

LEGAL FRAMEWORK

Unenforceability of EMSL Deed of Covenant Fee Demands

Pacific Harbour Residential Estate, Deuba, Fiji

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1. Executive Summary

This document sets out the legal basis on which residents of Pacific Harbour may lawfully decline to pay annual fees and assessments demanded by Estate Management Services Limited ("EMSL") under the Deed of Covenant. It is our position that:

- The Deed of Covenant fee obligations are contractually unenforceable because EMSL has materially failed to provide the services for which those fees were charged, a finding confirmed by the Fiji High Court in *Estate Management Services Ltd v Minami Taiheiyo Kaihatsu Kabushiki Kaisha* [2018] FJHC 1153 ("the 2018 Judgment").
- The vast majority of services originally promised under the Deed of Covenant have been taken over by Government authorities (Water Authority of Fiji, Fiji Roads Authority, Energy Fiji Limited (EFL), formerly the Fiji Electricity Authority, and the National Fire Authority), extinguishing EMSL's right to charge for them.
- Any claim for historic fees older than six years (prior to 2020) is strictly statute-barred under section 4(1) of the Limitation Act (Cap. 35).
- EMSL's pursuit of uncontested default judgments against individual residents in circumstances where its core legal position has already been judicially rejected may constitute an abuse of process.

2. Background: The Pacific Harbour Scheme and EMSL

Pacific Harbour was established as a planned residential resort development in Deuba, Serua District, Viti Levu. The original developer, Pacific Hotels and Development Limited, subsequently renamed itself Estate Management Services Limited (EMSL). EMSL's Managing Director is Seth Maharaj, who has occupied that role for an extended period and was a witness in the 2018 High Court proceedings.

As part of the original land sales, purchasers were required to execute a Deed of Covenant with EMSL. The Deed (in its standard form) obliges owners to pay annual contributions for: (a) rubbish collection; (b) street lighting; (c) grass cutting on road verges; and (d) maintenance of public open space. In return, EMSL undertook to provide those services.

Over time, the services originally bundled into the Deed have been progressively taken over by government bodies. Sewerage and water services were transferred to the Water Authority of Fiji. Road maintenance and the internal road network passed to the Fiji Roads Authority. Street lighting was absorbed by Energy Fiji Limited (EFL), formerly the Fiji Electricity Authority. Fire services became the responsibility of the National Fire Authority. EMSL's own statement of claim in the 2018 proceedings candidly acknowledged that the Government "has taken over the disposal of sewerage, and the internal road network and latterly the street lighting".

Notwithstanding the progressive withdrawal of these services, EMSL has continued to demand payment of the annual assessment at the same rate, adjusted only for electricity cost variations in the street lighting component.

3. The Controlling Legal Authority: EMSL v Kaisha [2018] FJHC 1153

3.1 Facts and Decision

In Civil Action HBC 148 of 2012, EMSL sued the first defendant (Minami Taiheiyo Kaihatsu Kabushiki Kaisha) for rates and fees totalling FJD 7,726,554.52, together with a further claim of USD 168,000, in respect of 170 residential lots and the hotel and golf course at Pacific Harbour. Judgment was delivered by Justice Brito-Mutunayagam on 26 November 2018.

The Court held, in terms directly applicable to all Pacific Harbour Deed of Covenant holders:

"...the first defendant was required by clause 12(b), to pay the 'annual assessment' for the totality of the services specified in clause 12(a). The 'annual assessment' was a payment for 'all the services herein before referred to in this Clause'. The charges for each service is not set out in clause 12(b)."

"...the first defendant was entitled to cease paying rates from 1996, when the totality of services were not provided."

"In my judgment, the claim against the first defendant for rates fails."

All of EMSL's claims were dismissed. EMSL was ordered to pay the defendants' costs summarily assessed at FJD 5,000. The Court further found that EMSL's own email of 27 April 2005 (from Director Carolyn Schnuerie) expressly confirmed that EMSL had discontinued all services, and that this was binding on the company.

3.2 Application to Individual Residents

While the 2018 Judgment was decided on a specific set of contractual documents (the Deed of Settlement, Deed of Indemnity and Sale and Purchase Agreement of 1990), the Court's reasoning is directly applicable to all Pacific Harbour Deed of Covenant holders. The legal principle established is general in nature: where payment is required for a bundle of services, and those services are not all provided, the payment obligation does not arise. The annual assessment under the Deed of Covenant is an indivisible payment for a bundle of services — it cannot be partially demanded where only some services are partially delivered.

