IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Lautoka

CIVIL APPEAL NO. ABU006/2021
High Court Civil Case No. HBC 198/2018

BETWEEN: **RAM TAPPESAR & SON** also known as **RTM GROUP** a limited liability company having its registered office at Queens Highway, Naiwaicoba, Nadi

Appellant

AND: **KALIONI RATU & KALESI DALITABUA** trading as **MAX JOHN INVESTMENT** originally of Vunamoli Village, Ba, currently of Waiyavi, Lautoka

Respondent

Coram: Jitoko, P
Jameel, JA
Andrews, JA

Counsel Mr R Charan, for the Appellant
Ms L Vateitei, for the Respondent

Date of Hearing 21 February 2024

Date of Judgment 29 February 2024

JUDGMENT

Jitoko, P

[1] I am in complete agreement with the judgment of Andrews, JA.

Jameel, JA

[2] I have read the draft judgment of Andrews, JA and I am in agreement with her conclusions and proposed orders.

Andrews, JA

[3] The Appellant has appealed against the judgment delivered by the Honourable Justice Ajmeer in the High Court at Lautoka on 13 November 2020.[1] The Judge found in favour of the Respondent in its claim against the Appellant, and ordered the Appellant to pay the Respondent damages for breach of contract of $85,800, together with punitive damages of $5,000, interest on the judgment sum of $90,800 at 5 percent as from 4 September 2018, and costs of $2,000.

Background

[4] The Respondent was the owner of two machines used in the forestry industry: Cat Skidder 518, registration no. FZ229 ("the Skidder"), and Bell Loader 220, registration no. EG 316 ("the Loader") ("the machines"). Pursuant to a "Selling and Buying Agreement" ("the Agreement") dated 18 May 2017, the Appellant agreed to purchase the machines.[2]

[5] The relevant clauses in the Agreement (for the purposes of this proceeding) were:[3]

> *AND WHEREAS the Company is in the business of purchasing second hand vehicles and machines for its spare parts purposes and repair if possible for the family business*

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1 *Kalioni Ratu & Kalesi Dalitubua v Ram Tappesar & Son* [2020] FJHC 965; HBC198.2018 (13 November 2020).

2 Although the Agreement is headed "made this 18th day of May 2017" it was executed by the parties on 21 July 2017.

3 In the Agreement, the "Company" is the Appellant and the "Logging Machines Owner" is the Respondent.

AND WHEREAS the Logging Machines Owner is in the process of selling its under repair vehicle for its own family development

THEREFORE THE PARTIES AGREE AS FOLLOWS;

1. *The Company to purchase and repair the Logging Machines belonging to the above owner.*

...

2. *Consideration*

   In consideration of payments to be resolved by the Logging Machines and the Company, the Company hereby agrees to diligently purchase the second-hand Logging Machines in accordance with the terms and conditions hereafter appearing.

3. *Term*

   3.1 This agreement shall begin on the 18 May and expire on the day and date when all fees and costs of the said machines are fully paid.

4.0 Conditions

4.1 The Company shall repair the said two machines at its own garage or wherever it may be at his own cost.

4.2 The Company is fully aware of the status of the two machines as discussed mutually with the Machine Owner. Currently the two Machines are under mortgage with the Fiji Development Bank ...

4.3 The Company shall pay the Logging Machines in dull, as mutually agreed above. The payment shall he based from the normal monthly instalment to the amount agreed previously by Fiji Development Bank.

4.4 The Logging Machine Owners had full right over its assets and may exercise its powers to stop or report to proper authorities shall the Company fails to honour any part of this agreement.

4.5 The transfer forms shall ONLY be signed for when 100% of the Machine costs to the Bank and the agreed total purchasing costs (4.6.1) are been paid in full and all other associated costs as agreed mutually by the Machine Owners.

4.6.1 The company shall pay $50,000 to the Machines Owners as the costs of the Machines when all debts are fully recovered by the bank.

4.6.2 The purchasing amount of $50,000 shall be paid on instalment basis every month on an agreed amount between $1,500 and $2,000 in addition to monthly payment as mentioned in (4.3). The said sum shall be paid directly to the Machine Owner bank Account number ... of the Bank of South Pacific, Lautoka Branch. It shall cease when full amount is recovered.

