

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

HBC No. 173 of 2013

BETWEEN : **FAIRDEAL EARTHMOVING CONTRACTORS LIMITED** a limited liability company having its registered office at Namaka, Nadi.

Plaintiff

AND : **BLACKTOP CONSTRUCTION LIMITED** a limited liability company having its registered office at Marsden Robinson Chow Limited, Level 2, Chamber of Commerce Building, 100 Mayoral Drive, Auckland, 1010 and duly incorporated in Fiji pursuant to the Companies Act Cap 247 and the address for the authorised person in Fiji is at C/- KPMG Suva Central, Renwick Road, Suva.

R U L I N G

INTRODUCTION

- [1]. Some years ago, the Fiji Road Authority (“FRA”), which is a corporate body set up under the Fiji Road Authority Decree 2012, and which is responsible for the construction and maintenance of all roads in Fiji, contracted Blacktop Construction Limited (“BCL”) to carry out some road maintenance work in the island of Vanua Levu and along some portions of the Kings Road on the island of Viti Levu. BCL is a company duly incorporated in New Zealand but registered in Fiji under the Companies Act (Cap 247).
- [2]. To secure the tender from FRA, BCL did give a bank guarantee to the tune of FJD\$5,000,000-00 (five million dollars). That bank guarantee is being held by FRA.
- [3]. BCL has since been put under receivership in New Zealand. Details of this are not known to me at this time. All that I am able to gather from an affidavit filed in Court by the plaintiff, Fairdeal Earthmoving Contractors Limited (“FECL”), is that the affairs of BCL are now dealt with by a Mr. Brian Mayo-Smith of Messrs BDO Auckland, Chartered Accountant in New Zealand, who is the appointed Receiver. This seems to suggest that

Mr. Mayo-Smith was appointed Receiver under a debenture executed and registered in New Zealand.

- [4]. The substantive matter in this case concerns a claim by FECL against BCL to the tune of \$1,918,037.61. As an unsecured creditor, FECL is pursuing the \$5,000,000-00 being held by the FRA. The question that keeps occurring in my mind is whether or not the said bond is part of the assets charged under the said debenture.

FECL – UNSECURED CREDITOR

- [5]. The debt claimed by FECL as owing to it by BCL stems from some road construction and maintenance work that the former had completed in June and July 2013 pursuant to a subcontract with the latter. Details of the work completed by FECL and the monies due and owing on each work by BCL are set out in the statement of claim as follows:

NORTHERN DIVISION

June (balance due and owing)	\$380,306.71
July	\$556,638.22
10% retention (\$320,252.82 + VAT)	

KINGS ROAD

June	\$612,801.94
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TOTAL DUE	\$1,918,037.61
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- [6]. All the above work and monies due appears to have all been certified by BCL, as evident in the various completion certificates that BCL has issued for each.

APPLICATION BEFORE ME

- [7]. Before me, is an application by FECL dated 16 September 2013 seeking the following garnishee-type and injunctive-type orders to secure payment of the above debt:

- (i) that any monies payable and/or become payable to BCL and/or to its receiver in New Zealand by the FRA be paid to FECL until the sum of \$1,918,037.61 is paid in full.

- (ii) alternatively, all payments that become due to BCL by the FRA be stopped and held with the FRA until the determination of this action.
- (iii) or, alternatively, an order that FECL be paid in the sum of \$1,918,037.61 from bond monies held by FRA.

- [8]. When the matter was called before me on 18 September 2013, Mr. Koya appeared and advised the Court that he has had some talk with Mr. Neil Cook, the CEO for FRA. Following those talks, there was no need to proceed on an *ex-parte* basis as they seem to have reached an arrangement whereby FRA will pay FECL some money, subject to clearance from the Attorney-General's Office. The matter henceforth did not proceed with any urgency. It appears that nothing eventuated and Mr. Koya is now rekindling his application.
- [9]. The question I did ask counsel at the outset was whether or not BCL's Receiver needs to be served?

SHOULD THE RECEIVER BE SERVED WITH THE APPLICATION?

- [10]. I ask the above question because, as stated, I keep asking the related question of - whether or not the bond in question is part of the charged assets in terms of the debenture upon which Mayo-Smith was appointed. And flowing from that, since the Receiver is characteristically often appointed over all of the assets and undertaking of the company, whether he should therefore be served with these proceedings.
- [11]. Section 391 of the Companies Act states that service of a document on a company may be done by sending the document by post to its registered postal address or by leaving the document at the registered office of the company.
- [12]. However, in the case of a foreign company registered in Fiji, section 373 of the Companies Act provides that service of a process or notice shall be done if addressed to any Fiji resident whose name has been delivered to the Registrar under section 367(1)(d) and who is authorized to accept, on behalf of the company, service of process and any notices required to be

served on the company or sent by registered post to the address which has been so delivered:

Provided that-

- (i) where any such company makes default in delivering to the registrar the name and address of a person resident in Fiji who is authorized to accept on behalf of the company service of process or notices; or
- (ii) if, at any time, all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company, or for any reason cannot be served, any process or notice may be served on the company by leaving it at or sending it by registered post to any place of business established by the company in Fiji.

[13]. The answer to the question as to whether or not the \$5,000,000 bank guarantee in question is a charged asset depends on two things.

[14]. Firstly, it depends on how the mortgage/debenture in question defines “*Charged Asset(s)*”. It may just be the case that the debenture/mortgage in question will define “*Charged Asset(s)*” to include all present and future assets “**whether situated in New Zealand or elsewhere**”.

[15]. Secondly, the answer to that question will depend on whether or not BCL had delivered to the Registrar of Companies in Fiji for registration the mortgage/debenture in question pursuant to section 367(1)(c) of the Companies Act. If BCL had not done so, then, under section 367(2), the mortgage/debenture in question will be “**void as regards property in Fiji against the liquidator and any creditor of the company**”.

367.-(1) Foreign companies which, on or after 1 January 1984, establish a place of business within Fiji shall, within 30 days of the establishment of the place of business, deliver to the registrar for registration-

- (a) a certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) a list of its directors, containing particulars with respect to its directors that are equivalent to the particulars that are required by this Act to be contained in the register of the directors and secretaries of a company incorporated under this Act;
- (c) a statement of all subsisting charges created by the company, being charges of the kinds set out in subsection (2) of section 98 and not being charges comprising solely property situate outside Fiji;
- (d) the names and postal addresses of some 1 or more persons resident in Fiji authorized to accept, on behalf of the company, service of process and any notices required to be served on the company; and

(e) the full address of the registered or principal office of the company.

(2) If any charge, being a charge which ought to have been included in the statement required by paragraph (c) of subsection (1), is not so included, it shall be void as regards property in Fiji against the liquidator and any creditor of the company.

- [16]. Mr. Koya has not given any evidence as to whether or not the mortgage/debenture in question is registered in Fiji pursuant to section 367(1)(c). In any event, to grant any of the Orders sought without having afforded to the Receiver an opportunity to be heard may be tantamount to a denial of the fundamental principle of natural justice. After all, there is at stake potential legal rights of some secured creditors conferred by the mortgage/debenture in question which are at stake.
- [17]. I am of the view that BCL's Receiver needs to be served with a copy of the application. Accordingly, I direct that the application be served on Mr. Mayo-Smith within 42 days of the date of this judgement. However, in the interim, I will order that that any monies payable and/or become payable to BCL and/or to its receiver in New Zealand by the FRA be held by FRA until further Orders.
- [18]. The case is adjourned to **Tuesday 01 April 2014 for mention before me at 10.30 a.m.**

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Anare Tuilevuka

JUDGE

10 February 2014