advised.
  - The Plaintiff chose not to obtain legal advise on the Deed of Covenant.
- [67] The Plaintiff all the time trusted PW2 - Ian Menzies who engaged Mr Peter Knight and paid all Legal fees for the purchase of 9 properties on the Estate.

#### Contra Proferentem Rule

- [68] The Plaintiff contends that contra proferentem rule should apply herein since there is no definition of the word "open space" and "just cause" and the Deed is unfair in that it is one sided as it does not have a termination clause, thus making the Deed ambiguous.
- [69] The Defendants Contentions is otherwise that there is no ambiguity in the Deed of Covenant and therefore, Contra proferentem rule does not apply in this case.
- [70] This Court accordingly holds the argument of the Defendant.
- [71] The Deed of Covenant here is in a Standard Form prepared by Mr Peter Knight. The meaning of the terms of the deed is to be determined by what a reasonable Lot owner would have understood for those terms to mean.
- [72] According to Mr Peter Knight the deed of Covenant is in its standard format and used since 2012. The construction and meaning of the Deed of Covenant is of Critical importance. We have to examine the exact nature of the obligation the parties have to fulfil towards each other to give effect to the Deed of Covenant, we have to have regards

to its context in which the words appear and the purpose and object of the Deed and must be read in its entirety and not on a piece meal basis.

- [73] The defendant manages Taveuni Estates. The defendant has undertaken to provide certain services to the lot owners on the estate. These services are set out in the deed of covenant. The surrounding circumstances indicate that the purpose of the deed between the parties was to govern the provision of those services rendered to the lot owners and the charges associated with it which the lot owners have to pay. At the time the parties entered into the deed, it was anticipated that the plaintiff would pay service charges for the 8 vacant lots. All these 8 lots are residential lots. The intent of the plaintiff and any purchaser for that matter when acquiring the lot is to build a house. It is not the responsibility of the defendant if the property owner chooses not to develop the lot for its intended purpose when the property is purchased. When a property is purchased the property owner signs a sale and purchase agreement and the deed of covenant with full disclosure of the required annual service charges, whether the lot is developed or not. If after the purchase the plaintiff chose not to build a house on the lot, that is her own choice, she is still liable to pay service charge to the defendant.
- [74] Under Clause 3 (c) if the charges are outstanding and have not been paid for a period in excess of 12 months without just cause then the defendant has certain rights which it may exercise.
- [75] This Clause 3 (c) does not deal with the situation where the Plaintiff denies liability, it doesn't give the Plaintiff the right to deny liability. It refers that the Plaintiff is owing service charges but has failed to pay. The Deed must be construed in accordance with the natural and ordinary meaning of the words and phrases used in the Deed.
- [76] I find that the Deed of covenant herein executed between the Plaintiff and the Defendant is a pretty clear one. However, only the terms 'open space' and 'just cause' is not defined. In any event there is no ambiguity. Therefore, the use of the contra proferentem rule does not arise.

Can the Plaintiff elect to terminate the Deed of Covenant over the 8 Vacant Lots?

- [77] There was a purpose as to why the parties entered into this Deed of Covenant. The Deed of Covenant was created for the provisions of service by the Defendant and for the service charge purpose. The Purpose of the Deed is for the performance of a covenant for a beneficial purpose having regards to the other land on the Taveuni Estate, as well as the Plaintiff's land. It was not created specifically or solely for the Plaintiff's Lots. The service charge is created for the legitimate purpose of contributing to the cost of the performance of the Covenants in the Deed for the benefit Lots and the Estate.

- [78] It is evident that the Plaintiff bought 8 Vacant Lots and entered into a Deed of Covenant with the Plaintiff promising to the defendant that she will pay service charge for these 8 Vacant Lots.
- [79] The Plaintiff is now resiling on her promise on the basis that she does not need services from the Defendant for those 8 Lots because they are Vacant. Hence, no services are required.
- [80] The Plaintiff executed the Deed of Covenant since she meant to do what was agreed between the parties i.e. to pay service charges for the 8 Vacant Lots. Now the Plaintiff says, that she does not require any services from the Defendant since the 8 Lots are still Vacant and not developed by her.
- [81] It was a condition of Sale and Purchase Agreement that the Plaintiff has to sign the Deed of Covenant, which she did. Otherwise, the Plaintiff could not have bought the 8 Vacant Lots until she complied with the requirement of the Deed and the Sale would not have eventuated.
- [82] The Plaintiff chose to sign the Deed of Covenants and purchased the 8 Vacant Lots. Therefore, the Deed of Covenants are binding upon the Plaintiff. The signing of the Deed of Covenant was a condition of sale.
- [83] Therefore, having said above, the Plaintiff cannot elect to terminate the Deed of Covenant. May be that it was an afterthought after PW2 Ian Menzies stopped paying the service charges and then wrote to the Defendant to terminate the Deed of Covenant

