IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 17 OF 1987

Between:

RAM JATI SINGH — Appellant

- and -

LETAMA TRADING COMPANY — Respondent

Mr G P Shankar and A K Singh for the Appellant
Mr Ikbal Khan for the Respondent

Date of Hearing: 23 September 1987

Delivery of Judgment: 27 October 1987

JUDGMENT OF THE COURT

O'Regan J.A.

This is an appeal by the defendants in the Court below against a judgment of Rooney J given on 13 February, 1987 in favour of the plaintiff, awarding it damages in the sum of $56,850 for wrongful repudiation of a conditional contract for the sale and purchase of sandalwood trees standing on a specified area of the appellant's freehold land at Luvuluvu in the province of Bau.

Clause 10 of the contract provided as follows:-

> "This agreement is conditional upon the vendor or the purchaser obtaining licenses from the Conservator of Forests for the felling, removal and export of the said trees and each party undertakes to use his best endeavours to obtain the issue of such licences."

The contract did not specify a time within which the foregoing condition had to be fulfilled. In that circumstance, by implication of law, each party is deemed to have undertaken to perform his part of the contract within a time which, having regard to all the circumstances, is reasonable - see Hick v Raymond & Reid (1893) A.C.22 Lord Watson at p.32; Diamond Cutting Works Federation Ltd v Triefus [1956] 1 Lloyd's Rep.224 - per Barry J. In the former case Lord Ashbourne, referring to the phrase "reasonable time" said:-

> "It would not be "reasonable if it was not sufficiently elastic to allow consideration of the circumstances, which all reason would require to be taken into account."

The contract was executed on the 31st May 1985. On 27th September 1985 Raman Singh & Associates then the solicitors for the appellant wrote to respondent's solicitors as follows:-

> "We act on instructions from Ram Jat Singh and refer to the above agreement. Our instructions are that as the Ministry of Forests has refused to grant the licence to export sandalwood and as the agreement is conditional upon this our client hereby gives notice of termination of the said agreement.
>
> Our client is not in a position to await any longer for the condition to be fulfilled."

68

The respondent's solicitors made reply on 10th October 1985. They wrote:

> "The Minister of Forests has not refused to grant a licence for the export of sandalwood. The application is still pending and we expect a reply shortly. Your client's notice of termination of the agreement is not therefore accepted. We do not believe the delay to date can be said to be unreasonable."

On 29th January, 1986 the respondent filed an action bearing endorsement that its claim was for specific performance of the contract and for damages in addition to or in lieu of specific performance. By formal statement of claim bearing date the 28th of July 1986, the respondent pleaded that it had accepted the repudiation by the issue and service of the statement of claim and claimed damages for breach only. In his statement of defence the appellant persisted in his assertion that the Conservator of Forests had refused to grant the licence but with a tincture of ambivalence went on to aver that the Conservator had undertaken to review the situation within two or three months of his letter of 29th June 1986. On any reading of the letter that averment of a refusal is not sustainable.

As at 10th October 1985 when the respondent's then attitude to the purported cancellation was conveyed to the appellant, the issue which projected itself from the history of events up till then was whether or not a reasonable time for the performancle of the condition

had elapsed by the 27th September, 1985. But despite that, no pleading putting that question directly in issue was made and no amendment to encompass it was sought either in the Court below or in this Court. That left the case in a less than satisfactory state.

The Notice of Appeal, terms of which were settled before Mr Shankar was briefed, contained several grounds of appeal. One of them (Ground 1) was in terms wide enough to encompass the question we referred to in the preceding paragraph; another (Ground 7) was an appeal against the quantum of the damages awarded but directed solely to the correctness of the market price per ton upon which the Judge founded his assessment.

At the hearing, Mr Shankar abandoned all the grounds set forth in the notice of appeal and substituted a single ground on the liability issue and a more general appeal against the quantum of the damages than that contained in the original Ground 7.

Mr Shankar's formulation of the new ground of appeal on the issue of liability was -

> "That the contract did not become operative nor did it become effective up to the date of judgment because the condition precedent had not been complied with."

This formulation, strictly speaking, does not raise an appealable issue inasmuch as "non-compliance"

with the condition as at the date of the judgment did not and could not affect the position of the contract as at the date of the purported cancellation. However, it became clear, in short order, that Mr Shankar was addressing himself to the critical question to which we have earlier alluded and notwithstanding the deficiencies of the statement of the defence and the notice of appeal we heard the appeal and now deal with it as if all amendments necessary to raise the real and, indeed, only issue had been made. The contract was prepared by Cromptons, a firm of solicitors practising in the city of Suva, which at the time of making of the contract until shortly before the appellant's letter of cancellation acted for both parties.

On the day before the execution of the contract Cromptons wrote to the Conservator of Forests giving very full details of the proposed transaction and seeking licences to remove the trees from the appellant's land to export the timber cut from them to Taiwan.

On 25th June 1985 the Conservator replied to that letter. He wrote:-

> "I confirm the Ministry of Forests is not in a position to grant your client licence to export sandalwood due to the current ban in force.
>
> The situation would be reviewed two or three months' time when your application will be reconsidered."

