IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 190 of 2021

BETWEEN: **LINCOLN REFRIGERATION PTE LIMITED** a limited liability company having its registered office at 131 Forster Road, Walu Bay, Suva.

PLAINTIFF

AND: **CITY PHARMACY LIMITED** trading as **KOKI SUPERMARKET** a limited liability company operating as a retail and wholesale organization having its registered headquarter office at Section 38, Allotment 33 Steamships Compound, Waigani Drive, National Capital District, Papua New Guinea.

DEFENDANT

Counsel : **Plaintiff: Mr O'Driscoll G.**
: **Defendant: Ms Lodhia .S**
Date of Hearing : **23.02.2022**
Date of Judgment : **31.05.2022**

JUDGMENT

INTRODUCTION

1. Plaintiff filed this action against Defendant, who is a foreign company doing business overseas, for a claim of FJD 390,480.00 for the goods and services it provided overseas. Defendant filed an acknowledgement for limited purpose of disputing jurisdiction. There after Defendant filed *inter partes* summons to set aside the writ and protest to jurisdiction in terms of Order 12 rule 7 of High Court Rules 1988. There was no written agreement between the parties as to providing goods and services pleaded or relied. The contract to provide refrigeration services including freezers were through and offer that was accepted from a sales invoice communicated to Defendant. So the contract was formed with the receipt of the said invoices by Defendant overseas. Goods and services were also provided overseas and there was an issue of quality of the product due to malfunctioning. Hence the dispute arose overseas, and Defendant had not paid final invoice. So Fiji is not the proper jurisdiction to institute this action. Writ of summons is set aside.

FACTS

2. Plaintiff is a local company having its registered office in Fiji. Plaintiff offers expert services for maintaining installation and repairing of air-conditioning and services related to that.

3. Defendant is a foreign company *inter alia* providing retail and wholesale business in foreign country. It had obtained services of Plaintiff to supply refrigeration equipment and installation for their supermarket abroad.

4. Plaintiff has filed writ of summons along with statement of claim .Accordingly, the claim against Defendant had arisen for the goods and services it provided the Defendant abroad.

5. Plaintiff had not alleged any written agreement or clauses of such contract, in the statement of claim but state on 19.8.2015 Defendant had raised a purchase order for an agreed price of FJD 1,550,000.00 for the goods and services that it provided abroad.

6. According to the statement of claim Plaintiff had issued Sales and Tax invoices in accepting to sell and provide services abroad creating a contract. Plaintiff had provided the goods and installation of them in PNG, where Defendant is registered and doing business.

7. Plaintiff had completed its work in 2017 and final invoice was sent to Defendant on 15.9.2017.

8. Plaintiff is claiming an outstanding debt of $411,187.42, due to non payment.

9. According to Plaintiff when Defendant had accepted purchase order, a valid contract was made in Fiji, the payment for that contract through remittances from abroad.

10. The claim is for failure to pay 'final payment plus additions in full.' Amounting $411,187.42.

11. Plaintiff had obtained leave of the court to serve Defendant abroad the writ and statement of claim.

12. Defendant had filed limited acknowledgment to oppose jurisdiction and had filed *inter partes* summons and an affidavit in support of the said summons.

13. In the affidavit in support of the summons to 'set aside writ and oppose jurisdiction' stated;

    a. Defendant and Plaintiff were parties to an agreement made in 2015, but this was lost due to a fire.

b. Defendant is foreign company registered and doing business in PNG.
c. The dispute between parties arose due to malfunction of some refrigeration installed in PNG by Plaintiff.
d. This malfunction was communicated to Plaintiff ,who refused to remedy unless full payment was made
e. Due to malfunction of the unit Defendant had suffered loss due to food being perished or wasted.
f. The malfunction resulted breakdowns and or unsteady temperature, in freezers.
g. Plaintiff had requested full payment before attending to the malfunction issues and Defendant had insisted that they are losing customers and items due to malfunction.
h. Both parties had communicated through emails in 2017-18 relating to the said defects in refrigeration item and defect is not denied.
i. While Plaintiff insisted full and final settlement of the payment, Defendant requested to remedy the defective refrigeration item, and there was a stalemate and business relationship broke.
j. According to Defendant cause of action had arisen in PNG due to malfunction of refrigeration units and their refusal to pay them.

