IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI ISLANDS

CIVIL APPEAL NO. ABU0001/1999
(Suva High Court No. HBC 0323 of 1994S)

BETWEEN:	EMPEROR GOLD MINING COMPANY LIMITED	*Appellant*
AND:	FIJI INDUSTRIES LIMITED	*Respondent*

Coram: The Rt Hon Sir Maurice Casey, Presiding Judge
The Hon Justice Gordon Ward, Justice of Appeal
The Hon Justice John E. Byrne, Judge of Appeal

Hearing: 27 November 2000

Counsel: Dr M.S. Sahu Khan and Mr S. Vaniqi for the Appellant
Ratu Joni Madraiwiwi for the Respondent

Date of Judgment: 1 December 2000

JUDGMENT OF THE COURT

Background

On 13 November 1998 Scott J gave judgment in the High Court at Suva in favour of the respondent Fiji Industries Ltd (FIL) against the appellant (Emperor) for $590,477.65 damages plus interest in respect of the latter's breach of a contract to purchase quicklime from it. Emperor appeals.

FIL operated a lime kiln and in its statement of claim alleged that by written agreement dated 22 April 1992, (which it called "the Supply Agreement") Emperor agreed to purchase

and it agreed to supply an estimated 6000 tonnes of quicklime per annum (supply guaranteed plus or minus a variation of 25%) over a period of two years from 1 May 1992 to 30 April 1994, the price of $257 per tonne being subject to adjustment according to a formula. Individual deliveries were to be called for by Emperor's supply services supervisor. FIL alleged that in breach of this agreement Emperor failed to order and purchase the estimated quantity of 12,000 tonnes over the two years, the shortfall being 7,192.84 tonnes, in respect of which a loss of profit of $140.83 per tonne was claimed, totalling $1,012,967. The quicklime is used to process tailings in gold-mining operations.

FIL produced as evidence of the agreement a letter dated 22 April 1992 to it from Emperor containing the foregoing and other provisions, which was signed on behalf of both parties. Also produced was a Local Purchase Order 30925 of the same date for 6000 tonnes p.a.(approx) of bulk quicklime with the note "Our contract document of 22/04/92 refers as the key document of commitment" Although this order form was headed "Koula Mining Co Ltd", it was acknowledged as Emperor's in the opening sentence of its letter reading "Our order Number 30295 follows for the supply of lime for 2 years against the following estimates, terms and conditions."

Emperor maintained that the contract was one for supply only, as and when needed by the joint venture it operated with a company called Ranger, with no obligation to buy, and that the annual estimate of 6000 tonnes was merely an indication of their combined usage. It says that FIL was aware of this at the time the agreement was made, and knew that when Ranger ceased operations shortly afterwards the estimated amount would be substantially reduced, and it had no claim for any shortfall.

Evidence summary

FIL had an earlier contract with the appellant for the supply of quicklime for another joint venture with Western Mining, according to Mr Lindsay, its then managing director. This was for a two year period 1990-92 and he said it had a three-month termination clause, but it continued for the full term without any problems. The amount required was only 5000 tonnes. Emperor wanted a much larger supply of 12,000 tonnes for the next two years for its joint venture with Ranger, but had reservations about FIL's ability to produce it from their kiln which was virtually at the end of its useful life. For this reason Mr Lindsay said Emperor insisted on the supply guarantee which went into the agreement, and that it was not prepared to give FIL the contract unless it agreed to upgrade the factory, which it committed itself to do and set the work in train for a new kiln, completed in June 1993 at a cost of $3.5m. By contrast with the earlier agreement, the new one did not contain a termination clause.

The management of FIL knew about the joint venture, and the contractual letter of 22 April stated that the estimated 6000 tonnes p.a. was the total combined usage of the two companies, and stipulated that delivery dockets would be signed by the mill managers of both. Emperor's Assistant Supply Manager (Mr Chandra) said the joint venture had been terminated in late October or November of 1992 and that he became aware of this four weeks later and told FIL's Production Manager (Mr Krishna), but he acknowledged that his subordinate had sent that company a letter on 10 November stating there would be no change from present consumption, namely 3 truckloads per week for Ranger and 2/3 for Emperor.

FIL's chief executive, Mr Cridland, said that lime sales had begun to diminish in about January 1993, and in March of that year he discovered the joint venture had ended , and thereafter deliveries fell off sharply. By January 1994 he was so concerned with this that he met Mr Barclay, Emperor's General Manager, to find out whether Emperor could meet its total commitment to take 12,000 tonnes by the end of April, and said Mr Barclay was non-committal. He heard nothing back after sending him a copy of the agreement. In March there was a meeting with Mr Patterson, Emperor's Managing Director, and two other officers, at which Mr Cridland said they discussed the fact that the company had not met its commitment, and Mr Patterson suggested they could buy some cement instead, but this would not meet the shortfall. No settlement was reached and these proceedings were issued after expiry of the contract period.

High Court Judgment

Scott J, after reviewing the evidence, held that the letter of 22 April 1992 and the purchase order of the same date constituted an agreement for sale and purchase and rejected the appellant's submission that there was a contract of supply only. He saw no problem with the fact that the quantity was merely estimated, pointing to the allowance of plus or minus 25% as removing any element of uncertainty in the contract. He said the agreement was solely with Emperor, and dismissed a submission by Dr Sahu Khan that it was dependent on the continued existence of the joint venture, holding also that Ranger's withdrawal could not affect the continuance of Emperor's obligations. He did not deal specifically with the defence of frustration of the contract due to that withdrawal, which was one of the main planks of Dr Sahu Khan's submission to this Court. He rightly rejected his arguments based on estoppel,

acquiescence and laches. Finally he assessed damages by applying the 25% tolerance to the annual estimate of 6,000 tonnes to calculate the shortfall over two years, producing a loss of profits comprising the figure of $590,477.65 which he awarded along with interest at 11.5%.