About the time the Conservator's letter was written, the appellant himself attended a meeting at the Conservator's office to ascertain the position as to the licences. He said he went there a few weeks after the contract had been made. In evidence, he said that he was informed that the price stipulated in the contract was too low and for that reason a licence would not be considered. The first part of this deposition gains some confirmation from the evidence of Mr Knight, a partner in Cromptons, who acted in the matter. He stated that during his conferences with the Conservator when he was endeavouring to hasten the issue of the licences, he was made aware that the Ministry was anxious to establish a uniform price for owners generally. The second part - the appellant's statement - that, because of the lowness of the price, a licence would not be considered, was not borne out of the subsequent events.

Shortly after his attendance upon the Conservator the appellant informed Mr Lionel Tam, the Managing Director of the respondent company of what he had learned. He asked Mr Tam to, as he put it, "increase the price a little." The request was refused.

On 3rd September 1985, replying to a further letter from Cromptons, the Conservator wrote:

"There are still some outstanding issues to be resolved by N.L.T.B. in regard to exporting sandalwood on native land. The matter now rests with N.L.T.B. and we are not in a position to say exactly when we will be in a position to issue a right licence however we hope that the matter will be fully resolved soon.

For the time being we are not issuing any logging or export licence for sandalwood."

The reference N.L.T.B. in this letter is a reference to the Native Land Trust Board. The appellant's land was freehold and not within the control or purview of the Native Land Trust Board. However, it would seem that the attitude and views of the Board bore some influence in the determination of the policy of the Ministry of Forests. No evidence as to the general policy of the Ministry or of the history of the application made by the parties was tendered by either party at the hearing. Notwithstanding the evidence that the Ministry was concerned to achieve minimum prices generally and about the price in the subject contract specifically, it intimated to Cromptons by letter dated 17th January 1986 that it had then agreed to allow felling of sandalwood on freehold land and invited an approach to it from the respondent "for necessary permits" - an invitation which we take to mean both types of permit originally applied for. There was no stipulation that such consent was to be subject to an increase in price.

In dealing with the control issue, the learned Judge - rightly in our opinion - held that the onus of

establishing that repudiation was justified in the circumstances lay on the defendant and he held that such onus had not been discharged. We agree with that view of the matter. Accordingly, the appeal on the issue of liability is dismissed.

Turning to the appeal as to the quantum of damages, Mr Shankar submitted that the Judge erred in taking the market price of the timber as at January 1967 instead of the date of the breach. In support he cited a passage from McGregor on Damages 14 Ed 591:-

> The time at which the market price is to be taken is .....the time fixed for delivery or if no time is fixed the time of refusal to deliver....."

We do not think this passage is authority for the proposition advanced, as time can be fixed in ways other than naming a date. In this contract the time of delivery was fixed in relation to events.

> "The purchaser shall complete the felling and removal of the said trees .....within two months of the issue ..... of a licence from the Commissioner of Forests to fell and remove the said trees ....."

A licence, of course, was not issued but one became available on 17th January 1986 and accordingly if the contract had not been repudiated the effective date of delivery would have been 17 March 1986. It so happened that the only evidence as to market price was the price obtaining in mid January 1986 and there being

no evidence of any subsequent variation of price, the Judge accepted that figure. In the circumstances he had no alternative.

The learned Judge accepted that the respondent had reasonable expectation of recovering 25 tonnes of sandalwood timber of average quality from the milling operation. That accorded with the evidence of both Mr Tam and the appellant. The latter noted that when he felled and milled the trees subsequent to the cancellation of the contract almost 20 tonnes were yielded but he had also said that about 10 tonnes had been stolen between the date of contract and the felling, half of which came from the timber sold to the respondent.

The learned Judge held that the timber would have sold at $3,900 per tonne. The defendant sold 7.158 tonnes in January 1986 for $30,000. He estimated that his nett return from this sale to be $3,900 per tonne. Mr Tam's evidence as to market price was to like effect. Allowing two months for the felling and milling - that period was allowed in the contract - after the availability of the permits, the respondent could not have effected a sale until after 17th March 1986. However, as we have already noted there is no evidence of any price variation between January and that date. Accordingly we think that price per tonne adopted by the Judge in his assessment was totally

justified. He also allowed the legal costs of and incidental to the preparation of the contract - $350.

Items of cost necessary for establishing nett loss which were allowed were :

Freight to Taiwan	$3,000
Expenses of felling and exporting	$7,000
	$10,000

Those items were not the subject of any contest in the Court below or before us and, in any event, they accord with the evidence.

The final assessment was made up as follows :

Price obtainable -		
25 tonnes @ $3,900 per tonne		$97,500
Legal expenses		350
		$97,850
Less :		
Purchase price of timber not paid	$35,000	
freight	3,000	
costs of felling and exporting	7,000	$45,000
		$52,850

The Judge entered judgment for $56,850. Each of the items in his assessment is the same as appears in the foregoing calculation. It is obvious that he has made a mistake in his arithmetic. But he was not the only Homer to nod. Neither ~~did~~ the parties and their solicitors, nor counsel noticed the slip. Certainly nothing about it was said to us.

To make good the mistake, however,-and for that reason only - we allow the appeal as to damages and in lieu of the amount of the judgment entered, substitute judgment for $52,850 plus the costs of the action in the lower Court.

The appellant is ordered to pay the costs of this appeal which, if not agreed upon, are to be taxed.

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Vice President

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Judge of Appeal

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Judge of Appeal