#### Counter Claim

- [84] The Defendant informed the Court at the close of the defendant's case that the Defendant will not pursue the Counterclaim, because the Defendants Counterclaim is for payment of service charges by the Plaintiff for the 8 Vacant Lots.
- [85] The issue in the Plaintiff's Statement of Claim and the Defendant's Counterclaim are inextricably intertwined. The common issue evolve around the 8 Deed of Covenants over the 8 Vacant Lots.
- [86] Whether this court should or should not terminate the Deed of Covenants over the Plaintiff's 8 Vacant Lots and/or whether the Plaintiff should or should not pay the Defendant the service charges as per the Deeds of Covenants?
- [87] This Court need not duplicate the Plaintiff's Substantive proceedings with the Defendants Counterclaim since the issue evolves around the 8 Deed of Covenants over the 8 Vacant Lots.

[88] It is only fair at this stage of the proceedings that I proceed to discontinue the Defendants Counterclaim on light of the Defendant not intending to pursue the Counterclaim.

**In Conclusion**

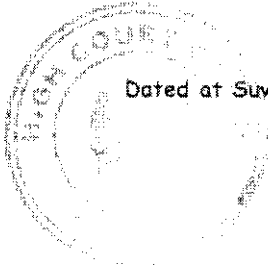
- [89] Bearing in mind the totality of the evidence and the Exhibits tendered into evidence.
- [90] The Deed of Covenants were created and entered into by the Plaintiff and the Defendant.
- [91] The purpose of the Deed is for the performance of a Covenant for a beneficial purpose having regard to the other land on Taveuni Estate, as well as the Plaintiff's Land.
- [92] It has not been created specifically for, or solely for the benefit of the Plaintiff's Lots. The service charge is created for the legitimate purpose of contributing to the cost of the performance of the Covenants in the Deed for the benefit of the Plaintiff's lots and the Estate.
- [93] The Plaintiff purchased 8 Vacant Lots and entered into a Deed of Covenant with the Plaintiff promising to the Defendant to pay the service charge for the 8 Vacant Lots.
- [94] The Plaintiff says that she does not require any services from the Defendant on the basis of the 8 Vacant Lots.
- [95] It was a condition of Sale and Purchase Agreement that the Plaintiff signed the Deed of Covenant.
- [96] It would be inequitable for the Plaintiff to enjoy the benefit of being able to purchase the 8 Vacant Lots and thereafter discarding the Deed of Covenants and her obligations thereunder.
- [97] There has been no failure on the part of the Defendant. The Plaintiff cannot approbate and reprobate. The signing of the Deed of Covenant was a condition of sale.
- [98] Therefore, the Plaintiff cannot elect to terminate the Deeds of Covenant, which she executed. The Deed of Covenants are binding on the Plaintiff.
- [99] Accordingly, for the reasons as stated hereinabove, I have no alternative but proceed to dismiss the Plaintiff's Statement of Claim filed on 11<sup>th</sup> May 2020 accordingly.

**Costs**


[100] The matter proceeded to full trial with documentation and written submissions filed into Court and the length of the trial. The Plaintiff to pay the Defendant a sum of \$3,500 as summarily assessed costs within a timeframe of 21 days.

**Orders**

- i. The Plaintiff's Statement of Claim filed on 11<sup>th</sup> May 2020 is dismissed.
- ii. The Plaintiff to pay the Defendant a sum of \$3,500 as summarily assessed costs.
- iii. The Defendants Counterclaim is discontinued and dismissed accordingly.



Dated at Suva this 7<sup>th</sup> day of December, 2023.

  
VISHWA DATT SHARMA  
JUDGE

cc: R Patel Lawyers, Suva  
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