14. Plaintiff did not file affidavit in opposition, to the affidavit in support of this summons.

15. Plaintiff had filed submissions and also authorities.

ANALYSIS

16. Defendant filed summons in terms of Order 12 rule 7 of High Court Rules 1988 to set aside the writ. The analogous provision in Supreme Court Rules of UK was Order 12 rule 8(1)

Supreme Court Rules (UK) (White Book) 1988 12/7-8/1 p 108

> "These rules, which should be read together provide machinery enabling the defendant to contend that the Court has no jurisdiction over him or over the claim or any part thereof made against him by the plaintiff or that there has been an irregularity in the issue of a writ or the service thereof or that any other giving leave to serve the writ out of the jurisdiction or extending the validity of the writ for the purpose to discharge orders seizing his property or restraining his use of it."

Procedure(12/7-8/2) White Book 1988 states at p 108

> " 1. A defendant who wishes to contest the proceedings on any of the ways, set out in r8(1)[1] or on the merits must give notice of intention to defend; at this stage that notice is neutral; it does not amount to a submission to the jurisdiction nor to a waiver of objection to the jurisdiction or to irregularities.

[1] analogous to Order 12 rule 7(1) High Court Rules 1988

2. Thereafter the defendant must choose whether to make an application under r.8(1) or contest the case on the merits. If he chooses the former course he must issue an application in the method prescribed in ...

3. If the application is successful the Court makes whatever order is appropriate (including dismissing he action ....."

17. According to Plaintiff cause of action had arisen in Fiji by Defendant's failure to pay for the sum agreed between parties through invoices. Payments were received in Fiji through three remittances made by Defendant, but the last invoice was not paid.

18. According to Defendant cause of action had arisen in PNG as the goods supplied by Plaintiff in PNG and they were defective.

19. It is clear that parties had entered in to a contract, to provide the goods and services to Defendant overseas and there was an issue as to the quality of the goods supplied. So the non payment relate to the said issue of defective items hence non payment and defects of the items are linked together.

20. Plaintiff installed refrigeration units in PNG, they were not providing constant temperature and also constant breakdowns. These facts are not denied.

21. Plaintiff had failed to remedy the situation and Defendant had stopped payment as they had suffered damages due to loss of customers and waste of perishable goods due to fluctuating temperature and breakdowns.

22. Defendant advance arguments towards establishing that this court lacks territorial jurisdiction and or this court should refuse to adjudicate the matter on forum non *convenience*.

23. According to undisputed facts the dispute between the parties relate to quality of the items and services provided by Plaintiff in PNG.

24. Plaintiff provided services and goods to Defendant in PNG in terms of a sum agreed between parties. Neither party submitted written agreement.

25. It is undisputed that Plaintiff had provided refrigeration items to Defendant and they have also accepted and part payment made and only final invoice was not settled.

26. Defendant had raised temperature fluctuation in the units and remedy the issue, but Plaintiff had requested full payment to remedy the issues.

27. From the emails submitted in the affidavit in support of this summons, Plaintiff had not denied the issues regarding the temperature fluctuations in the refrigeration item, hence the non payment and quality of the work or goods supplied cannot be separated.

28. The refusal to pay arose from alleged malfunction and loss of food items stored and also economic loss due to that including loss of reputation and or customers in PNG.

Proper Law of the contract

29. Proper law of the contract is the law which contract has its closest and most real connection (See Per Lord Denning in *Power Curber International Ltd V National Bank of Kuwait* [1981] 3 All ER 607 at 612.

30. In *United City Merchants V Royal Bank of Canada* [1982] 2 WLR 1039 it was held the proper law of the contract the law that has power to alter obligations of parties (see also *Adams v National Bank of Greece* [1960] 2 All ER 421.

31. *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* [1937] 4 All ER 206 (Privy Council), in the head note stated, 'The obligation to pay was not governed by the law of the place where payment was stipulated to be made in the sense that the amount of the debt, as expressed in the instrument creating it, ...'

32. So Privy Council did not apply *lex loci contractus* or *lex loci solutionis* , as conclusive in the determination of proper law of the contract. So, proper law of the contract can be one or more of the aspects that govern contract.

33. The most common method in written contracts where proper law is when there is a choice of law clause contained in it.

34. The approach to determine proper law of the contract is subjective and in this instance Defendants affidavit in support of this summons considered. These facts are not disputed.

35. In *Amin Rasheed Shipping Corpn v Kuwait Insurance Co, The Al Wahab* [1984] AC 50; [1983] 2 All ER 884; [1983] 3 WLR 241, House of Lords had applied both subjective and objective tests and had come to same conclusion. In that case Lord Wilberforce adopted 'closest and most real connection'.