It is highly significant that EMSL has continued to pursue individual residential owners for fees notwithstanding the definitive rejection of its legal position by the High Court. Residents who have not appeared in those proceedings have had default judgments entered against them — a procedurally valid but substantively unjust outcome given the judicial record.

4. Grounds for Non-Payment: Detailed Analysis

4.1 Failure of Consideration / Material Breach

A contract is not enforceable against a party where the other party has failed to perform its fundamental obligations. The Deed of Covenant creates a bilateral arrangement: EMSL provides services; owners pay the annual assessment. Where EMSL does not provide the agreed services, or provides only a fraction of them, the contractual foundation for the fee demand collapses.

The services originally comprising the Deed of Covenant obligations — sewerage, water, fire services, street lighting, and road maintenance — have substantially or entirely been transferred to Government bodies. EMSL's remaining service delivery (if any) consists at most of partial grass cutting of some road verges and common areas. This residual delivery, even if accepted at face value, does not sustain the entirety of the annual assessment, which the Court has confirmed is an indivisible charge for all services.

4.2 The Termination Trigger in the Deed

The Deed of Covenant's fee obligations are expressly linked to EMSL's service provision. Clause 2 of the Deed provides that owners will pay as long as services are provided. When those services are taken over by a government body or authority — the precise termination trigger the Deed contemplates — the ongoing obligation to pay ceases. This is not a discretionary right; it is a contractual outcome prescribed by the terms of the Deed itself.

4.3 Statute of Limitations

Section 4(1) of the Limitation Act (Cap. 35) of Fiji provides that actions founded on contract must be brought within six years from the date on which the cause of action accrued. The High Court in the 2018 Judgment held that the cause of action for unpaid rates accrued at the time of each non-payment, and that claims more than six years old were time-barred.

Any fees alleged to be outstanding prior to six years before the date of EMSL's demand or court filing are accordingly statute-barred and unrecoverable as a matter of law. Residents should carefully note the date of any demand or court proceeding and calculate the limitation cut-off accordingly.

4.4 EMSL's Own Conduct: Discontinuance of Services

As the 2018 Judgment records, EMSL itself communicated in writing (April 2005 email) that it had discontinued all services to lots where rates had not been paid, including road verge maintenance and V-drain cleaning. A party cannot simultaneously disclaim its service obligations and demand payment for those same

services. This conduct also raises estoppel arguments — EMSL having represented by conduct that the service/payment relationship had ended, it cannot resile from that position to the detriment of residents who relied upon it.

4.5 Possible Abuse of Process

Where a party pursues claims through default proceedings that are substantively identical to claims already dismissed by the Court, there is a strong argument that such proceedings constitute an abuse of the court's process. Residents who are served with proceedings by EMSL should file an acknowledgment and raise this issue before the Court. A defendant who appears and puts EMSL to proof of its contractual entitlement — in light of the 2018 Judgment — is in a very strong legal position.

5. The Torrens Title System: A Fundamental Structural Weakness in EMSL's Position

5.1 Fiji's Torrens System and the Mirror Principle

Fiji operates under the Torrens title system, governed by the Land Transfer Act 1971. The foundational principle of the Torrens system is indefeasibility of title — the registered Certificate of Title is the definitive and conclusive record of all interests affecting that land. Under the 'mirror principle', if a legal interest or obligation does not appear on the registered title, it generally does not bind a registered owner or purchaser for value without notice.

5.2 Positive Covenants Do Not Run with Freehold Land

Under common law and Fiji property law, there is a critical distinction between two types of covenants:

- **Restrictive (negative) covenants** — obligations to refrain from doing something (e.g., not to build above a certain height, not to subdivide). These may attach to freehold land and bind successors in title, provided they are properly registered.
- **Positive covenants** — obligations to do something, particularly to spend money (e.g., paying an annual estate fee). Under settled common law, positive covenants do not run with freehold land. They bind only the original covenantor personally — they do not automatically pass to, or bind, subsequent purchasers of the land.

EMSL's annual assessment — a demand that landowners pay money — is unambiguously a positive covenant. It is not a use restriction or a building control. EMSL holds no registered interest on the Torrens title of any individual Pacific Harbour lot. It is not a mortgagee, a registered caveat holder, or a party with any registered encumbrance over freehold titles. Accordingly, it cannot enforce a money payment obligation against a registered owner simply by virtue of that person owning the land.