[6] At a Pre-Trial Conference on 20 February 2020, the parties agreed to the following as Agreed Facts:

1. *The [Respondent] was the registered owner of Cat Skidder 518, FZ 229 and Bell Loader 220, EG316.*
2. *The [Respondent] and the [Appellant] on 18 May 2017 entered into an agreement to purchase the above said machines.*
3. *That upon the mortgage being fully paid the [Respondent] would then transfer the said machines to the [Appellant's] company.*
4. *That the [Appellant] made payment towards the first instalment after they were given possession of the machines.*

[7] Ms Kaseli Dalitabua Ratu, (the second-named Respondent) gave evidence for the Respondent in the High Court. She told the Court that the initial payment required to be made by the Appellant comprised a loan repayment of $6,640 for the Skidder, a loan repayment of $2,250 for the Loader, and an instalment of $1,500 towards the purchase price for the machines. She said that the Appellant took possession of the machines in February 2017.

[8] Ms Ratu's evidence was that the Appellant only paid (in total) $6,000. She said the Respondent sent a demand letter to the Appellant, and made oral requests for payment each month. She told the High Court that the Respondent was at the same time receiving demand letters from the Fiji Development Bank ("the Bank"). Ms Ratu said the Respondent repossessed the machines in January 2018 from a third party.

High Court judgment

[9] Having set out the evidence, the Judge found that the Appellant had breached the Agreement, after partly performing it by payment of the first instalment. He found that the breach occurred when the Appellant failed to make payments as agreed in the Agreement. He further found that because of the breach of the Agreement, the Appellant was liable to pay damages to the Respondent.

[10] In his consideration of the quantum of damages, the Judge found that the Appellant was able to repair the machines, and they were passed by the Land Transport Authority for operation in May 2017. He also found that the Appellant had hired the machines out to a third party (Eltech) and obtained payment for the hire for a period of 8 months, from May 2017 to January 2018. The Judge held that the Appellant was liable to pay damages of $85,800 comprising unpaid instalments of loan repayments from June 2017 to January 2018 ($69,600), unpaid instalments of the purchase price from June 2017 to January 2018 ($12,000), and the shortfall on the first instalment paid in May 2017 ($4,200).

[11] The Judge also held the Appellant liable to pay punitive damages of $5,000. He described the Appellant's conduct as deceptive and misleading. He found that the Appellant had used the machines in its business and failed to make payments, except for the first payment. He further found that the Appellant had refused to make further payments saying they could not operate the machines because of the lack of spare parts.

[12] As recorded earlier, the Judge also ordered the Appellant to pay interest on the judgment sum at 5% from the date of the writ of summons to the date of the judgment, and to pay costs (summarily assessed) of $2,000.

Appeal grounds

[13] The Appellant's grounds of appeal may be summarised as being that the Judge:

(1) failed to deal with the Appellant's preliminary objection to the proceeding, to the effect that the Appellant was wrongly described or the wrong entity had been sued;

(2) erred in finding that the Appellant had hired out machines belonging to the Respondent, and unjustly enriched itself, when in fact the Appellant had hired out its own machines;

(3) erred in finding that payments to the Respondent were to be simultaneous with repayments to the Bank when the Agreement provided that payments to the Respondent were to be made after full repayment to the Bank;

(4) erred in finding the Respondent had suffered loss and damage when the Respondent had failed to establish any loss and damage;

(5) failed to take into account the time and money the Appellant spent repairing the Respondent's machines;

(6) erred in relying on the evidence in chief given by Mr Roshan Tappesar (called by the Respondent) but disregarding his evidence when under cross examination; and

(7) erred in awarding damages totalling $90,800 (including punitive damages) when there was no evidence on which such damages could be awarded.

Appeal ground 1: Did the Judge fail to deal with the Appellant's preliminary objection?

[14] This ground of appeal has no merit. Despite Mr Charan's submission for the Appellant that the Appellant's statement of defence to the proceeding was filed under protest, the trial proceeded on the basis of a statement of Agreed Facts, signed by counsel for the Appellant and the Respondent. The second Agreed Fact was:

> *The Plaintiff and the Defendant on the 18th day of May, 2017 entered into agreement to purchase the above said machines.*

[15] As a result of that Agreed Fact, there was no longer any issue as to the naming of the parties. There was no argument before the Judge. The Appellant cannot raise as an issue on appeal a matter not argued in the High Court, and contrary to an agreed fact.