Issues on appeal

Although numerous grounds of appeal were raised by Dr Sahu Khan and elaborated on in his written submissions which we have read and considered, he concentrated in his argument before us on the proposition that the contract was one of supply only, with no obligation on Emperor to buy quicklime. Alternatively, if the documents amounted to an agreement for sale and purchase as found by the Judge, then it ceased to have effect on termination of the joint venture and in particular had been frustrated by Ranger's withdrawal.

The first matter is to determine what constituted the written contract between these parties. We are satisfied that the mutual references in the letter and the purchase order in the extracts we have quoted above make it clear that they were intended to be read together as a single document setting out the terms agreed between the parties; and that this is how any reasonable businessman would have understood them. That was also His Lordship's conclusion. Together they constituted a sale and purchase agreement for the quicklime, and this disposes of Dr Sahu Khan's first point that this was no more than a contract to supply. Nor are we persuaded that it was uncertain in its content or operation. The use of the word "estimate" is common in commercial contracts and here, as the Judge accepted, the parties pointed to the boundaries they considered should be applied to that expression by adopting the "plus or minus 25%" provision in FIL's guarantee clause. Dr Sahu Khan complained about

the failure to plead the LPO as part of the agreement, but we see no substance in this point.

There was nothing in the agreement to cover the possibility and effect of Ranger's withdrawal. The appellant's contention that it then ceased to have effect raises the question of whether there was an implied condition along those lines. The law on this topic (and on the allied one of frustration) was extensively discussed in Codelfa Construction Pty Ltd v State Railway Authority of NSW [1982] 149 CLR 337. For the purposes of this appeal it is sufficient to ask whether the parties, assuming them to be reasonable business-people, would necessarily have agreed on such a condition as appropriate to put into their contract if the point had been raised with them at the time it was made. In other words, is the term to be implied (i e that the agreement would cease to have effect if Ranger withdrew) so obvious that it "goes without saying?" Having regard to the resources FIL was committing to ensure full production, it is impossible to answer this in the affirmative. Accordingly there was no implied condition.

This leaves the issue of frustration which was forcefully put to us by Dr Sahu Khan. As good a definition as any from the mass of reported decisions on the topic is that of Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at 727to 729 quoted by Aickin J at p 377 of Codelfa:

> ".....frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.... "It was not this that I promised to do"
>
> .....special importance is necessarily attached to the occurrence of any

> unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

However, "....the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains" per Lord Roskill in Pioneer Shipping Ltd v B.T.P.Tioxide Ltd [1982] AC 724 at 751-752.

Discharge of a contract occurs automatically on the happening of the frustrating event, regardless of the intention, opinions or even the knowledge of the parties - see Hirji Mulji v Cheong Yue SS Co [1926] AC 497 at 510. It should not be due to the act or election of the party relying on it and proof of such "fault" is on the party alleging it (Joseph Constantine SS Line Ltd V Imperial Smelting Corp Ltd [1942] AC 154).

In British Movietone News Ltd v London and District Cinemas Ltd [1952] AC 166 at 185 Lord Simon said

> "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle in execution, or the like. Yet this does not affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing at the time it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point..."

This passage brings out the important point that at the outset the Court must consider the terms of the contract in the light of the surrounding circumstances known to the parties at

the time it was made. Emperor was putting itself forward as being solely responsible for buying the estimated quantity of quicklime for use in the joint venture conducted with its associate and, in the absence of any provision for earlier dissolution in the sale agreement, the inference is that it was intended to last for the stipulated two years, whatever might be the success or failure of the joint venture or the stability of that relationship, which was of its own choosing. After all, those risks were similar to those run by any businessman with associates entering into a long-term contract with a third person. Furthermore, the resources FIL was putting into new plant made a stable commitment by Emperor essential, a factor strengthening the inference that the parties intended their agreement should take effect according to its tenor, with each assuming the risks of unexpected events affecting its own performance, and arising out of its own business activities and relationships.

Looked at in this light, Ranger's withdrawal was a risk it was intended Emperor should carry, as reflected in the unequivocal terms of the agreement. It was not something that made the continued obligation to purchase the stated quantity something radically different from the obligation undertaken therein. Accordingly it does not qualify as frustration, and this ground of appeal fails.

There were complaints about the assessment of damages but we can see nothing to criticise in the way His Lordship decided this issue, and we are unclear about the extent to which it is alleged he "came down into the arena" by asking questions about them. At the point where counsel's objection is noted in the record at p 209 he seemed to be exploring how the figures put forward by the respondent were arrived at, and mitigation. We see nothing significant in this. Nor do we find any substance in other grounds advanced in the

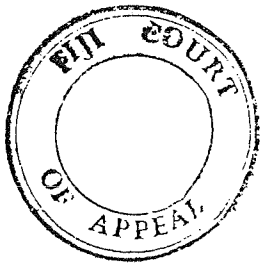
appellant's submissions and not specifically dealt with in this judgment.

Result

The appeal is dismissed with costs of $2000 to the respondent together with disbursements to be fixed by the Registrar if not agreed.

Sir Maurice Casey
Presiding Judge

Justice Gordon Ward
Justice of Appeal



Justice John E. Byrne
Judge of Appeal

Solicitors:

Messrs Sahu Khan & Sahu Khan, Ba for the Appellant
Messrs Howards, Suva for the Respondent

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