

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 317 of 2020

BETWEEN: **CONCRETE SOLUTION (FIJI) LIMITED** a limited liability company
having its registered office at Suva Fiji.

PLAINTIFF

AND: **SAMBHU LAL CONSTRUCTION (FIJI) LIMITED** a limited liability
company having its registered office at Tavulomo, Savusavu in the
Republic of Fiji.

DEFENDANT

BEFORE: **Hon. Mr Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Prasad D. for the Plaintiff**
Mr. Singh A. K. for the Defendant

Date of Judgment: **05th March, 2025 @ 9.30am**

JUDGMENT

**[Breach of Sub-Contract, Negligence, unconscionable misleading,
deceptive conduct and counterclaim]**

Introduction

1. The Plaintiff commenced civil proceedings against the Defendant on 21st October, 2020 and claimed for the following:
 - (a) The sum of \$768,507.65 VIP;
 - (b) Interest;
 - (c) Costs on indemnity basis;
 - (d) Post Judgment interest;
 - (e) An order that the sum of \$84,440.05 be paid to Fiji Revenue & Customs services directly being 5% Provisional Tax;
 - (f) Such other relief as this Honourable Court deems just.

Plaintiff's Contention

2. According to the Plaintiff, it finished its subcontract project for the Construction of a three-storey building for Fiji National University - Fiji Maritime Academy, Nasese, in Suva, on 26 November 2019 and handed over the building to the Defendant for rectifying defects as per the contract.
3. The defects were then addressed by 28 January 2020 and a list of remedial defects was provided and handed over which was approved by the Defendant's project manager.
4. The Plaintiff contends that the Defendant failed to fulfil their payment obligations to the Plaintiff and hence breached their subcontract Agreement and caused delays, which resulted in the hardship for the Plaintiff.
5. However, the Defendant subsequently refused payments and instead claimed for liquidated damages, despite absence of such a provision in the sub-contract entered into.
6. The Plaintiff agreed to the deductions from the total amount owed by the Defendant, However, the Defendant owed the Plaintiff the sum of \$768,507.65 as claimed for by the Plaintiff in his Statement of Claim.
7. However, the Defendant filed its Amended Statement of Defence with a Counter claim on 12 May 2022 striking out of the Plaintiff's Claim and sought for -
 - (i) Judgment against the Plaintiff in the sum of \$1,723,681.83;
 - (ii) Judgment under paragraph 20 of the Defendant's counterclaim wherein Fiji National University uncashed the unconditional bond,
 - (iii) Alternatively, that the Plaintiff's Claim be set off against the Defendant;
 - (iv) Interest of 12.95% on the Judgment Amounts from the day of the breach to the day of the Judgment.
 - (v) Costs on indemnity basis, and such further or other relief as the Court deems just.

Defendant's Contention

8. The Defendant argued that even after the initial defects were fixed, the work did not meet the proper standards and remained faulty and were forced to have everything redone, hence incurring additional costs.
9. The Defendant contended that the Plaintiff exceeded the agreed - upon timeframe for the completion of their work. Thus, the Defendants are now claiming liquidated damages as compensation.
10. The Defendant further contends that liquidated damages were implicitly included as a term within the Agreement and therefore claims a total sum of \$1,723,681.83.

Background to Case

11. A sub-contract was entered into between the Plaintiff, Concrete Solutions (Fiji) Ltd and the Defendant, Sambhu Lal Construction (Fiji) Limited on 04th August 2018 for work valued at \$2,329,293.
12. The Defendant, contracted by the Fiji National University served as the primary contractor, whilst the Plaintiff, engaged by the Defendant, acted as the subcontractor providing construction service for the Construction of a three level building for Fiji National University - Fiji Maritime Academy, in Suva.
13. According to the Plaintiff, the Defendant had to pay the Plaintiff upon the structural engineer's approval as follows:
 - (i) Progress payment less 10% retention to be paid on monthly basis;
 - (ii) 50% of retention sum to be released upon practical completion, and
 - (iii) The remainder 50% to be paid upon the completion of defect liability period.
14. The Plaintiff's Contention is that the Defendant began **defaulting on payments** to the Plaintiff and without any prior explanation, suddenly invokes **liquidated damages** when prompted to fulfil their payment obligation.
15. The issues that were identified for determination are the following -
 - (i) **Whether there was a provision in the sub-contract addressing the time-frame of the construction work?**
 - (ii) **Whether any remedial works were performed, again by the Defendant, Sambhu Lal Construction (Fiji) Limited? and**
 - (iii) **Whether the Plaintiff, Concrete Solution (Fiji) Limited was compensated for their work?**
16. Bearing the above issue in mind coupled with the bundle of documents and Exhibits, the Court embarked on with the trial where the Plaintiff 4 witnesses to give viva voce evidence and the Defence called 2 witnesses.

