

Andrews, JA

Introduction

[3] The appellant, Hans Raj & Co Ltd (“Hans Raj”), has appealed against the judgment of Justice M.H. Mohamed Ajmeer, delivered in the High Court at Lautoka on 25 September 2020 (“the High Court judgment”).¹ In that judgment, the High Court Judge found in favour of the respondent, Vision Investments Ltd (“Vision”) in its claim against Hans Raj for breach of contract, and dismissed Hans Raj’s counterclaim against Vision. The Judge also ordered Hans Raj to pay Vision damages totalling \$21,818.36, interest on the judgment sum at 5% per annum from the date of the writ of summons to the date of the High Court judgment, and summarily assessed costs of \$3,500.

Background

[4] In April 2014, Vision and Hans Raj entered into an agreement under which Vision was to supply, install, and commission an escalator for Hans Raj at its retail premises in Nadi, at an agreed price of \$142,000. In the course of the exchange of correspondence and offers, Vision made a number of representations (“the representations”), which were summarised by the High Court Judge at paragraph [23] of the High Court judgment as follows:

- a) *[Vision] had the expertise and knowledge of the most suitable escalators, the sourcing, supply, installation, suitability, suitability and fitness for purpose and accommodation of existing structures.*
- b) *[Vision] had a team of skilled technicians and trained installers to provide a complete turnkey solution.*
- c) *The escalator would be custom designed to suit [Hans Raj’s] requirement and to enhance the appearance of [Hans Raj’s] premises.*
- d) *[Vision’s] pricing was for a complete package for supply, installation and commissioning.*

¹ *Vision Investments Ltd (trading as Vision Motors) v Hans Raj & Co Ltd* [2020] FJHC 788; HBC233,2018 (25 September 2020).

- [5] After correspondence between the parties, Vision sent Hans Raj a “final quotation” on 14 April 2014. For present purposes, the relevant provisions of Vision’s final quotation were as follows:

Our offer

In summary, our offer for supply, installation and the commissioning cost will be FJD\$142,000.

The price quoted is inclusive of the following:

- 1. 15% VAT*
- 2. Supply and installation of one (1) pair escalator*
- 3. Testing and commissioning, including OHS inspection and regulatory fees*
- 4. 12 months monthly inspection*

This offer excludes the following:

- Any on-site modifications, alterations/alterations, drawings attached for builders reference*
- Constructional & structural works*
- Obtaining relevant permits and building certificates including labour inspection and certification*
- Electrical upgrade if any*

I will refer to the matters listed as being excluded as “the exclusions”.

- [6] Hans Raj accepted the final quotation by way of a purchase order dated 30 April 2014, which added two further terms, first, that the escalator supplied was to be of a “scissors” design rather than “parallel”, and that Vision was to provide “12 months free service – monthly service”.
- [7] Hans Raj provided Vision with plans for the escalator, prepared by its architect, Design Hut. Vision sent the plans to its supplier and ordered the escalator. The supplier subsequently sent Vision the layout plan for the escalator, which Vision forwarded to Hans Raj.
- [8] There was no dispute between the parties that the builder engaged by Hans Raj to do the site preparation had difficulty reading and/or interpreting the layout plan. Hans Raj sought assistance from Vision, and Vision made one of its technicians available to assist the builder to measure the site. The technician undertook the measurements, and made markings on the floor and walls of the premises.

- [9] In the course of site preparation, the builder excavated a pit in the floor, where the escalator was to be placed. A concrete tie beam was discovered under the floor. The presence of the tie beam meant that the escalator could not be installed on the site as per the architect's plans. The tie beam had not been identified in the architect's plans for the escalator.
- [10] At this point an issue arose between Hans Raj and Vision. Vision maintained that as site preparation was Hans Raj's responsibility, it was required to undertake any required structural modifications and alterations to enable the escalators to be installed. Hans Raj refused to deal with the tie beam and contended that it would compromise the structural integrity of the building.
- [11] In an attempt to resolve the issue, Vision engaged an engineer, Mr Krishnan, to suggest a solution. Mr Krishnan inspected the site and noted that the pit encroached on the tie beam by about 200 mm. In the High Court, he produced in evidence a report he had provided to Vision, which was as follows:

Further to your instructions we have undertaken a structural review of the tie beam and proposed escalator pit junction.

