

IN THE FIJI COURT OF APPEAL

261

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0018 OF 1995S

(High Court Civil Action No. 261 of 1990)

BETWEEN

CARPENTERS FIJI LIMITED

APPELLANT

and

DAVID HERBERT VALENTINE COLLISON

RESPONDENT

Mr H. Lateef for the Appellant
Mr R. Krishna for the Respondent

Date and Place of Hearing : 9 August, 1995, Suva
Date of Delivery of Judgment : 14 August, 1995

JUDGMENT OF THE COURT

This is an appeal against the judgment of Byrne J. delivered on the 26 January 1995 in an action in which the respondent Collison was Plaintiff and the appellant Carpenters Fiji Limited (Carpenters) was the Defendant.

The circumstances out of which the action arose related to a Clark Bobcat Loader, the ownership of which was disputed and which had been hired out to Carpenters on the 23 March 1990, and which on the 31 of March of that year was damaged in an accident when it fell to the bottom of the hold of M.V. Capitaine Wallis at Kings Wharf, Suva, and was badly damaged.

It is not necessary to discuss at any length the evidence given in the case in this judgment as, in the event, both Counsel were agreed that there was only one issue to be

determined on the appeal; that of the ownership of the Bobcat. The appeal had also raised the question of the quantum of damages awarded but during the hearing Counsel came to an agreement upon that to the effect that if the appeal failed then the amount of the judgment including interest remained unaltered.

The question of ownership of the Bobcat revolved around the issue of whether it belonged, at the relevant time, to the Plaintiff Collison personally or to Collison Construction Limited, a company of which he was the principal shareholder and managing director. Mr Collison gave evidence to the effect that the Bobcat was his. He stated it had originally belonged to the company, Collison Construction Limited, but that it was transferred to him in January 1990 because the company was not profitable and so some of the company's assets were transferred into his name in an attempt to make some money. This was before the hire to Carpenters. In cross examination Mr Collison said the transfer was recorded in a company minute of a meeting of Directors of Collison Construction Limited and that the consideration paid was salary he was owed but which had not been paid for a long time. Amongst other things he said that the written order for the hire of the Bobcat given by Carpenters was addressed to Collison Construction Limited because the hiring out was still being done by Collison Construction Limited. Later, in re-examination, a copy of the minute of the meeting of Directors transferring assets from the company to Mr Collison was produced.

It was dated 17 January 1990 and recorded that in lieu of salary and other considerations a truck and the Bobcat and all accessories then owned by the company were transferred to the personal ownership of Mr Collison and his wife for the sum of \$45,000.

It appears that this document had not been produced by Mr Collison in terms of the pre-trial discovery that had been ordered. Carpenters Counsel did not object to its being given in evidence, though he did protest at the failure to discover it, but he was granted leave to cross-examine further upon it. He elicited the information that the copy minute produced had been faxed by Mr Collison from his home in Hawaii to his Fiji solicitors some 18 months previously but it had no date of transmission because Mr Collison's machine did not state the date of transmission.

The only witness for the defence was Mr Swann. He gave evidence as representative of the owners of the M.V. Capitaine Wallis and through them was authorised to act for Carpenters in relation to the hire of the Bobcat. He dealt with the negotiations for the hire of the Bobcat and the subsequent discussions in relation to the damage to it. Among other things he said that at the time of the hire he thought Collison Construction Limited owned the Bobcat. He added that "Normally we do not ask the person from whom we hire a vehicle who is the owner of it. It really did not matter to us so long as we hired the machine."

The learned trial judge was severely critical of Mr Collison's evidence. He expressed "serious reservations" about the authenticity of the minute of the meeting of Director's and remarked on his failure to discover it in his affidavit verifying his list of documents. He described his explanation for certain other matters as "very plausible and not entirely convincing" and added that Mr Collison's failure to disclose the document must raise "serious doubts" about his credibility.

The judge nevertheless said

"The position may well be as the Plaintiff claims and on the balance of probabilities I am prepared to hold that whilst Mr Collison was the owner of the Bobcat it was always hired by Collison Construction Limited."


He then went on to say that it was to be regretted that there was no document evidencing that situation, which we take to be that the Bobcat was owned by Mr Collison but that the hiring out of it was done by the company, and he went on to hold on the balance of probabilities, that Mr Collison was the owner of it at the relevant time.

Mr Lateef submitted that the learned trial judge was wrong in holding that the Bobcat belonged to Mr Collison and not the company. He urged two broad grounds in support of this submission. The first was that there were a number of items of evidence that pointed to the company being the owner. These included documentary matters, such as certain wording on the Writ issued out of the Court, the correspondence and the Carpenters order for hire all of which were in the name of the company, as was the payment by cheque for the hire. However, since Mr Collison's evidence was that the hiring out was done by Collison Construction Limited and not himself that is not surprising.

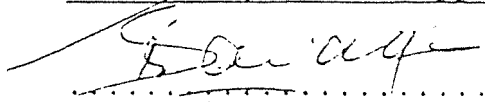
The second broad ground related to the evidence of Mr Swann and the use the judge appeared to make of that in coming to his conclusion. In our view the judge's assessment of Mr Swann's evidence is not particularly helpful on the question of the ownership of the Bobcat but it does bear upon his finding that the hiring out was always done by the company.

It appears to us that on this issue of ownership the only direct evidence was that of Mr Collison, who said the Bobcat was his and explained how and when he acquired it. The learned judge obviously did not find him a very satisfactory witness, indeed the contrary, but there was no evidence to contradict Mr Collison's assertion that the Bobcat was his. Such other evidence that might point to the company being the owner, such as the matters urged Mr Lateef in his first broad ground referred to earlier, are explainable on the basis that the company did the hiring out. Clearly the learned judge had the deficiencies of Mr Collison as a witness in his mind, for he canvasses them at some length, yet notwithstanding them he held, on the balance of probabilities, that Mr Collison was the owner of the Bobcat. In these circumstances and in the light of the well established reluctance of appellate courts to interfere with the findings of fact of the trial judge we are satisfied that the appeal must be dismissed.

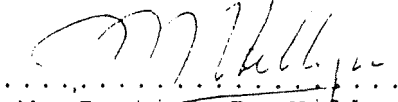
The appeal is accordingly dismissed. The respondent Mr Collison is entitled to costs.



 Sir Moti Tikaram
President, Court of Appeal



 Mr Justice Savage
Judge of Appeal



 Mr Justice P. Hillyer
Judge of Appeal