Analysis and Determination

- (i) **Whether there was a provision in the sub-contract addressing the time-frame of the construction work?**
17. The defendant's bundle of Documents at page 1 contains the sub-contract Agreement reflecting 11 articles that was entered into by both parties to the proceedings on 04th August 2018.
18. Article 3 shows the schedule of work and states that:
- "Subcontractor hereby acknowledges that **time is of essence** with respect to the Contractor's completing the project pursuant to the General Contract and that such completion is substantially dependent upon the subcontractor's performance of this subcontract on or before the date set forth in the Progress schedule and/ or Progress meetings. Time, therefore is of essence in this subcontract."
19. **[PW1] Leith Wilson** in his capacity as the Managing Directors of Concrete Solutions (Fiji) Limited told the Court that he oversaw the Construction site with Manager Kamal. The Defendant did not provide a specific timeframe for the completion of the works. He also testified that no master work program was shared with them and neither were they given any notices of delay in works on the premises and project. His Company, Concrete Solutions (Fiji) Limited completed the work and the Engineer certified the job completed.
20. **Mr. Kamal Goundar** in his capacity as the National Construction Manager of Concrete Solution Fiji Limited testified that there were no additional attachments to the sub-contract and no work and/or time schedule was provided to them. He further told Court that there were no specific completion dates for tasks like columns and beams and affirmed that no Master work program was provided to them.
21. **[DW1] Shiu Dayal Sharma** - he was the 1st Defence witness and gave evidence in his capacity as the managing director of Sambhu Lal Construction Limited. He told Court that 19 June 2019 was the last month and date for the completion of the work i.e. handing over of the Fiji National University Academy. However, on 19 August 2019, 2 months after when the work was supposed to cease the actual completion of the Fiji Maritime Academy that a local purchase order was sent out for structural steel. This was the clear indication that work remained incomplete as on 19 June 2019 [Plaintiff's list of Exhibits, Vol 2, Tab 23 at page 75 refers.
22. According to the Defendant, on 26 November 2019, Concrete Solution informed his Project Manager that it had completed the subcontract, but in fact, it was supposed to be completed on 19 June 2019. Hence, there was a delay of 07 months' timeframe.
23. **[DW2] Shiu Dayal Sharma** was not completed by 26 November and substantial work remained on the roofing structure, which the Concrete Solution came and completed in January 2020. Other works were also left unresolved.
24. **[DW2] - Nishcal Lal** in his capacity as the Project Manager of Sambhu Lal Construction (Fiji) Limited testified that there was no letter sent to the Plaintiff regarding the time schedule. However, he admitted his involvement in the Contract and Expectation of time scheduled in construction contracts.