As the most cost-effective option and without compromising the structural integrity of the existing building and its foundations we recommend the following:

- 1. Demolish carefully part of the existing tie beams which are obstructing the proposed pit walls. Ensure that the tie beam reinforcement is not damaged.*
- 2. Prepare formwork and install reinforcement for the pit walls as required by the escalator.*
- 3. Apply an epoxy coat to the mating surface between the tie beam and the pit wall.*
- 4. Place and finish concreting as required.*

The above procedure will ensure that the new pit wall is integral with the tie beam whilst accommodating the required clearances for the escalator equipment.

- [12] In his evidence in chief in the High Court, and in cross examination, Mr Krishnan said that unambiguous and specific instructions as to the modification were required, and that if those instructions were followed, any risk of compromise of the structural integrity of the building was "fairly minimal".

[13] Further, when asked in cross examination whether the length of the escalator “turned out to be longer than the pit” Mr Krishnan responded:

I believe it was a standard escalator the problem arose when upon excavation it was found that the extent of the escalator pit encroached somewhat to an existing tie beam. Obviously that could not have been foreseen by anyone except those who knew that there has been a tie beam there and without the structural drawings it would be something that would be uncertain prior to actually excavating the pit.

[14] Hans Raj was not satisfied with Mr Krishnan’s opinion and demanded that Vision pay the costs of the modifications and alterations, and give an assurance as to the structural integrity of the building. Vision then passed the matter to its solicitors, who gave notice to Hans Raj that it was in breach of the agreement, by not having prepared the site for installation of the escalator. Through their solicitors, Hans Raj’s response was to repudiate the agreement.

The High Court proceeding

[15] Vision then issued proceedings against Hans Raj for breach of contract. It alleged that Vision had fulfilled its obligations by supplying the escalator as ordered by Hans Raj. It further alleged that it was not able to install and commission the escalator because Hans Raj, in breach of its obligations under the agreement to prepare the site for installation including (but not limited to) onsite structural modifications and alterations, had failed to prepare the site for installation by making necessary structural alterations and modifications. In its prayer for relief Vision sought order for damages for loss of profits (\$6,818.36), detention costs (\$15,600), and storage costs of \$46,550, together with Court ordered costs of the proceeding.

[16] Hans Raj said in its defence that structural works were not part of its responsibility, and that Vision had failed to provide and install an escalator of the correct size and had thereby breached the representations made to Hans Raj. It counterclaimed for damages totalling \$666,194.58, comprising “loss of opening and anticipated loss of sales”, commissioning and building a temporary manual staircase, the cost of a new escalator, and construction costs.

The High Court judgment

[17] The issues for determination, as recorded in the Pre-trial Conference Minute dated 26 March 2019, were:

1. *What were the terms of the Agreement between the parties and their respective obligations thereunder?*
2. *Did [Hans Raj] breach the said Agreement and if so is [Vision] entitled to any of the relief it is seeking in its Statement of Claim?*
3. *Did [Vision] breach the said Agreement or Fijian Competition and Consumer Commission Act and if so is [Hans Raj] entitled to any of the relief it is claiming in its Counter-Claim?*
4. *Are the parties entitled to interest? If so, at what rate and what period?*

[18] The High Court Judge found that the terms and conditions of the agreement were to be gathered from the email correspondence between the parties.² He found that there was no dispute between the parties that under the agreement, preparation of the site in Hans Raj's premises (which included digging a pit in the floor of the premises to accommodate the base of the escalator and any required structural modifications or alterations) was the responsibility of Hans Raj, not Vision. The Judge referred to Vision's final quotation (incorporating the exclusions) and Hans Raj's acceptance of the quotation by way of its purchase order. He referred to the exclusions and found that site preparation, and in particular any modification and alteration required, was Hans Raj's obligation.³ He accepted Vision's claim that Hans Raj had failed to fulfil its obligations under the agreement by failing to prepare the site for installation of the escalator, and had thereafter repudiated the contract.⁴

[19] The Judge also found that Hans Raj had attempted to impose conditions on Vision (as to the costs of modifications and alterations) which were in fact its own obligations under the agreement. He found those conditions to be unreasonable.⁵

² High Court judgment, paragraph [22].