Appeal ground 2: Did the Judge err in finding that the Appellant had hired out machines that belonged to the Respondent?

[16] Mr Charan submitted for the Appellant that the Judge found that the Appellant had hired out the machines to a third party and had unjustly enriched itself, when the Respondent had not included a pleading to that effect in its statement of claim. He further submitted that the Judge when assessing damages came up with a calculation which was never pleaded.

[17] The difficulty the Appellant faces with this ground of appeal is that Mr Charan was not able to point this Court to any part of the High Court judgment in which the Judge made an award of damages for hire of the machines, or in respect of "unjust enrichment". At paragraph [26] of the judgment, the Judge found:

> *More importantly, the [Appellant] had hired out the machines to Eltech from May to December 2017 and [Appellant's witness Mr Vijay Tappesar] accepted that Eltech had paid them [Appellant] for the work they had done from May to December 2017 (see PEx8(a-i) for tonnage).*

[18] The Judge's calculation of damages, at paragraph [34] of the judgment, does not include any allowance for hire of the machines, and his award of punitive damages, at paragraphs [36]-[38] of the judgment was in respect of the Appellant's "misleading and deceptive conduct" in refusing to make payments to the Respondent, claiming it could not operate the machines because of the lack of spare parts, while at the same time using the machines in their business.

[19] While Mr Charan withdrew the reference to "unjust enrichment", I am not persuaded that this ground of appeal could succeed. The Appellant contended that "in fact it had hired out its own machines". Mr Vijay Tappesar, a director of the Appellant, said in his evidence in chief that the Respondent's machines were used for the Eltech contract (he said for only four weeks). He did not say that the Appellant used its own machines. However, if the Appellant was contending that ownership of the machines had passed to the Appellant, then the submission is contrary to clause 4.5 of the Agreement:

> *The transfer forms shall ONLY be signed for when 100% of the Machine costs to the Bank and the agreed total purchasing costs (4.6.1) are been paid in full and all other associated costs as agreed mutually by the Machine owners.*

[20] Pursuant to clause 4.5, while possession had passed to the Appellant, ownership could not pass from the Respondent until such time as the Appellant had paid in full.

[21] Accordingly, this ground of appeal must fail.

Appeal ground 3: Did the Judge err in finding that the Appellant was required to make payments to the Respondent simultaneously with repayments to the Bank?

[22] Mr Charan submitted that the Agreement provided that payments were to be made to the Respondent after full repayment to the Bank. He referred to clause 4.6.1 of the Agreement:

> *The Company shall pay $50,000 to the Machine Owners as the costs of the Machines when all debts are fully recovered by the Bank.*

[23] He submitted that the Judge erred in awarding damages to the Respondent for the unpaid purchase price, when the Agreement made it mandatory that the purchase price for the machines was to follow after all payment to the Bank was cleared. He further submitted that the Judge's order wrongly required the Appellant to make payments to the Respondent for the period from June 2017 to January 2018, when the machines were not operational.

[24] The Appellant's submission ignores clause 4.6.2 of the Agreement, which expressly provides as to the payment of the purchase price for the machines by monthly instalments, in addition to the payments to the Bank:

> *The purchasing amount of $50,000 shall be paid on instalment basis every month on an agreed amount between $1,500 and $2,000 in addition to the monthly payment as mentioned in (4.3). The said sum shall be paid directly to the Machine Owner bank Account ... It shall cease when full amount is recovered.*

[25] The Appellant's submission also ignores the fact that the Appellant made a part payment of the purchase price to the Respondent, and the fact that the Judge's order of damages was in respect of the Appellant's breach of the Agreement. Following that breach, there could be no question of an order that the Appellant should first pay the Bank, then (when payment to the Bank was complete) the Appellant should pay the Respondent.

[26] Further, Mr Charan was not able to direct this Court to any provision in the Agreement which relieved the Appellant from the obligation to make payments if the machines were not operational, or for any other reason. In the absence of any such provision, the obligation to make payments remained in effect.

[27] I am not persuaded that the Judge erred in ordering the Appellant to pay the unpaid purchase price instalments for the period from June 2017 to January 2018. This ground of appeal must fail.