25. The defendants are strongly raising the issue of 'time is of essence' and emphasis its importance.
26. However, it cannot be disputed and/or denied that the sub-contract stated 'Time is of essence'. The specific timeframe should have been outlined clearly in the subcontract. The employee of Concrete Solutions Fiji Limited testified that there was no discussion concerning the precise date and time for concluding and// or the completion of the Construction works.
27. The Question then arises 'Whether is there any evidence and/or whether the Plaintiff's, Concrete Solution (Fiji) Ltd caused any delays with the Completion of the subcontract as agreed upon between the parties to the proceedings?
28. The Plaintiff completed the subcontract project of the Maritime Academy on 26 November 2019 and handed over the building to the Defendant for rectification of defects as per the Contract. The defects were evidently addressed by 28 January 2020 and a list of remedial defects was provided during the handover, which was approved by the Defendant's project manager.
29. The defence argued that even after the initial defects were fixed the work carried out did not meet proper standards and remained faulty. This forced to have everything redone, recurring additional costs. The Defendant says the delay caused by the Plaintiff in the project together with the defects that had to be rectified by the Defendant had caused damages and substantive losses to the Defendant.
30. The Defendant's refused to fulfil the Plaintiff their payments obligation and instead claimed for liquidated damages in their counter claim in absence of any provision in the contract entered between the parties.
31. In the absence of any specific start and end date within the contract, the 'time is of essence' clause becomes ambiguous, unclear and uncertain as to when the contractual obligation must be fulfilled, making it rather difficult for parties to ascertain and determine their respective rights and liabilities in the event of delay.
32. The importance of timely performance of the contract is the very purpose of the clause 'Time is of essence' and there must be a definite and unalterable date within which the performance of the contract has been effected.
33. The Plaintiff's employees testified that there was no discussion whatsoever concerning the precise date and time for concluding the construction works of the Maritime Academy, despite the sub-contract stating 'Time is of essence' .
34. The sub-contract however, should have outlined the timeframe in the contract in order to avoid any misunderstanding and commitment between the parties.

Article 3

35. Failure to include and/or attached any time schedule or the master program without specific dates to the sub-contract make the clause, 'time is of essence' unenforceable.

36. Therefore, I find that the Defendants have failed to present any evidence and establish the 'time schedule' within the contract upon which they are basing their claims in terms of the Defence and counterclaim.

(ii) Whether the defects were rectified by Concrete Solution Ltd?

37. [PW2] - Shivneel Mishra in his capacity as the Project Superintendent from HLK Jacob told Court that:

"Based on the office Engineer's assessment, the works were finished. Volume 2 of the Plaintiff's Exhibit, Tab 27, Page 108, items 2.3.1 - 2.5.5 individual that the 100% claim signified the 100% completion by PW2."

38. [PW3] - Manoratnam Narayan (Manager Project, Fiji National University) testified that -

"He was aware of the defects and their rectification as the Project is near - completion which indicates that the defects at page 41 of the Defendant's Bundle of Documents were rectified. He also agreed that Concrete Solutions Limited subcontracted work was 100% completed."

39. [PW4] - Kamal Krishan Goundar, construction manager informed Court that their work was inspected by the structural engineers of HLK Jacobs and Krishnit Charan who was Defendant, Sambhu Lal Construction Limited's Project Manager. He testified that Sambhu Lal's Project Manager recorded the percentage of work completed and signed off the defects as stated in the Plaintiff's List of Exhibits. Defects were acknowledged, inspected by Engineers, rectified, and re-inspected before Concrete was poured. However, he confirmed receiving one defect report.

40. [PW2] - Shivneel Mishra saw the defects list from the Defendant's Bundle of Documents and agreed that all defects were rectified.

41. [DW1] - Shiu Dayal Sharma testified that Sambhu Lal Construction Limited had rectified the defects. However, an invoice from Concrete Solutions claiming \$139,000 was documented within the Defendants Bundle of Documents as paid with Mr. Sharma's signature approving it. The witness admitted to being aware of the defects to the Fiji National University - Academy Building, however, relied on his terms for clarification instead.

42. According to the written submissions of the Defendant, Concrete Solutions Project Manager informed [DW1] Shiu Dayal Sharma that Project Manager Instruction No. PMI - 268 on 28 September 2020, and he printed out many defects. Further, Concrete Solutions work was not approved and accepted by Fiji National University through its agents, who were the Project Managers. The Project Manager on behalf of the owner Fiji National University, issued a comprehensive list of defects inclusive of the works of Sambhu Lal Construction Limited that were not rectified by Concrete Solutions but were rectified by Sambhu Lal Construction Limited.

43. PW2 - Shivneel Mishra told Court that the pouring of the Concrete would not have been

possible if the defects were not rectified by the Defendant, Concrete Solutions Fiji Limited, since it needed the Engineer's approval prior to pouring.

