

IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 31 OF 2015

BETWEEN: ABELE TUBABA

Plaintiff

AND: SHEIK MOHAMMED TASHEEN trading as FOUR STAR
EQUIPMENT HIRE SERVICES

Defendant

CORAM: The Hon. Mr. Justice David Alfred

COUNSEL: Mr. N. Nawaikula for the Plaintiff

Mr. A. Kohli for the Defendant

Dates of Hearing: 06 and 07 November, 2017

Date of Judgment: 08 November, 2017

JUDGMENT

1. (1) According to the Amended Writ and Statement of Claim, the Plaintiff brings this action as representative of the Mataqali Waisali (clan). By a contract made by the Plaintiff Clan and the Defendant on 10 January 2014 (the contract) the Defendant was to pay \$5.00 per cubic metre for gravel extracted, to keep the road and provide a culvert.

(2) The contract also provided for the payment of \$50,000.00 by any party breaching the agreement.

(3) The Defendant has breached the contract agreement by:

- (i) Abandoning extraction work in January 2014 (sic) thus denying the Plaintiff their rightful payment.
- (ii) Non – payment of arrears – clause 1.
- (iii) Failed to upgrade the road – clause 2.
- (iv) Failed to provide culvert – clause 4.
- (v) Failed to pay \$50,000.00 – clause 11

(4) The Plaintiff has consequently suffered the following losses:

- (a) Extraction work abandoned.
- (b) Arrears due on date of departure - \$6,000.00
- (c) Upgrade of village road - \$40,022.00.
- (d) Cost of culvert.
- (e) \$50,000.00 under clause 11.

Total: \$96,022.00.

(5) The Plaintiff claims \$96,022.00 from the Defendant for breach of contract.

2. In the Amended Statement of Defence the Defendant says:

- (1) He admits obtaining a licence to extract gravel at the site concerned.
- (2) He admits as per the contract, he had agreed, to pay \$5.00 per cubic metre for gravel extracted, to keep the village road up to standard and to provide a culvert.
- (3) The Plaintiff breached the contract and as a result he suffered losses and damages. Particulars of Breach:
 - (i) Despite the contract for the period January 2014 to January (sic) 2015, the Plaintiff allowed China Railway to extract from the site concerned within the Defendant's contract period.
 - (ii) As a result the Defendant's work was affected, the Defendant had to stop work and incurred loss of income.
 - (iii) The Plaintiff breached clause 9 in allowing members of the clan to enter the site and damage the Defendant's machine resulting in work stoppage.Particulars of Losses:
 - (a) Loss of income.

- (b) Cost of repairs of machine - \$575.00.
 - (c) Breach of contract in the sum of \$50,000.00.
- (4) Wherefore the Defendant claims:-
- (a) Special Damages - \$50,575.00.
 - (b) General Damages.
3. In their Reply the Plaintiff denies they allowed China Railway to conduct extraction and state they had no dealings at all with China Railway.
4. The Minutes of the Pre-Trial Conference dated 12 June 2017 include the following:
- A. Agreed Facts, inter-alia.**
- (1) This is an action for breach of contract.
 - (2) The contract provided for the payment of \$50,000.00 by any party breaching the agreement.
- B. Issues to be Tried, inter-alia,**
- (1) Did the Defendant breach the contract by abandoning the extraction work by failing to upgrade the village road, etc.
- C. Issues to be tried, inter-alia,**
- (1) Did the Plaintiff breach the contract by allowing China Railway to do extraction on the site.
 - (2) Did the Defendant suffer losses in loss of income, cost of repairs and \$50,000.00 for breach of contract.
5. The hearing commenced with the Plaintiff (PW1) giving evidence. He said the clan met and gave him approval to represent them. Exhibit P1 is their authorization. The clan and the Defendant signed an agreement – Exhibit P2. Elia Bureilobau signed for the clan, the Defendant signed for the company and the witness was Roko Tui, the Provincial Administrator.
6. It was agreed that the Defendant has to pay \$5.00 per cubic metre, upgrade their roads etc. The Defendant did not pay in full for the gravel and there was a balance

of \$6,000.00. They were unable to obtain payment from or to contact the Defendant. The sum of \$40,000.00 was required for the upgrading of the road which the P.W.D came to survey. One culvert costs \$600.00 and a river requires 4 culverts. The clan had no authority to give to another company and no other company came to the land till today. No reason was given by the Defendant why they were not coming back.