³ High Court judgment, paragraphs [27]-[28].

⁴ High Court judgment, paragraph [44].

⁵ High Court judgment, paragraph [39].

[20] The damages awarded by the Judge comprised \$6,818.36 for loss of profit expected on the transaction (noting that Vision had sold the escalator to another division of Vision Investments Ltd), \$15,000 for storage costs (noting that Vision had stored the escalator in its own yard), and interest on the judgment sum at 5% per annum from the date of the writ of summons to the date of judgment.⁶ He also ordered Hans Raj to pay costs of \$3,500 to Vision.⁷

[21] The Judge dismissed Hans Raj's counterclaim on the grounds that it necessarily failed, given that Hans Raj had breached the contract, and Vision was not liable to compensate it.⁸

Grounds of Appeal

[22] In its Notice of Appeal, Hans Raj set out eight grounds of appeal. It was contended that the High Court Judge:

1. *Erred in law and in fact in concluding that [Mr Krishnan] was an expert witness and as such treating his evidence as an expert opinion when [Vision] did not qualify him as one nor was any expert report opinion tendered/and or disclosed prior to the trial as required under the rules.*
2. *Erred in law and in fact when he relied on [Mr Krishnan's] opinion and concluded that modification of the tie beam would have no risk to the integrity of [Hans Raj's] building when in fact, the totality of the evidence through [Mr Krishnan] and [Hans Raj's] witness proved that work on the tie beam involved risk.*
3. *Erred in law and in fact when he misapplied [Hans Raj's] concerns as unreasonable when it sought indemnity/assurance from [Vision] as to any losses should it suffer any due to modifications as [Vision] was contractually obliged in the first place to provide the most suitable escalators,- supply, installation, suitability for purpose and accommodation of existing structure.*
4. *Failed to properly interpret and apply the contractual obligations of [Vision] and [Hans Raj] and the evidence when he held that [Hans Raj] failed to prepare the site for installation of the escalator, thereafter repudiated the contract when in fact, inter alia:*
 - a. *[Hans Raj] had prepared the site for installation based on [Vision's] initial and agreed to specifications;*
 - b. *[Vision] had supplied on oversized escalator to install in the premises contrary to the initial and agreed to specifications;*

⁶ High Court judgment, paragraphs [50]-[53].

⁷ High Court judgment, paragraph [55].

⁸ High Court judgment, paragraph [56].

- c. *[Hans Raj] agreed to modify the site however sought reassurances of the integrity of the building due to [Vision] seeking to install an oversized escalator.*
5. *Fell into error when awarding [Vision] damages under various headings when in fact, based on the evidence [Vision]:*
 - a. *did not suffer any damages for loss of profit as the escalator was sold for a profit;*
 - b. *did not suffer any damages for storage costs as the escalator was in the possession of [Vision] and [Vision] did not tender and evidence of loss/expense/costs incurred.*
 6. *Erred in fact and in law when [he] failed to consider some of the relevant facts not limited to the following:*
 - a. *the escalator was to be "custom made" to suit the existing structure;*
 - b. *that [Hans Raj] was relying on [Vision's] experience;*
 - c. *[Vision's] technicians to measure the site before an order was placed by [Vision] with the supplier;*
 - d. *in [the supplier's] Plan there were no instructions to demolish any part of [Hans Raj's] structure and that it only contains height and width;*
 - e. *[Vision] did not ask for any building plans prior to placing the order with the supplier.*
 7. *Fell into error when awarding judgment in favour of [Vision] thereby dismissing the entire counterclaim of [Hans Raj].*
 8. *Erred in fact and in law when he disallowed an amendment application of [Hans Raj].*

[23] Counsel for Hans Raj, Mr Vananalagi, advised this Court that Appeal Ground 8 was abandoned. I turn to consider the remaining grounds of appeal. I do so in the order adopted in the written and oral submissions for Hans Raj.