Appeal grounds 4 and 7: did the Judge err in finding that the Respondent had suffered loss and damages when the Respondent failed to establish any loss and damage?

[28] Mr Charan submitted in respect of the Appellant's 4th and 7th grounds of appeal that the Judge erred in law and fact in finding that the Respondent had suffered loss and damage when the Respondent had "clearly failed to establish any such loss and damage". He submitted that the Respondent's statement of claim did not provide particulars of breach, and no loss was established at trial.

[29] Mr Charan further submitted that the Judge erred in awarding punitive damages when the Respondent had failed to place any evidence that justified the court granting such damages.

[30] As noted earlier, the award of damages was made in respect of the Appellant's breach of the Agreement. Evidence as to the Appellant's breach was given for the Respondent by Ms Ratu. She told the Court that the Appellant had made an initial payment, and had failed to make the monthly payments thereafter. I am not persuaded that the Judge was wrong to find that the Appellants were in breach of contract. Nor am I persuaded that the Judge was wrong to award damages to be paid to the Respondent representing the repayments to the Bank and the instalments of the purchase price the Appellant had failed to make during the period up until the machines were repossessed. The evidence as to the breaches was clearly before the Judge. In fact Mr Charan conceded that there was a breach in failing to pay the monthly instalments, but he tried to justify on the basis that the Respondent deprived it of the

possession of the machine, and therefore, it was unable to use the machine to generate income.

[31] Nor am I persuaded that there was no evidence upon which the Judge could make an award of punitive damages: the Appellant's failure to make payments was clear, as was the evidence that the machines were hired out to Eltech while they were in the Appellant's possession and under its control.

[32] These grounds of appeal must fail.

Appeal ground 5: Did the Judge err by "failing to take into consideration the amount of time and money spent by the Appellant to repair the Respondent's machines"?

[33] Mr Charan submitted that the Judge was wrong to the Appellant's counterclaim, in which it claimed $47,000 for the costs of repairing the vehicles. It alleged that upon the machines being repaired, the Respondent took possession of them and leased them out to a third party. It further alleged that the Respondent breached the Agreement and caused the Appellant loss, as the Appellant could not maximise in its investment by repairing the machines and using them in its own business.

[34] The Judge dismissed the Appellant's counterclaim. He found, at paragraph [44] of the judgment, that there was nothing in the Agreement to the effect that the Respondent was required to reimburse the Appellant for the costs of repair. Secondly, the Judge found that the Appellant had failed to establish the counterclaim. He found (at paragraphs [45] and [46] of the Judgment):

> *[45] ... The [Appellant's] exhibits – invoices and delivery dockets – were not signed or received. There are no payments receipts for repairs done to the machines. The descriptions of the parts that were purchased on all the invoices do not mention that the parts were for the machines (the [Respondent's] machines) except for two invoices.*
>
> *[46] The repair amount includes payment of $20,000 to the mechanics to fix the machines. However, the [Appellant]was unable to prove payment of this sum to the mechanics by payment invoice. I cannot accept the [Appellant's] evidence that mechanics do not issue receipts.*

[35] Pursuant to clause 4.1 of the Agreement:

> *The company shall repair the said two machines at its own garage or wherever it may be at his own cost.*

[36] Mr Charan's argument overlooks a vital clause in the Agreement which obliged the Appellant to repair the machines, at its own cost. Under the Agreement it was also obliged to make payments to the Bank and the Respondent. It breached the Agreement by failing to make the payments and the machines were repossessed.

[37] I am not persuaded that the Judge was wrong to dismiss the Appellant's counterclaim for lack of evidence, or that he should have taken the cost of repairing the vehicles into account when awarding damages. The Agreement made it clear that repair costs were the sole responsibility of the Appellant. Further, Mr Charan was not able to refer this Court to any provision in the Agreement which would have allowed the Appellant to defer or avoid payment of any amount it was required to pay while the machines were being repaired, or for any other reason.

[38] This ground of appeal must fail

Appeal ground 6: Did the Judge err in relying on the evidence in chief of Mr Ronesh Tappesar and failing to hold the witness as an independent witness in cross examination?

