IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Civil Jurisdiction

Action No. 86 of 1978

000010

Between

CONSTRUCTION AND DEVELOPMENT LIMITED Plaintiff

- and -

LEEWARD ISLANDS LIMITED Defendant

Messrs. Gordon & Co., Solicitors for the Plaintiff
Messrs. Cromptons, Solicitors for the Defendant

JUDGMENT

The plaintiff is a contractor who contracted to clear a site for an airfield on the island of Malololailai owned by the defendant company. The agreed contract price for the job was $6000, and it was not disputed that the job was completed satisfactorily and that $5000 had been paid to the plaintiff. The first dispute was as to the payment of the remaining $1000 of the agreed contract price. The plaintiff said that he was not paid this remaining $1000 and the defendant said that he was.

Mr. Dawson for the plaintiff gave evidence that he was given a cheque for $1000 by Mr. Smith a director of the defendant firm drawn on a Castaway Resort bank account, the owner of Castaway at the time being Mr. Smith. Mr. Dawson said that at the time he thought the money was for the contract and he cashed the cheque. However he said that Mr. Smith later told him that it was not for the contract, but in respect of something else, and deducted the sum from other monies due to the plaintiff for other work done for Mr. Smith. Hence there was still $1000 outstanding on the airfield contract. Mr. Smith gave evidence for the defendant and his explanation of the $1000 cheque was that it was a loan by him to Mr. Dawson to hire or purchase some equipment, that it was nothing to do with the airfield contract, and that it had been recovered from the plaintiff. So Mr. Smith supported Mr. Dawson's own evidence that the Castaway cheque was not in final payment of the contract fee, but for

something else. Mr. Smith was the only person to give evidence for the defendant on this aspect of the case, and in support of the defence plea that the $1000 had nevertheless been paid to the plaintiff produced an entry in an analysis book purporting to record a payment of $1000 to the plaintiff. This was supposed to be by way of a cheque from the company's accountants in Australia to the plaintiff, and Mr. Smith had no personal knowledge of it. In fact he seemed to have little knowledge of - or even interest in - the affairs of the defendant, particularly after his fellow directors removed him from the position of Chairman and Managing Director of the defendant company in June 1972. That really is not good enough.

The defendant company could have produced a witness who could have spoken from personal knowledge, or there could have been some evidence that the cheque had been cashed by the plaintiff. As it is the court is left with the plaintiff's claim that the $1000 was still due and owing to him, quite uncontradicted by any proper or credible evidence from the defence, and so far as this aspect of the plaintiff's claim is concerned I give judgment for him in the sum of $1000.

The other aspect of the plaintiff's claim is rather more complicated. It was not disputed that in order to prepare the airstrip properly a large number of coconut tree stumps had to be pulled out, the holes filled in and the whole compacted to form a firm foundation for aircraft to land on. Mr. Dawson says that he was unaware of the stumps when he offered to do the job for $6000, that he had in fact been informed that the site had been cleared, and that the extra work was worth a further $3000. But according to him the only person who did inform him that the site had been cleared was a Mr. Crompton of Fiji Air Services, who could not speak on behalf of the defendant company. There was no such representation on the part of the defendant.

The plaintiff was asked to tender for the job. Plans and specifications were drawn up by the consulting engineers Harrison and Grierson, and Mr. Dawson saw Mr. East from the consultants before tendering. It was not disputed that the plaintiff was aware that some vegetation clearing was necessary including the removal of some trees, and he was advised to visit

the site before tendering. Mr. East gave evidence for the defendant and said that he told Mr. Dawson that there were some stumps that needed clearing. This had not been put to Mr. Dawson in the witness box, but I think one can say from Mr. Dawson's evidence that it is his case that he was unaware of the stumps until he had already started the work. Perhaps Mr. Dawson, who is hard of hearing (although perhaps worse now than in 1971 - 72 at the time of the contract) didn't hear Mr. East clearly, but I saw no reason to doubt what Mr. East said in evidence.

The plans prepared by the consultants don't show the stumps or refer to them in any way, and are almost entirely concerned with the cutting and filling necessary to make the strip suitable for aircraft landings. But then neither do they show the vegetation clearing that was necessary and which Mr. Dawson knew was necessary. In any case Mr. Dawson's tender was not based solely on the plans and specifications. Upon advice (and presumably as any prudent contract-or would do) he visited the site. He complained that due to various factors he could only spend less than ½ hour at the site, but surely if he felt that closer, more detailed, inspection was necessary he should have made sure that he had sufficient time. He said that the grass had grown high and he only went about 100 yards along the length of the strip and never saw the stumps. But again he should surely have been on his guard.

A previous contractor had done some work clearing the site and had knocked or pulled down a lot of coconut trees - somewhere in the region of 700 of them. This must have been quite obvious because the strip was being built through a plantation of coconut trees and the gap in the trees was obvious. Mr. Dawson must have been aware that a problem would arise if the stumps of the trees had been left - and in fact all the trees lay as they had been knocked or pulled down, some had come up by the roots, in some cases the stumps had broken off - because he said that Mr. Crompton, who visited the site with him assured him, presumably in answer to a question, that the palm trees had been cleared from the site. As I have said Mr. Crompton could not speak on behalf of the defendant company, and Mr. Dawson was unwise if he relied on what Mr. Crompton told him.

After inspecting the site Mr. Dawson put in his tender on the basis of "the plans and the inspection." Those are the words which he used in his letter offering to do the job for $6000, and he can hardly complain now that he didn't inspect the site properly. According to Mr. East he thought the tender was satisfactory on the basis of the work to be done and accepted it on behalf of the defendant.

If Mr. Dawson later found that the work to be done was more than he had tendered for, it was really up to him to go back to the defendant or the consultants and agree extra remuneration for the extra work. He did not do this. He says he spoke to Mr. Smith about it but nowhere in his reported conversation with Mr. Smith was there anything that could be interpreted as an express or implied agreement that the stump clearing was extra work requiring extra remuneration, or as to what the extra remuneration might be. In fact even according to Mr. Dawson's evidence Mr. Smith seemed to be more concerned to keep his fellow directors in the dark as to what was happening and asked him not to press for more payment.

Mr. Smith in evidence admitted speaking to Mr. Dawson about the stumps, but only in general terms as one of the problems of the job, not as an extra item.

I am quite unable to find, as was pleaded by the plaintiff, that there was any verbal agreement, or indeed any agreement implied or otherwise, that the plaintiff should remove the stumps in return for which the defendant would pay an additional $3000. So far as the defendant is concerned I cannot find that there was any acceptance that the stumps clearing was additional work. The job for which the plaintiff had tendered must of necessity have included the removal of the stumps. If the plaintiff was caught unaware Mr. Dawson really only has himself to blame for not making a proper inspection, and for not entering into the contract in a more businesslike way with proper and full written details of the work to be done and detailed costings.

I therefore dismiss the plaintiff's claim for $3000 additional payment. So that the nett result is that the plaintiff will have judgment for $1000 only and costs to be taxed if not agreed.

LAUTOKA,
15th February, 1980.

(sgd.) G.O.L. Dyke
JUDGE