Grounds of appeal 3, 4, and 6: Was Vision in breach of its obligations under the agreement?

Submissions

[24] Mr Vananalagi submitted that Hans Raj, not being experts in matters relating to escalators, relied on Vision's knowledge and expertise, as represented by Vision. He submitted that Hans Raj sought Vision's assistance to measure the pit required to fit the escalator that was

to be installed, and that the pit was excavated to those measurements. Mr Vananalagi submitted that when the escalator arrived, it was found to be larger than the pit that had been excavated for it. Therefore, he submitted, Vision failed to meet its obligations as to installing and commissioning the escalator.

- [25] Mr Vananalagi further submitted that Vision agreed to supply, install and commission an escalator that was custom-built to Hans Raj's requirements. He submitted that Vision had represented that it would provide a turn key solution, and that in supplying an escalator that did not fit into the excavated pit, it was in breach of that representation and the agreement. He submitted that the "root cause" of the problems that arose was that Vision's technician had not measured the site correctly. It was contended that Vision had waived the exclusion of site preparation and structural work by providing its technician to assist Hans Raj's builder to understand and interpret the architect's plans and to do measurements.
- [26] Mr Vananalagi also submitted that the building in which the escalator was to be installed was old, and was used as retail premises. He submitted that Hans Raj was entirely reasonable in being concerned that undertaking the modifications suggested by Mr Krishnan would compromise its structural integrity, and in seeking indemnity against the costs of the modifications and assurances that there was no risk to the structural integrity of the building.
- [27] Mr Nandan submitted for Vision that excavation of the pit revealed the tie beam, which had not been shown in the architect's plans provided to Vision, or made known to Vision. He submitted that the escalator had been built exactly to the plans provided to Vision and that, had the tie beam not been found in the under-floor area, the escalator would have been installed and commissioned without any problem.
- [28] Mr Nandan submitted that the High Court Judge correctly found that Vision was not in breach of any of its obligations, as it had supplied an escalator that had been constructed according to the plans supplied by Hans Raj, and would have been installed in Hans Raj's premises if Hans Raj had complied with its obligation to prepare the site, including undertaking any structural modifications or alterations, as set out in the agreement between the parties.

[29] He submitted that although Vision had represented that it could provide a turn key solution, in the present case Vision and Hans Raj did not make an agreement for a turn key solution: they made an agreement that Vision would supply, install and commission the escalator, and (pursuant to the exclusions) that Hans Raj would undertake any site modifications, alterations, drawings attached for builders reference, constructional and structural works, obtaining relevant permits and building certificates including labour inspection and certification, and any electrical upgrade. He submitted that there had been no waiver of the exclusions.

[30] With respect to the indemnity and assurance sought by Hans Raj, Mr Nandan submitted that at no time did Vision have any obligation to provide any form of indemnity or assurance as to site modifications or structural work. He referred again to the agreement between Vision and Hans Raj, and submitted that Vision's obligations were limited to supplying, installing and commissioning the escalator, and expressly excluded any obligation on the part of Vision for site modifications and structural work. He submitted that the High Court Judge did not err in finding that Hans Raj's demand that Vision provide an indemnity or assurance in relation to any modifications or structural work required on the site in order to install and commission the escalator was "unreasonable".

Discussion

[31] In the course of the appeal hearing, the Court enquired of counsel for the parties as to whether, when the escalator was supplied, it was a case of the escalator being longer than as specified in the Architect's plans, and therefore could not be fitted into the excavated pit, or of the excavated pit (having been excavated according to the measurements provided) being too small to accommodate the escalator, as a result of the presence of the tie beam.