44. Therefore, it can be concluded that obviously the defects were rectified by the Plaintiff, Concrete Solutions (Fiji) Ltd accordingly.

Whether any Remedial works were performed again by the Defendant Sambhu Lal Construction Limited?

45. The assistant Project Manager of Sambhu Lal Construction Limited, told Court that he was involved in the Fiji National University Project. He referred to defects reports and confirmed that Sambhu Lal Construction Limited rectified the major defects of the starter bar etc. and explained the major defects and the delay Concrete Solutions Fiji Limited had caused with the project.
46. Above stated that because Concrete Solutions Fiji Limited's negligence in having defects in the building, the delay cause in rectifying the defects, Sambhu Lal Construction Limited sustained damages.
47. [PW1] - Leith Andrew Wilson told Court that they had not received any notices from Sambhu Lal Construction Limited regarding further defects after their rectification.
48. [PW2] Mr. Narayan also informed Court that in terms of the structural work/finishing, no other work was carried out.
49. The Defendant, Sambhu Lal Construction Limited had not furnished and/or provided any Engineer's Report or Project Manager's Report to demonstrate any subsequent defects found after rectification and whether those rectifications were indeed carried out by the Defendant. Further, there are no evidence of any documents presented to verify any additional repairs made to address these defects.
50. [DW1] - Shiu Dayal Sharma was questioned about the certificates from HLK Jacobs regarding the repairs conducted by his company on the defects. His answer was that he was not sure, his boys carried out the work and was unable to show and/or produce any reports that his boys performed the work, he claimed to be unsure.
51. There is no evidence before this Court to establish that Sambhu Lal Construction Limited carried out the defects or did any remedial works again, if left unattended and/or undone by Concrete Solutions Fiji Limited.

Whether the Plaintiff Concrete Solutions Fiji Limited was compensated for their work?

52. The Plaintiff, Concrete Solutions Fiji Limited confirms in its Statement of Claim that they have already received payments for claims 1 to 13. However, their claims still stands for claims 14 to 17 inclusive since the Defendant's still owes them these payments for services as appears in the Plaintiff's Exhibits, Volume 2, Tab 15 to Tab 18 (Page 52 - 61 inclusive).

53. HLK Jacob's assessed the claims for payments and forwarded the same to Fiji National University upon which they then release the payments. This was confirmed in his testimony by [PW2] - Narayan.
54. The Plaintiff's Concrete Solutions Fiji Limited's initial claim was for \$313,483.38. However, it was subsequently assessed at \$392,855.58, an amount exceeding the initial claim of \$313,483.38. Only a total sum of \$229,528.26 was actually paid and resulted in a shortfall of \$83,955.12. [Plaintiff's Exhibit, Vol 1, Tab 15 on PP.53 - 53 refers].
55. To the Plaintiff's Exhibits, Vol 2, Tab 37, pp 106 -108, [DW1] Sambhu Lal Sharma acknowledged that items 2.3.1 - 2.5.5 (page 108) were the works carried out by the Plaintiff and paid for by Fiji National University. A total sum of \$2,382,532 was disbursed to the main contractor. DW2 conceded that all the works listed under items 2.3.1 - 2.5.5 were performed by Concrete Solutions Fiji limited [CSFL].

Structural Steel Works

56. [DW1] Shiu Dayal Sharma denied owing any money to Concrete Solutions Fiji Limited for structural steel works. However, Plaintiff Company provided the Defendant with pricing for the structural steel works.
57. There is evidence of purchase order from Sambhu Lal Construction Limited dated 19 August 2019 amounting to \$367,024. Only \$25,000 was disbursed to Concrete Solutions Fiji Limited leaving shortfall of \$325,048.16.
58. **Payment** on 25 March 2019, a Notice of payment delay was issued to the Defendant Company followed by a letter on 30 May 2019, giving the Defendant 7 days' Notice of Payment delay, citing an outstanding amount of \$410,315.45 and urged them to settle the bill.
59. In return the Defendant Company on 12 December 2019 notified the Plaintiff Company of **Liquidated Damages** totaling \$44,000.
60. Plaintiff's Exhibit (Tab 28, page 116) - letter signed by the managing director Shiu Dayal Sharma signifies their Agreement to settle the outstanding bills on specific dates.
61. Subsequently, the defendant company stated their dispute with the entire outstanding Bill without offering any further clarifications.

