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

CIVIL APPEAL NO. ABU 076 OF 2004
(High Court Civil Action No. HBC 334/01L)

BETWEEN:

LEMEKI DAMU

Appellant

AND:

EAST WEST (SOUTH PACIFIC) LIMITED

First Respondent

AND:

EMPEROR GOLD MINING COMPANY LIMITED

Second Respondent

Coram: Smellie, JA
Penlington, JA
Scott, JA

Date of Hearing: 21 November 2005

Counsel: Mr. R. P. Chaudhary for the Appellant
No appearance by the First Respondent
Mr. D. Sharma for the Second Respondent

Date of Judgment: 25 November 2005

JUDGMENT OF THE COURT

INTRODUCTION

[1] The first Respondent is a company engaged, inter alia, in sandblasting.

[2] The second Respondent operates a gold mine at Vatukoula. It was the owner of a storage tank that required sandblasting.

[3] The Appellant was employed by the first Respondent to sandblast the second Respondent's storage tank.

[4] To enable the Appellant to reach the highest point of the second Respondent's storage tank, the second Respondent supplied a crane and driver. A cage was suspended from the crane's boom.

[5] On about 22 March 1999 the Appellant was injured when the cage in which he was standing fell to the ground. He commenced proceedings in the High Court against the Respondents seeking damages for personal injuries sustained in the fall.

[6] Both Respondents filed Defences. In the case of the first Respondent, it purported to file a defence in person. This is in breach of RHC O 5 r 6 (2) which requires a Statement of Defence by a limited company to be filed by a legal practitioner. The first Respondent admitted employing the Appellant as a sandblaster. It also admitted that an accident had occurred in which the Appellant was injured. The first Respondent denied negligence and breach of statutory duty and asserted that the accident was caused or contributed to by the Appellant's own actions. The claim of contribution was not advanced at the trial.

[7] The second Respondent filed a very brief and lean Defence. It admitted that the first Respondent engaged it to provide a crane to facilitate the sandblasting of its storage tank. It also admitted supplying the crane but denied supplying the crane driver. The injuries and negligence were simply denied, as was the claim for special damages.

[8] The so-called minutes of a pre-trial conference said to have been held on 10 July 2002 were wholly unsatisfactory. None of the matters set out in RHC O 34 was considered. Once again, the Court is moved to observe that circumvention or avoidance of the mandatory provisions of Order 34 cannot be condoned.

THE HIGH COURT PROCEEDINGS

[9] The Appellant gave evidence and described how the accident happened. He confirmed that he was working for the first Respondent on the day in question. He also told the Court that the crane was being operated by an employee of the second Respondent. He described how he fell in the cage from a considerable height:

> "... operator put me on top of a building next to the tank. I signalled to him to put me on the ground, not on the roof. He extended the boom so cage could go up. He swung cage away from the building. He tried to release cable but cage was not coming down. He tried to shift boom so cage could come down. All of a sudden cage came down in free fall with me inside, I recall hitting ground."

[10] The Appellant told the Court that he had been admitted in Lautoka Hospital for about 1 month. He had injured his ankle and back. Five years after the accident he still suffered from pain, was now afraid of heights and was unable to earn at his pre-accident rate.

[11] A medical report dated October 2001 was produced. This revealed osteoarthritis in the ankle and an osteophyte in the lumbar region of the spine. Apparently, the Appellant had not returned to hospital since 2001.

[12] The first Defence witness, Abdul Khaiyum Rafiq was a director of the first Respondent. He admitted that the Appellant was employed by the first Respondent. He also admitted that the second Respondent had supplied the crane and driver but suggested that these were supplied not to the first Respondent but to a sister company. This evidence was not consistent with paragraph 1 of the first Respondent's Statement of Defence.

[13] The third Defence witness was William Morrison, the second Respondent's Manager, Engineering Resources. He told the Court that the crane came under his portfolio and that on the day of the accident it was being operated by an experienced employee of the second Respondent, one Ghana. The crane had obtained a certificate of fitness about two months prior to the accident. He went on:

> "we have mechanics allocated to machines. They are trained to report all safety defects. Under normal circumstances, if everything worked well, boom will not drop with man inside. Accident should not happen. If (second Respondent) is found in fault, some action is taken to remedy further accidents. I believe drivers statement was taken."

[14] The operator of the crane was not called to give evidence and the contents of his report were not revealed. No engineer's report on the condition of the crane at the time of the accident was disclosed or adduced.

THE JUDGMENT OF THE HIGH COURT

[15] The trial judge (Singh J) characterised the accident as:

> "an unexplained event which is the freefall of cage, it should not have occurred in ordinary course of things without negligence on part of someone other than the Plaintiff and at time of the incident, the first Defendant had control and supervision over the working of

the crane. I therefore hold applying the maxim res ipsa loquitur that the Plaintiff has on the balance of probability proved negligence against the first Defendant."

[16] Although the judge found as a fact that the crane and driver had been supplied "as one package, the driver forming an inseparable unit from the crane" he concluded that the crane and driver were "not serving the purposes of (the second Respondent) but (the first Respondent)". Accordingly, the vicarious liability of the second Respondent was held not to have been proved. The action against the second Respondent was dismissed with costs assessed at $2,300. The judge awarded damages to the Appellant as follows:

(a)	loss of wages	$11,958.00
(b)	past pain suffering and loss of amenities of life	$10,000.00
(c)	future pain, suffering and loss of amenities	$ 7,000.00
(d)	loss of earning capacity	$16,000.00
(e)	interest on (a) and (b) at 6% per annum from date of filing writ 24/10/01 to 9/9/04	$ 3,790.61
	Total	**$48,747.61**

FIRST GROUND OF APPEAL

[18] The first ground of appeal is that the trial judge erred in not holding the second Respondent to be vicariously liable for the accident.