5.3 EMSL's Contractual Workaround — and Its Vulnerability

EMSL is fully aware that the fee does not attach to the land as a property right. This is precisely why the Deed of Covenant (Clause 5) contains the following mechanism: upon any resale of the property, the selling owner is required to obtain a new Deed of Covenant from the incoming purchaser and forward it to EMSL. This creates a 'chain of contracts' — rather than burdening the land, EMSL forces each seller to compel each buyer to enter into a fresh direct contract.

This approach has two critical vulnerabilities:

- **If the chain is broken** — that is, if a purchaser acquires land but never executes a Deed of Covenant with EMSL — that purchaser has no direct contractual relationship with EMSL and owes it nothing. The obligation to pay disappears entirely. EMSL's only recourse in that scenario would be against the seller who failed to procure the new deed, not against the new landowner.
- **The chain device does not overcome the positive covenant rule** — it confirms it. EMSL is forced to rely on contract law precisely because it cannot impose payment obligations on land under the Torrens system. Each contract in the chain is still subject to all the ordinary contractual defences — including failure of consideration and the service-delivery arguments outlined above.

5.4 Judicial Confirmation: Second Defendant Not Bound

The 2018 Judgment provides direct judicial authority for the proposition that a subsequent purchaser who has not personally contracted with EMSL is not bound by EMSL's fee obligations. At paragraphs 31–33 of the judgment, the Court considered EMSL's attempt to pursue the second defendant (a subsequent purchaser of the lots) for rates. The Court rejected this claim in unambiguous terms:

"The DOS and DOI were entered into between the plaintiff [EMSL] and the first defendant. I need hardly add that the second defendant is not bound by these agreements. The claim against the second defendant for rates and indemnity fails."

This passage confirms that EMSL's fee demands are purely contractual in nature, not proprietary. A registered owner of a Pacific Harbour lot who never personally signed a Deed of Covenant with EMSL — or whose Deed is unenforceable for the reasons set out in this framework — owes EMSL nothing.

5.5 Practical Implications for Residents

Residents should consider the following questions in light of this analysis:

1. **Did you personally sign a Deed of Covenant with EMSL?** If you purchased your lot from a private seller and were never asked to, or never did, execute a Deed directly with EMSL, there may be no direct contractual relationship between you and EMSL at all.
2. **Is there any registered encumbrance on your Certificate of Title?** Obtain a current title search from the Registrar of Titles. If EMSL holds no registered caveat, charge, or encumbrance on your title, it has no proprietary claim over your land.

3. **What does your Deed say, if you signed one?** Review the specific terms of any Deed you signed — particularly whether the fee obligation is expressly linked to service delivery, and whether there is any termination mechanism triggered by government takeover of services.

6. Recommended Courses of Action

Residents who receive demands or court proceedings from EMSL are advised to:

4. **Do not ignore court proceedings.** A failure to file an acknowledgment of service or defence will result in a default judgment being entered, which EMSL can then enforce. Default judgments entered in these circumstances are procedurally valid even if the underlying claim is meritless.
5. **Respond in writing to fee demands.** Use the form letter included with this framework. Clearly state that payment is declined pending EMSL's provision of evidence that all Deed services are currently being delivered, and cite the 2018 Judgment.
6. **Seek legal advice if proceedings are issued.** The legal grounds set out in this document provide a strong basis for defence. A defendant who files a defence citing the 2018 Judgment and the failure of consideration will force EMSL to prove its case — something it was unable to do in the High Court.
7. **Document EMSL's actual service delivery (or lack thereof).** Contemporaneous evidence — dated photographs of unmaintained verges, written records of when drains were last cleared, correspondence from Government bodies confirming takeover of specific services — will be invaluable if proceedings are defended.
8. **Consider collective action.** A coordinated response among affected residents — sharing legal costs and presenting a unified position — will be significantly more effective than isolated individual responses and may deter further litigation.

7. Important Disclaimer

This document is prepared as a legal framework for the use of Pacific Harbour residents and does not constitute formal legal advice. Each resident's situation may differ depending on the specific terms of their Deed of Covenant, the date and amount of any demand, and whether court proceedings have been issued. Residents facing active court proceedings are strongly urged to obtain independent legal advice from a Fiji-qualified solicitor without delay.

Nothing in this document should be taken as encouraging residents to ignore genuine service obligations or to act in bad faith. The position advanced here is based on the reasonable and legally supported proposition that payment obligations do not arise where the corresponding service obligations have not been fulfilled — a proposition confirmed by the Fiji High Court.