Crane Hire

62. The contract of having a 45 ton crane costs \$15,000 per month. Plaintiff's Exhibit in Tab 24, 9 out of 11 invoices payments have been settled whilst 2 invoices remains outstanding totaling to \$37,000.

Retention Money

63. [PW3] Manoratnam Narayan told Court that the retention money was specifically held concerning Sambhu Lal Construction Limited in terms of the term/conditions outlined in the contract its liability period.

Variation of Liquidated Damages.

64. [DW1] Sambhu Lal Sharma could not recall issuing a local purchase order for structural steel.
65. He agreed that variations result in changes to the amount and stated that the Local Purchase Order was binding to the Contract.
66. DW2, Lal also agreed that he was aware of the Structural Steel Work issues and said it was part of the sub-contract.
67. Reference is made to the case of **Ausmech Services (Australia) Limited v Neo (Fiji) Limited**, HBC 172 of 2012:

"The Plaintiff, acted as a subcontractor, was engaged by the Defendant, who served as the general contractor, much like the current case. The Plaintiff undertook the installation and construction of air-conditioning and mechanical works, as well as **fit-outs**, including any agreed-upon variations, and successfully completed the assigned tasks.

Regular progress valuation certificates were submitted by the Plaintiff to the Defendant, yet payments was unreasonably delayed, resulting in financial strain for the Plaintiff and difficulty in settling payments to their suppliers.

Despite repeated requests for payment, the Defendant failed to compensate the Plaintiff for their labor and services.

In summary the court determined that there existence of a valid contract between the parties for the construction of base mechanical service, which were indeed delivered by the Plaintiff. The Court also noted that throughout the proceedings, the Defendant consistently maintained the stance that no contract existed between them, yet they never refuted the fact that outstanding payments were owed. The Defendant was ordered to pay the Plaintiff the sum and costs along with the interest."

68. In **Sudbrook Trading Estate vs Eggleton and Others** [1983] 1AC 444/ [1982] 3 ALL ER1:

"A contract is complete as a contract as soon as the parties have reached agreement as to what each of its essential terms is or can with certainty be ascertained: for it is an elementary principle of the English law of contract *id certum est quod certum reddi protest...*"

69. In **Dodd v Churton** [1897] 1 QB 562 it was stated:

"It is well settled that in building contracts-and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct-it may be quite legitimate conduct, such as ordering extra-renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

70. Refer to case of **Bhan v Chand (trading as Prem Builders)** [2020] FJHC 442; HBC 22 of 2014, The Plaintiff and the Defendant entered into a Contract for Construction purpose, which included a **Liquidated damage clause**.
71. The Court ruled that an employer cannot demand additional work or structural variations and subsequently seek liquidated damages for delays, as such actions would be deemed unreasonable.

"Of course, another way in which it can sometimes be argued that the **liquidated damages provisions constitute a penalty is the situation where the employer has prevented completion and could be said to be seeking to take advantage of that wrong by levying liquidated damages in respect of the delay**. It was the proliferation of such arguments which gave rise to extension of time provisions in the first place, in order to ensure that the contractor was not penalized for delays which were not his responsibility, but that an employer could be compensated by way of liquidated damages for those delays for which the contractor did bear the risk under the contract."
72. Bearing in mind the aforesaid case and applying to the current case at hand, - Concrete Solutions Fiji Ltd was tasked with structural steel works for the roofing, this constituted a variation from the main contract, which was not originally included in the scope of work. The contract did not include a provision for extending time in case of delays resulting from a subcontract variation. It would have been reasonable to grant them additional time to complete the additional work.
73. If there existed any agreement between the Defendant and Fiji National University regarding liquidated damages, it would have been incumbent upon the Defendants, during the subcontract formalization with the Plaintiff, to disclose the specifics and potential liabilities arising from the main contract. However, this aspect was not within the Plaintiff's awareness or consideration.
74. If the Defendant intended to pursue **liquidated damages**, as the contracting party, they would have undoubtedly included such provisions in the subcontract which was executed by them.
75. There is no evidence before this Court to establish if there was any correspondences between the parties that indicated their agreement to the Existence of the **Liquidated Damages Clause** in the contract.
76. In the Plaintiff's email dated 11 May 2020, [In Plaintiff's List of Exhibits, Vol 2. Tab 29, Page 119], they informed the Defendant's that the Contract was very clear as there was **no Liquidated Damages Clause existing**.
77. In absence of the issue of Liquidated Damages Clauses: in the contract between the parties it would not be just and/or equitable in the Plaintiff given their lack of argument and awareness regarding the inclusion of the liquidate damages clause.