[32] On a review of the evidence before the High Court, I am not persuaded that the High Court Judge erred in finding that the escalator was the correct size, and constructed according to the architect's plans. Nor am I persuaded that the technician's measurements were incorrect and the "root cause" of the difficulties that arose. There was no dispute that the architect's plans for the escalator did not indicate the presence of the tie beam, and there was no

evidence that Vision was made aware of it in any other manner. Because of the presence of the tie beam, the pit was too small to accommodate the escalator, and the escalator could not be installed unless the tie beam was modified.

[33] I do not accept Hans Raj's contention that the agreement between Hans Raj and Vision was for a turn key solution. It is evident from the material before the High Court that the agreement was the outcome of a period of negotiation which commenced in July 2013 and culminated in Vision's final quotation on 14 April 2014 (which incorporated the exclusions), which was accepted by Hans Raj by way of its purchase order on 30 April 2014. Because of the exclusions, it is clear that the agreement between Vision and Hans Raj was not a turn key solution: the exclusions (agreed to by Hans Raj) meant that the agreement was far from being a turn key agreement.

[34] I have concluded that Hans Raj has not established that the Judge erred in his findings as to the terms of the agreement between Vision and Hans Raj, that those terms incorporated the exclusions, that the escalator was constructed in accordance with the architect's plans, that Vision was not in breach of its obligations to supply, install and commission the escalator, and that Hans Raj was in breach of its obligation to prepare the site for installation of the escalator.

[35] I have concluded that the evidence before the High Court Judge was that the escalator was properly constructed according to the plans provided by the architects and that, but for the presence of the tie beam, the escalator would have been installed and commissioned as planned. I am not persuaded that the Judge erred in finding that Vision was not in breach of any of its obligations. Accordingly, I have concluded that Grounds 3, 4 and 6 of Hans Raj's appeal should be dismissed.

Grounds of appeal 1 and 2: Mr Krishnan's evidence

Submissions

[36] Mr Vananalagi relied at the appeal hearing on the written submissions filed on behalf of Hans Raj. Hans Raj submitted that the High Court Judge erred in accepting and relying on

Mr Krishnan's evidence as expert evidence. Hans Raj's submission was that there were questions as to whether Mr Krishnan's report furnished the Judge with the necessary scientific criteria for testing the accuracy of his conclusions, whether it enabled the Judge to form his own independent conclusions by applying those criteria to the proved facts, whether it was intelligible, convincing and tested, whether it went beyond a mere assertion without supporting evidence or proof, and whether it contained within itself material which could have convinced the Judge to its soundness.

- [37] It was submitted that Mr Krishnan's report had not taken into account that the escalator was to be installed in an existing building which was old, had three floors, and was used as a retail shop in the main street in Nadi, that he had failed to make enquiries of Hans Raj and properly research the building's plans, had not described the dimensions of the tie beam and its location, had not taken into account the volume of traffic in and out of the building, and had taken into account hearsay evidence by Vision. It was further submitted that Mr Krishnan's report was speculative.
- [38] Hans Raj submitted that the Judge summarised Mr Krishnan's evidence and accepted his conclusions without any analysis of those conclusions. It submitted that notwithstanding that no expert was called in opposition, and Mr Krishnan's examination in chief and cross examination were not lengthy, the High Court Judge should have analysed his conclusions rather than accept them as stated. It was further submitted that while Mr Krishnan's report and evidence may have been admissible under the provisions as to expert evidence in ss 14 to 16 of the Civil Evidence Act 2002, the Judge was not obliged to accept it as conclusive or attach any weight to it.
- [39] Mr Nandan submitted that Vision did not call Mr Krishnan as an "expert witness" in the traditional sense, in which a person with established knowledge and expertise in a particular field is called to give evidence to the Court. He submitted that Mr Krishnan was called to give evidence as to the fact that Vision had asked him to inspect the escalator pit and come up with a solution that would work without compromising the structural integrity of the structure and the tie beam, while giving sufficient clearance to the escalator pit.