[19] In support of this ground, Mr. Chaudhary submitted that although the crane and its driver had been put at the disposal of the first Respondent by the second Respondent, the second Respondent in fact retained control of the method of operating the crane and therefore remained liable for its maloperation.

[20] Mr. Chaudhary referred to Mersey Docks and Harbour Board v. Coggins & Griffith [1943] AC 1, a case also involving the supply of a crane and operator in which the concept of transferred employment was considered (and see also *Bowstead on Agency* 15th Edn page 390).

[21] In answer to this submission, written submissions filed by Dr. Sahu Khan and adopted by Mr. Sharma advanced a number of arguments. He suggested that in fact the contract to sandblast the storage tank had not been placed with the first Respondent but with another company, Design Engineering Limited. We find no merit in this argument first, because it is inconsistent with the Defence filed by the first Respondent, secondly because there is no reference to Design Engineering Limited either by the first or second Respondents in their pleadings, in the documents disclosed or at the pre-trial conference and thirdly because this is an action in tort, not contract, and therefore the question of privity is of no relevance to the issue of liability.

[22] In the written submissions it was also suggested that there was nothing to show that the second Respondent was aware that the crane was defective or when these defects had occurred. In his closing submissions to the High Court Dr. Sahu Khan is recorded as suggesting that the crane suffered from some form of latent defect. We are unable to discern any evidence affording a foundation for that suggestion. As has been noted, the High Court found that the accident was "unexplained". It is not open to us now to seek an explanation or to question the merits of explanations offered in evidence for what occurred.

[23] Perhaps the most significant argument advanced on behalf of the second Respondent, and stressed by Mr. Sharma, was that the operation of the crane was at all times controlled, not by the second Respondent but by the sandblasters, the first Respondent. In our view it was in the consideration of this question that the High Court fell into error. As we see it, a very clear distinction must be drawn between the purpose to which the crane was being put and the operation of the crane to achieve that purpose. The purpose of using the crane was to sandblast the storage tank. In order to achieve that purpose, the first Respondent directed the operator of the crane to lift the boom, to lift the cage, to move the crane here

and there. When manoeuvering his machine to the order of the first Respondent, the driver was clearly subject to the first Respondent's directions, however the manner in which the crane was operated in order to comply with those directions was, in our view, a matter for the operator and not a matter for the first Respondent.

[24] A simple example will illustrate the dichotomy of responsibility: the hirer requires the crane to move to the edge of a field. In moving his machine the operator fails to notice the Plaintiff standing in his path. That failure is to be attributed, not to the hirer, but to the operator.

[25] Without attempting precisely to identify the exact cause of the accident which occurred we are satisfied that in the absence of any breach of statutory duty the responsibility for the accident lay not with the first Respondent but with the party which furnished and operated the machine which dropped the Plaintiff to the ground. The first ground of appeal succeeds.

SECOND GROUND OF APPEAL

[26] The second ground of appeal was not separately argued. Mr. Chaudhary accepted that it was in fact clear from the judgment that the driver had been held to be the Second Respondent's employee. In these circumstances once his liability had been established, the vicarious liability of the Second Respondent was not in issue.

THIRD GROUND OF APPEAL – QUANTUM OF DAMAGES

[27] Mr. Chaudhary frankly acknowledged that it is only in cases of obvious error that an appeal court will vary an amount of damages awarded by the court of first instance (Nance v. British Columbia Electric Railway Co. Ltd [1951] AC 601, 613 and see also Pran Gopal Chandra v. V. Kumar and Ors FCA Civ. App. 6/80 – B/V 80/245).

[28] The evidence relating to the Appellant's personal circumstances was unsatisfactorily sparse. The sole medical report was prepared some two and half years after the accident and almost three years before the trial. The Appellant had apparently not sought medical advice since. The amount of bonus claimed ranged from $75 per week as pleaded to $50 a week as given in evidence. It emerged that the Appellant had been sandblasting again as recently as two weeks before the trial. The judge observed that he did not appear to be experiencing any discomfort when attending Court; he thought that there may have been some exaggeration of the amount of pain claimed.

[29] Although described by Mr. Chaudhary as "very serious" the injuries suffered by the Appellant were nowhere nearly as serious as those suffered by his principal comparator Renuka Shankar ABU 3/01. The judge awarded substantial amounts of $17,000 for pain and suffering and loss of amenities of life. He awarded $28,000 for loss of wages and earning capacity. While, arguably, on the low side we are not satisfied that it has been shown that the award made by an experienced judge well aware of local conditions was so inordinately low as to justify interference. This ground fails.

RESULT:

[1] Appeal allowed. Judgment and award of costs against the first Respondent set aside.

[2] Judgment against the second Respondent for $48,748. Order for costs in favour of the second Respondent in the High Court set aside.

[3] The Appellant is to have his costs of this appeal which we assess at $2,000.00.

Smellie, JA

Penlington, JA

Scott, JA

Solicitors:

Messrs. Chaudhary & Associates, for the Appellant
Messrs. Sahu Khan & Sahu Khan, for the Second Respondent