In Conclusion

78. The Defendant's Bundle of Documents contains the sub-contract that was entered into by both parties to the proceedings on 04 August 2018. However, the master program, time schedules and the main contract were neither annexed in the sub-contract nor were there any if those documents furnished to court.
79. There was no discussion regarding the specific timeframe and/or date for concluding the construction works, despite the sub-contract starting 'time is of essence.' if the time schedule or the master program was attached in the sub-contract, then the Plaintiff would have been aware of the time since it was essential. In absence of specific, start and end date, the 'time is of essence' clause becomes ambiguous and uncertain and therefore is unenforceable.
80. The project superintendent from HLK Jacob's together with PW3 Manoratnam Narayan and PW4 Mr. Gounder obliged the works were inspected and finished and the defects rectified whereas the Defendant's contention was otherwise.
81. The Defence is claiming \$511,241 is prolonged costs with no evidence of any breakdown. They also claim compensation for wages, however have failed to substantiate their claim with supporting documentary evidence or any pay supra.
82. The Defence has further failed to present any comprehensive engineers or project manager's report to confirm any remedial, work done by the Defendant, Sambhu Lal Construction Limited on the Fiji National University - Fiji Maritime Academy in Suva.
83. The Plaintiffs are contesting claims 14 to 17 in their Statement of Claim as the Defendant owes their payments for their service as reflected in Plaintiff's Exhibits, Vol 1 of Tab 15-18 pages 52-61.
84. The Defendants were issued with Notice of payments on 25 March 2019, 30 May 2019 and 11 May 2020, Plaintiff's Exhibit in Tab 24 consist of invoices of Crane Hire. Nine (09) invoices have been settled while 2 remains outstanding totaling \$37,700, pending clearance by the Defendant Company.
85. After analysis and consideration of the evidence and Exhibits tendered into Court, on the Balance of Probabilities, I find that the Defendant has breached the contract by withholding the payments after they benefitted the services of Plaintiffs as per the Concrete executed therein.
86. The Plaintiff has rectified all defects, which were subsequently approved and signed off by the Engineer and the Defendant's project manager.
87. The Defendant has failed to prove and establish with any Concrete evidence with regards to their counterclaim in terms of misrepresentation. Negligence, recklessness and unconscionable and conduct. Accordingly, the Defendants counterclaim is dismissed in its entirety.
88. As per the Evidence before the Court substantiated by the Plaintiff in terms of documentary evidence with all communication between the Plaintiff and the Defendants, evidence of invoices, progress valuation certificates and engineers approval, the Plaintiff

has established its claim in terms of the Statement of Claim on the Balance of Probability and therefore succeeds in seeking Judgment for the relief as sought for in their claim.

Costs

89. The matter proceeded to trial with *viva voce* evidence of witnesses, written submissions and trial took almost 2½ days to complete.
90. It is only just and fair that the Defendant pay the Plaintiff summarily assessed costs of \$5,000 within 14 days timeframe.
91. Following are the final orders of this Honourable Court:

Orders

- (i) Judgment is entered against the Defendant in the sum of \$768,507.65 VIP;
- (ii) Defendant to pay a sum of \$5,000 as summarily assessed costs to the Plaintiff within 14 days timeframe
- (iii) Interest; and
- (iv) Post Judgment interest.

Dated at Suva this 05th day of March, 2025.




VISHWA DATT SHARMA
PUISNE JUDGE

Cc: DIVEN PRASAD LAWYERS, SUVA
A.K. SINGH LAW, NAUSORI