[40] However, he submitted, trial counsel for Hans Raj cross examined Mr Krishnan, as if Mr Krishnan were an expert, as to his assessment of risk resulting from his suggested modifications. He submitted that Hans Raj's trial counsel had "opened it up" for the High Court Judge to treat Mr Krishnan as an expert witness. He submitted that the Judge did not err in accepting Mr Krishnan's evidence.

[41] I am not persuaded that the Judge erred in his approach to Mr Krishnan's evidence. It was clear that he was called as a witness of fact; that he had been asked to inspect the escalator pit and the tie beam and come up with a suggested solution. Vision's trial counsel's eliciting of evidence as to his qualifications and experience at the start of Mr Krishnan's evidence was intended to establish that he was an appropriate person to undertake such a task, not to establish him as an independent expert witness. Further, Mr Krishnan made it clear in his evidence in chief and cross examination that he had prepared a brief report, only, and that it would be normal for an engineer to be consulted if any work was to be done on a building's foundation.

[42] I have concluded that grounds 1 and 2 of Hans Raj's appeal are misconceived and should be dismissed.

Grounds of appeal 5: Special Damages

(a) Loss of profit

Submissions

[43] Mr Vananalagi relied on the written submissions filed on behalf of Hans Raj's appeal against the High Court Judge's orders as to damages. It was submitted that Vision had not suffered any "loss of profit" as the escalator was sold at a profit. Hans Raj submitted that under the agreement the escalator was to be sold to Hans Raj (inclusive of supply, installation and commissioning) for \$142,000.00 VIP, and that after the agreement was repudiated, it was sold for \$135,191.64 VIP, leading to Vision's claim for a loss of \$6,818.36. However, it was put to Vision's witness (Mr Bal) in cross examination that at the time the agreement was made (2014) the VAT rate was 15%, whereas at the time VAT was payable was when the

escalator was sold in 2016, the VAT rate was 9%. When the two VAT prices were compared (\$123,478.26 at the time of the agreement with Hans Raj, and \$124,019.85 at the time of sale) it was evident that Vision had actually made a profit of \$541.59 on the sale. It was submitted that the High Court Judge therefore erred in finding that Vision had suffered a loss of \$6,818.36 on the sale of the escalator.

- [44] Mr Nandan submitted in his written submissions that Vision's evidence (via Mr Bal) was that it expected to make a profit of approximately 10% (amounting to \$14,200) on the transaction with Hans Raj, had it been completed. He submitted that as it had not been completed Vision mitigated its loss by selling the escalator to an associated company. He submitted that Vision's claim is simply for the loss between the two contract prices: \$142,000 as against \$135,181.64, and that Vision's claim for \$6,818.36 was neither unreasonable nor exaggerated.

Discussion

- [45] At the High Court trial, Hans Raj's counsel objected to Vision's witness Mr Bal giving evidence in re-examination as to its anticipated overall profit of 10%, but the objection was disallowed. The Judge found that Vision's claim for \$6,818.36 was reasonable. I am not persuaded that the Judge erred in doing so. I have concluded that this ground of appeal should be dismissed.

(b) Storage costs

Submissions

- [46] Hans Raj submitted in its written submissions that the High Court Judge rejected Vision's claim for storage costs of \$35,820.00, based on a rate of \$70 per day, as being exaggerated and unreasonable and not based on any independent evidence as to the best market rate for storage at the time. It was submitted that the Judge then erred in allowing Vision \$15,000 for storage costs by "merely accepting" that the escalator had been stored in Vision's yard

from 3 March 2015 to 29 December 2016. It was submitted that the Judge did not provide any discussion or rationale as to why Vision was entitled to that sum.

[47] Hans Raj further submitted that Vision had specifically pleaded that it had suffered special damages for storage costs, and had claimed storage costs at \$70.00 per day. It was submitted that Vision knew or ought to have known that it had the onus to produce evidence in support of its claim.⁹

[48] Vision submitted in its written submissions that Mr Bal gave evidence for Vision that \$70.00 per day was the best market rate available and that in the light of the nature of Vision's business, he was well qualified to give that evidence, and it was open to the Judge to accept it. It was submitted that the Judge was in error in reducing the award to \$15,000, which had ultimately benefitted Hans Raj.¹⁰ It was further submitted that Vision was entitled to claim storage costs, as otherwise it would have been required to pay detention costs charged in respect of the shipping container, which would have been greater.