36. Plaintiff had decided to provide services and good in PNG hence the proper law of the alleged agreement between the parties are law of PNG. They had agreed to abide by the laws of contract when Plaintiff provided its services while installation of the items and services relating to the items.

37. Plaintiff had submitted to PNG jurisdiction when it decided to supply goods and service in PNG without a choice of law clause or written agreement, so they could alter the agreement in terms of laws of PNG.

38. So the proper law of the contract entered between the parties through purchase order and acceptance through invoice is law of PNG.

Choice of Law

39. There was no choice of law clause in this instance.

40. Plaintiff in the statement of claim had stated that Defendant had issued a purchase order indicating products and services to be supplied in PNG and this was accepted by Plaintiff who was in Fiji.

41. So the contract was formed with the acceptance of purchase order which was communicated to Defendant in PNG. So the contract was made in PNG when the acceptance was communicated to Defendant. See *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169, [2014] All ER (D) 127 (Apr).

42. The method of acceptance of the offer was also not revealed by both parties.

43. Plaintiff had issued sales invoices to Defendant creating a contract in terms of paragraph 4, 5 of the statement of claim.

44. There is no dispute as to formation of contract between parties and Plaintiff complying with such contract and providing items and services relating to installation.

45. Defendant had paid for three invoices relating to the items and services it obtained from Defendant in their business in PNG.

46. Breach of that contract also happened in PNG due to alleged issues regarding quality of the goods supplied. This had resulted Defendant requesting Plaintiff to repair the items and Plaintiff's refusal to remedy the issue.

47. Considering the nature of the goods and services supplied the performance of the contract was in PNG and the alleged breaches happened in PNG.

48. In *James Miller & Partners Ltd v Whitworth Street Estates (Manchaster)* 1970 1 All ER 789, the factors such as place of performance of the contract, work site, regulations applicable for performance of the contract eg building regulations were considered.

49. Defendant's premises where the contract was performed was in PNG. Installation was in PNG under their law and or regulations including and labour and or safety regulations. So in fact entire contract was localized in PNG though performed by Plaintiff.

Forum *non conveniens*

50. This is not to be misled by just a factor of convenience, but most suitable forum taking in to consideration circumstances of the action.

51. In *Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843 at 853 -954, UK House of Lords , held,

> "But it is most important not to allow it to mislead us into thinking that the question at issue is one of 'mere practical convenience'. Such a suggestion was emphatically rejected by Lord Kinnear in Sim v Robinow (1892) 19 R (Ct of Sess) 665 at 668 and by Lord Dunedin, Lord Shaw and Lord Sumner in the Société du Gaz case 1926 SC (HL) 13, 19, and 22 respectively. Lord Dunedin said, with reference to the expressions forum non competens and forum non conveniens:
>
> "In my view, "competent" is just as bad a translation for "competens" as "convenient" is for "conveniens". **The proper translation for these Latin words, so far as this plea is concerned, is "appropriate".**
>
> Lord Sumner referred to a phrase used by Lord Cowan in Clements v Macaulay (1866) 4 Macph (Ct of Sess) 583 at 594, viz 'more convenient and preferable for securing the ends of justice', and said:
>
> "... one cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as "**more convenient, that is to say, preferable, for securing the ends of justice,**" I think the true meaning of the doctrine is arrived at. The object, under the words "forum non conveniens" is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends."(emphasis added)

52. What is more preferable in this instance to consider the dispute between the parties and allow that to be resolved in most efficient manner. Defendant has no properties or business in Fiji and ends of justice would be served in an action in PNG.

53. Having considered authorities Lord Goff (UK House of Lords) in *Spiliada Maritime Corp v Cansulex Ltd; The SpiliadaKenneth Rokison* [1986] 3 All ER 843, at 854-855, held,

> "In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the **court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action**, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in **general the burden of proof rests on the defendant to persuade the court to exercise its discretion** to grant a stay(see, eg, the *Société du Gaz* case 1926 SC (HL) 13per Lord Sumner and Anton *Private International Law* (1967) p 150). It is, however, of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see para (f) below).

(c) The question being **whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance** with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where 'the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant' (see Scoles and Hay *Conflict of Laws* (1982) p 366, and cases there cited); and also in Canada, where it has been stated that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed' (see Castel *Conflict of Laws* (3rd edn, 1974) p 282). This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the *Société du Gaz* case 1926 SC (HL) 13, where he said:

'All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer.'