7. Under cross-examination PW 1 said there was no disagreement between Elia and the members of the clan. The clan and Elia never received any money from China Railway. On Exhibit P2, Elia's signature appears as the receiving officer. The document is the official receipt of a cooperative ltd the name of which he did not know. Elia's signature is not the same as in the contract. PW1 did not know where Elia was today. He and the clan did not know why the Defendant left. He is not aware if China Railway paid \$1060.00 to the clan on behalf of the Defendant. The sum of \$40,000.00 was for the upgrade of the road.
8. In re-examination, PW1 said Elia informed him that \$6,000.00 was the arrears. The P.W.D told him \$40,000.00 was required for the upgrade of roads. They agreed with the Defendant to upgrade the roads till the Defendant completes the contract. Four culverts still had to be done and one cost \$600.00. The clan was not aware of the payment of \$1060.00 by China Railway nor aware if it had been paid to Elia. Elia never accounted to the clan for this money. The clan only knew the Defendant had abandoned the project when the equipment and machines were missing for some time. The clan were not aware if Elia had asked the Defendant to leave.
9. The next witness was Rogasiano Ranuka (PW2), the village headman. He said the Defendant worked 3 months plus and then stopped working but he did not know the reason why they left. He did not agree that the Defendant left because of China Railway.
10. Under cross-examination PW2 said he knew of China Railway, that they were constructing the Hibiscus road and that the Defendant was supplying gravel to them. It was the Defendant who came to the clan. He was not told why the Defendant left. He asked Elia but he did not say anything. He was not aware (as Defendant's counsel was putting to him) that the Defendant was late in payments

as China Railway was not paying the Defendant on time. The last payment was still in arrears and was around \$2,000.00. They were 2 tallymen, one is sitting in the public gallery and the other was Elia. It was not his, PW2's duty to see if the clan were paid for the gravel extracted. The money was deposited in the ANZ Bank account of the clan.

11. PW2 said the Defendant had damaged a big culvert and the heavy trucks had damaged the whole road. A Defendant's vehicle had been damaged by PW2's child. He was not aware that China Railway had come into the picture. He was not aware China Railway gave money to Elia. He was not aware Elia told the Defendant to go away.

12. In cross-examination, PW2 said Elia never told the clan that he had advised the Defendant to go away. The Defendant's excavation caused the culvert to fall but he did not fix it back. The 3 culverts were placed beside the road but should have been placed beside the river. The Defendant never explained why he did not do that. The Defendant did not maintain the road. The sum of \$6,000.00 were the arrears for the gravel that were due to the clan.

13. With that the Plaintiff closed their case and the Defendant opened his.

14. The Defendant (DW1) now gave evidence. He said on 10 January 2014 he entered into an agreement with the clan. Para 2 of the contract (Exhibit P2) provided for him to maintain the road as trucks were driven on it. The clan was to supply the gravel for free. He was to pay royalty to the clan. On 1 March 2014 he obtained a licence to extract gravel. They extracted gravel for 4-5 months, and stopped in June 2014. They were stopped by Elia around July 2014 as he, the Defendant, had delayed in payment and he was advised to stay away for some time. His machines were damaged. He was extracting gravel and supplying to China Railway. China Railway's payments were not regular. He paid into the clan's account and was not in arrears. China Railway reduced payment by the receipt amount of \$1060.00. China Railway delayed payment and when Elia took money from China Railway, China Railway deducted that amount from his payment.

15. The Defendant said he had a one year period to maintain the road as the licence was for one year – Exhibit D1. He did not continue after July 2014 because there

was some problem going on. He went to another place to extract gravel in Vunivesi. Elia told him that China Railway would do the extraction and the road construction.

16. The Defendant incurred costs of \$3,000.00 to obtain a new licence and \$2,500.00 to obtain an environmental impact assessment. The gravel was available and China Railway was paying him. He had stopped at the site in order to save the machinery and to maintain his good name.
17. The Defendant concluded by saying he did not want to claim against the clan because he did not want to end up in court.
18. Under cross-examination the Defendant said he signed the contract and Elia signed for the clan and the Roko Tui witnessed their signatures. He agreed with the terms of the contract. He said he stopped in June/July 2014. The licence was given on 1 March 2014 and would end on 28 February 2015. He had paid up to date. The Defendant agreed that Elia had no authority to stop him extracting the gravel.
19. The Defendant said para 6 of the contract required the Defendant to pay royalty to the clan. These payments were to the clan while China Railway's money was paid to Elia.
20. In re-examination, the Defendant said Elia had no authority to stop him extracting gravel from the river. It is possible that the clan can go to the Ministry of Lands and get somebody else to extract gravel. The licence in para 3 provides that other people can be given a licence to extract gravel.
21. The next witness was Mohammed Aleem Rahim (DW2). He said in 2014 he was working for the Defendant as a digger operator. He said the gravel extracted was taken to the Defendant's crusher and the crushed metal was supplied to China Railway. He said the China Railway tallyman told him that China Railway was extracting gravel from the river.
22. Under cross-examination, DW2 said he worked for the Defendant who asked him to give evidence. He denied that what he had been saying are lies.

23. With that the Defendant closed his case and counsel began their oral submissions.
24. The Plaintiff's counsel said the court had to decide whether there had been a breach of contract. The court had to decide whether the Defendant was justified in leaving. Elia did not have any authority from the contract to do what he was doing. All monies were to be paid into the clan account and nobody else. The discussion were to be with the clan committee and not with Elia. What Elia did was not authorized by the terms of the contract. Even if China Railway came to the scene, which counsel said they did not, the Defendant is not exonerated from his obligations to the clan. The Plaintiff was claiming \$50,000.00 and other damages.
25. The counsel for the Defendant now submitted. He said the Defendant left for the following reasons:
- (1) There was a disagreement between Elia and the clan members.
 - (2) Elia advised the Defendant not to come there.
 - (3) The Defendant feared his machinery would be damaged.
 - (4) He did not want to get a bad name for his company.
 - (5) Because Elia had said China Railway would do the extraction and maintain the road.
26. Counsel said Elia was the representative of the clan and should have been called to give evidence. He said the agreement was not well drafted but \$50,000.00 were the damages. However he submitted there was no breach.
27. The Plaintiff's counsel in his reply said the contract went with the licence, which was for 1 year. The Defendant left after 4 months. The Defendant abandoned the contract and the Plaintiff lost \$48,000.00 based on what the Defendant had been paying monthly. Elia signed as the representative of the clan and that is all.
28. At the conclusion of the arguments I said I would take time for consideration. Hearing done so I shall now deliver my Judgment. The foundation of the claim is the contract. Although it was not drafted in Chancery Lane legalese, its meaning would not prove too difficult for the laymen to discern. The crux of the matter is the claim for damages for breach. From the pleadings and the submissions of


counsel on both sides it is accepted by both parties that the party in breach has to pay the other party \$50,000.00.

29. It is trite law that if the parties provide in the contract for a certain sum to be paid as damages for a breach, that sum will be awarded by the court as liquidated damages. This is because the sum represents what both parties genuinely estimate will be the loss suffered by the party who is not in breach. Only if one party asserts that the amount is too high and is a penalty, will the court refuse its enforcement. Here neither counsel/party has raised such an assertion/contention. On the contrary it can be safely said that each counsel considers that \$50,000.00 is the measure of damages payable by the party in breach.
30. The question then is which is the party in breach here. The answer comes from the Defendant and his counsel. The Defendant's counsel put it to the Plaintiff that the Defendant had delayed his payments because China Railway had delayed paying him. Then the Defendant testified he had delayed in paying the clan and that China Railway had delayed payment to him.
31. Further if he really thought that the Plaintiff were in breach and not himself, then it should have been him who brought proceedings, not the Plaintiff, to recover the agreed damages. The explanation, I nearly said excuse, that he did not want to end up in court, stretches credulity to breaking point, because he is right here and now in court.
32. At the end of the day, I am satisfied on the evidence and I find as a fact that the Defendant had breached para 1 of the contract by not paying promptly and regularly into the clan account. Further by his own sworn testimony, the Defendant had abandoned the work, resulting in loses to the clan, and has not shown any justification, which could stand up in a court of law, for his abandoning his contractual obligations. I do not need to repeat the evidence here as I have reproduced the same in extenso earlier in this judgment.
33. Consequently, I told that it was the Defendant who was in breach and it is the Defendant who is liable to pay the \$50,000.00 agreed damages to the Plaintiff.

34. With the award of the agreed liquidated damages, the Plaintiff is not entitled to claim any other damages from the Defendant under the contract nor at common law. This is because each party had pre estimated this would be the loss that would be suffered by a breach.
35. I note the Defendant did not file a counter-claim so all his alleged losses would not have been allowed even if he had proved them, which in the event he had not.
36. I also note the Plaintiff did not claim for any pre-judgment interest.
37. In the result, I order the Defendant to pay the Plaintiff \$50,000.00 as damages together with interest thereon at 4% per annum from the date of judgment to the date of payment and \$1,000.00 as costs summarily assessed.

Delivered this 8th day of November 2017 at Labasa.




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DAVID ALFRED
JUDGE
HIGH COURT OF FIJI