Discussion

[49] The sum of \$46,550.00 for storage costs (\$70.00 per day for the period from 3 March 2015 to 29 December 2016) was claimed in Vision's 2nd amended statement of claim dated 21 March 2018. That was amended to \$35,820, being \$70.00 per day for the period from 17 August 2015 (being the day that the shipping container in which the escalator had been shipped was removed by the shipping line) to 29 December 2016 (being the day the escalator was sold) during Mr Bal's evidence at the High Court trial.

[50] I am not persuaded that the High Court Judge erred in ordering Hans Raj to pay storage costs of \$15,000 to Vision. A claim for storage costs is clearly an allowable head of special damages. The Judge did not err in accepting that Vision stored the escalator in its yard. It would have been open to the Judge to accept Mr Bal's evidence as to the market rate for

⁹ Citing *Credit Corporation (Fiji) Ltd v Khan* [2008] FJCA 26; ABU0040.2006S (8 July 2008), and *Mahendra Naidu v Ravindra Patel* CA No. 105/1979.

¹⁰ Vision did not cross-appeal on this point.

storage, but he chose not to, and allowed a sum that he considered to be reasonable in the circumstances. The Judge's course of action has benefitted Hans Raj.

[51] I am not persuaded that the High Court Judge erred in allowing damages of \$15,000 for storage costs. I have concluded that this ground of appeal should be dismissed.

Grounds of Appeal 7: Hans Raj's counterclaim

Submissions

[52] Hans Raj's written submissions on ground 7 was:

We respectfully submit that should this Honourable Court allow the appeal for the grounds 3,4 and 6 above, then automatically our counterclaim will follow suit.

[53] Mr Vananalagi did not elaborate on that submission at the appeal hearing.

[54] Mr Nandan submitted that Vision is not liable to pay damages to Hans Raj. He submitted that as Hans Raj refused to perform its obligations under the agreement, and unilaterally ended it, no liability attaches to Vision.

[55] Mr Nandan further submitted that, in any event, none of the heads of claim pleaded by Hans Raj could support an award. He submitted that the claim for "loss of opening and anticipated loss of sales" is not a proper head of damages, and in any event the loss is too speculative to be given serious consideration. He noted that Hans Raj had sought to amend the head of damages on the final day of trial, but the amendment was disallowed.

[56] Mr Nandan also submitted that Hans Raj's claim for the cost of "commissioning and building a temporary staircase" could not be pursued, as the staircase was in fact a "complete solution", and permanent, as Hans Raj has to date not installed another escalator.

[57] Finally, Mr Nandan submitted that Hans Raj cannot claim for the costs of excavating the pit for the escalator, breaking and opening a concrete ceiling, covering up the escalator pit,

and rebuilding the floor and ceiling, as all of these costs arose out of Hans Raj's breach of contract. He further submitted that had Vision been able to install the escalator these costs would, in any event, have been incurred by Hans Raj.

Discussion

[58] Having found that Hans Raj had breached its agreement with Vision, the Judge found that its counterclaim necessarily failed; Vision was not liable to compensate the breaching party, Hans Raj. I am not persuaded that the Judge erred in reaching this conclusion. I have concluded that this ground of appeal should be dismissed.

ORDERS

- (1) The appeal by Hans Raj is dismissed.
- (2) The judgment of the High Court dated 25 September 2020 is affirmed.
- (3) Hans Raj is to pay costs to Vision in the sum of \$2,500.00 within 28 days of the date of this judgment.



Hon. Justice A. Qetaki
JUSTICE OF APPEAL

Hon. Justice W. Morgan
JUSTICE OF APPEAL

Hon. Justice P. Andrews
JUSTICE OF APPEAL