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, eg, *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum: in *The Atlantic Star* [1973] 2 All ER 175, [1974] AC 436(Belgium), in *MacShannon*'s case [1978] 1 All ER 625, [1978] AC 795(Scotland), in *Trendtex Trading Corp v Crédit Suisse* [1981] 3 All ER 520, [1982] AC 679(Switzerland) and in *The Abidin Daver* [1984] 1 All ER 470, [1984] AC 398(Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon*'s case [1978] 1 All ER 625–637, [1978] AC 795–820 per Lord Salmon); and there is the further advantage that on a subject where comity is of importance it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some **other forum which is clearly more appropriate for the trial of the action,** the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon*'s case [1978] 1 All ER 625, [1978] AC 795, as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'. Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case 1926 SC (HL) 13 concerning the use of the word 'convenience' in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by Lord Keith in *The Abidin Daver* [1984] 1 All ER 470, [1984] AC 398 when he referred to the **'natural forum' as being 'that with which the action has the** most real and substantial connection'. So it is for connecting factors in this sense that the court must first look; and these will include

not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v James Scott Engineering Group Ltd* 1982 SLT 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay: see, eg, the decision of the Court of Appeal in *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356. It is difficult to imagine circumstances when, in such a case, a stay may be granted.

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction: see *The Abidin Daver* [1984] 1 All ER 470, [1984] AC 398 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage." (emphasis added)

54. UK House of Lords in the above case was considering stay of writ served out of jurisdiction with the leave of the court. The principles applied to such can be applied *mutatis mutandis* to summons seeking setting aside of 'writ **or** service 'in terms of Order 12 rule 7(1)(a) of High Court Rules 1988. So the principles regarding setting aside of writ and service are similar.

55. So each of the factors above are considered, below to determine competent forum.

56. It is clear that Plaintiff can institute an action in PNG, where Defendant is having its registered office and also doing business. This will enable Plaintiff to execute any award obtained without difficulty.

57. There is no evidence that PNG is inappropriate forum.

58. The most appropriate forum is PNG considering the alleged dispute regarding quality of the items and installations supplied by Plaintiff in PNG.

59. Almost all relevant, connections to this case are in PNG. Plaintiff did not deny that there was a complaint regarding refrigeration unit and its malfunction and also loss due to that. Goods and services were supplied in PNG and alleged malfunction was also in PNG. Plaintiff is only doing their business in Fiji but had accepted the offer to provide its services overseas, knowing the risks involved, including risk relating payment.

60. PNG is clearly not only convenient for both parties but also appropriate forum considering issues relating to Defendant's failure to pay the last invoice of Plaintiff.

61. There is no affidavit in opposition filed by Plaintiff for the summons so the facts stated in the affidavit are to be given its due weight for this application as they remain undisputed.

62. So the natural venue is the place where Plaintiff had delivered and installed fixtuers and services provided for the installation of such items and the dispute arose as to its function. All these had arisen in PNG.

63. *Spiliada Maritime Corp v Cansulex Ltd;* [1986] 3 All ER 843, it was held clearly, the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the Société du Gaz case 1926 SC (HL) 13:

> "I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."

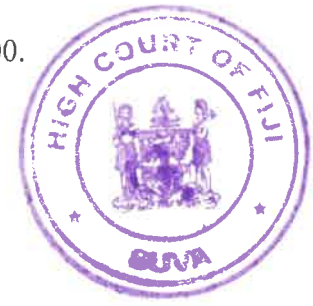
64. So any jurisdictional advantage for Plaintiff is not a factor to be considered as decisive. An advantage to Plaintiff may also be disadvantage to Defendant as stated in the above case *Spiliada Maritime Corp v Cansulex Ltd;* [1986] 3 All ER 843,in following manner. "Indeed, as Oliver LJ pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v Robinow* (1892) 19 R (Ct of Sess) 665 at 668".

CONCLUSION

65. For the reasons discussed, Fiji court is not the appropriate forum. Plaintiff's writ is set aside and cost of this application is summarily assessed at $1,500. Plaintiff's right to institute an action in PNG is not affected by this ruling subject to any legal and procedural limitation applicable in PNG.

FINAL ORDERS

a. Writ of summons in this action is set aside.
b. Action is accordingly deemed struck off.
c. Cost of this action is summarily assessed at $1,500.



Dated at Suva this 31th day of May, 2022.

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Justice Deepthi Amaratunga
High Court, Suva