[39] The Respondent subpoenaed Mr Ronesh Tappesar, the Managing Director of the Appellant, to give evidence. He was referred to in the trial as "PW4". He confirmed in his examination-in-chief that the Appellant and the Respondent had entered into the Agreement, and confirmed the terms and conditions of the agreement. He also confirmed invoices issued by the Appellant to Eltech for work done by the Appellant during the months of May to November 2017, and said that Eltech had paid the Appellant pursuant to those invoices. He said that all payments were received by his brother Vijay. He also said that the Appellant had the machinery in its possession from February 2017 to December 2017.

[40] In answer to questions in cross examination, Ronesh Tappesar said that the invoices had been raised by his brother Vijay, and that he had no knowledge of them, and that Vijay dealt with Eltech. He also said that the machines were with the Appellant for 8 months, but only used for 4 weeks, because the parts required to repair them had to be imported. He also said that the nature of the repairs to the machines was known to Vijay, that while Mr Kalione Ratu (the first-named Respondent) had visited the Appellant's garage, he had never seen Ms Ratu there, and that all "talks" had been between Vijay, Mr Ratu, and Ms Ratu.

[41] The Judge was critical of Ronesh Tappesar's evidence. At paragraph [27] of the judgment, after noting the evidence given in evidence in chief, the Judge said:

> *However, during cross examination, PW4 turned around and became an adverse witness for the [Respondent]. He started to give evidence for the [Appellant]. During cross examination PW4 appeared to be a bias witness. He started to give evidence in favour of the [Appellant] because he is one of the directors of the [Appellant]. He did not appear to be an independent witness during cross examination by the [Appellant's] counsel. I would therefore, disregard PW4's evidence during cross examination.*

[42] Mr Charan submitted that the evidence given by Ronesh Tappesar was independent and not biased towards the Appellant. He submitted that the Judge failed to give reasons as to how he considered Ronesh Tappesar to be an adverse witness, and why he did not appear to be independent.

[43] It is difficult to see how the evidence of the Managing Director of a party to a proceeding could ever be regarded as "independent". The whole point of calling "independent" witnesses to give evidence is that they are just that: independent of either party. The evidence of the Managing Director of a party would normally be seen as inherently partisan towards that party. This Court would have expected that counsel for the parties in the High Court trial would have been well aware of Ronesh Tappesar's position. That said, his evidence both in chief and in cross examination does not appear to display any grounds for concluding that he was not a credible witness.

[44] This Court enquired of Mr Charan at the appeal hearing how it would assist the appeal if the Court were to accept his submission that Ronesh Tappesar's evidence under cross

examination should not have been disregarded. Mr Charan submitted that the evidence was crucial to the appeal, in that he said that the Appellant only had use of the machines for "a few weeks". However, that evidence was also given by Vijay Tappesar. The fact that his brother also said it does not add anything to the "crucial" nature of the evidence.

[45] I am not persuaded that the Judge's rejection of Ronesh Tappesar's evidence in cross examination had any influence on the outcome of the trial. The Appellant's evidence that it used the machines for only 4 weeks (given by both Ronesh and Vijay Tappesar) was irrelevant, in the light of the Appellant's obligation under the Agreement to make the required payments, and the absence of any provision allowing that obligation to be deferred or avoided.

[46] Accordingly, I have concluded that this ground of appeal must fail.

Costs

[47] I have concluded that each of the Appellant's grounds of appeal must fail, and the appeal will therefore be dismissed. Ordinarily, costs follow the event, and the Respondents will be entitled to an order for costs in their favour.

[48] This appeal was set down for hearing on Thursday 8 February 2024. As is customary, counsel were directed to file written submissions in advance. Written submissions were filed on behalf of the Appellant, but not the Respondent. On the appointed hearing date, Counsel for the Appellant appeared, but there was no appearance by or on behalf of the Respondent. The Court was advised (by counsel for the Appellant) that counsel for the Respondent (Ms Vateitei) was unwell.

[49] The appeal was rescheduled for Wednesday 21 February 2024, and a direction was made that written submissions were to be filed for the Respondent. No submissions were filed. Ms Vateitei appeared at the hearing on 21 February 2024 and made brief oral submissions.

[50] In the circumstances, the order for costs has been summarily assessed at a lower level than might otherwise have been the case.

ORDERS

(1) The Appellant's appeal is dismissed.

(2) The Appellant is ordered to pay costs to the Respondent, summarily assessed at $500, within 21 days of the date of this judgment.

Hon. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL