

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0083 OF 2000S
(High Court Civil Action No. HBC0145 of 1995)

BETWEEN:

STAR PRINTERY LIMITED

Appellant

AND:

UNITED PACIFIC ENGINEERING LIMITED

Respondent

Coram:

Reddy, P.
Barker JA
Davies JA

Hearing:

25 February 2002, Suva

Counsel:

Messrs. D. Sharma and S. Parshotam for the Appellant
Mr P.I. Knight for the Respondent

Date of Judgment:

1 March 2002

JUDGMENT OF THE COURT

Introductory

A hearing of the respondent's claim in contract against the appellant commenced in the High Court on 6th August 1998. It thereafter occupied another four sitting days over the next 22 months. Byrne J., on 19 October 2000 delivered a reserved decision. This apparent lack of urgency was consistent with the fact that the writ was filed as long ago as 15 March 1995.

The contract with which the appeal is concerned was entered into by the parties on 25 October 1994 - some 7½ years ago. It was for the supply by the appellant

to the respondent of 7500 diaries for 1995 at a total price of \$13,000. The delays mentioned above made the case a prime candidate for some form of alternative dispute resolution. The economic effect of a staggered hearing in the High Court plus various interlocutory skirmishes extending over many years, must have been considerable for both parties. A mediated settlement around the time the writ was issued in 1995 would surely have been more beneficial economically for both of them.

Byrne J. awarded the respondent damages for breach of contract in the sum of \$89,969.43 plus interest at 10.5% from 1st January 1995 to date of judgment plus costs. He rejected the appellant's counter-claim for \$37,753. The appellant appeals against the Judge's findings in respect of both liability and quantum. The appellant did not pursue some of its grounds of appeal. It did not challenge the Judge's rejection of its counter-claim. At the hearing in this Court, the respondent acknowledged that the Judge's calculations of quantum were incorrect and that damages had therefore to be reduced. The appellant was accordingly justified in pursuing this appeal as regards quantum.

Essential facts

The initial delivery date for the diaries was agreed by the parties to be 4 November 1994, but this date was extended to 30 December 1994 without prejudice to the respondent's claim for breach of contract. The Judge found that the diaries were to be "sewn" and then bound in a cardboard cover. In all, only 1538 diaries were delivered.

There was thus a shortfall of 5962. Letters from the respondent's solicitors to the appellant evidenced the time extension for completing the contract. The appellant did not reply to these letters. The Judge held that the diaries would not have been of much use after the end of December 1994.

The first delivery of diaries was made on 22 November 1994. More followed between then and 30 December 1994. The appellant claimed that there had been a variation of the contract to require the diaries to be sewn not stapled was rejected by the Judge. The Respondent insisted, that the original order was for stapled diaries only, and not for sewn diaries as contended by the appellant. The Judges rejection of this contention was not surprising, since the appellant first raised the alleged variation on 27 October 1999 after defence evidence had been given at trial. The Respondent claimed that it had received orders for all the diaries contracted to be supplied. When the order was unfulfilled by 30 December 1994, respondent obtained 2000 diaries from another supplier. Respondent claimed it had order books to prove its contention about forward orders but appellant objected to their production on the ground that the books had not been discovered. The Judge upheld this objection. Whilst the Court deplores inadequate performance of discovery obligations, it would have been preferable for the Judge to have admitted these documents on terms, if necessary, as to adjournment and/or costs.

The Judge held, after seeing and hearing the witnesses, that the respondent had established a breach of contract by the appellant to supply the sewn diaries by

30 December 1994. Having considered the evidence, this Court is satisfied that the Judge's findings on liability were open to him.

Liability Appeal

Counsel for the appellant tried valiantly to point to errors in the Judge's findings of fact. We can find nothing which would justify this Court holding that the Judge was in error in his factual findings. They were all open to him on the evidence: he had the advantage of seeing and hearing the witnesses. His reasons for rejecting the respondent's version of events are detailed and cogent. Accordingly, the appeal against liability must be dismissed.

Quantum Appeal

The Judge calculated damages on the respondent's loss of profits on the shortfall of 3962 diaries less \$566.81 paid by appellant to a third party. He accepted, as he was entitled to do, the claim of the respondent's witness that the net profit to the respondent would have been \$14.29 per diary, although there was no documentation to support this assertion. The Judge did not:

- (a) give credit to the appellant for the reduction in the shortfall caused by the respondent obtaining 2000 diaries from another source in January 1995 and

- b) make any allowance for the respondent's overhead, expenses.

Counsel are agreed that the amended figure which takes into account the 2000 diaries from another supplier is \$63,629.43. From this sum, it is reasonable to deduct, say, 10% for overhead and sale costs that the respondent must have incurred, in operating its business. Accordingly, the amount due to the respondent is now fixed at \$57,266.49. It would have been much better if the appellant had produced some documentary evidence to support its claim for loss of profit. However, the Judge was entitled to act on the evidence of respondent's witness alone.

Interest

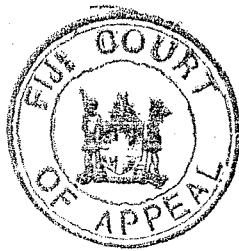
The judge awarded interest at the rate of 10.5%. Although he gave no reasons for selecting this rate, he did have evidence from the respondent's witness that the respondent had an overdraft at the time of the contract and that this was the rate of interest charged under the overdraft. Consequently, we see nothing untoward in the Judge's award of interest at that rate. Had the diaries been delivered on time and the proceeds from their sale paid to the respondent, then the respondent would not have had to pay interest on its overdraft pro tanto.

Miscellaneous

- (a) Counsel for appellant put up an elaborate alternative argument on assessment of quantum on the basis that what was claimed by the respondent represented an exorbitant profit taken by the respondent from each diary. As noted above, the Judge was entitled to accept the evidence of respondent's witness on this point, although it had little in the way of documentary corroboration. The appellant objected to the production by the respondent of its order books.
- (b) No deduction for income tax should be made from the damages awarded. These damages are in the nature of income in the hands of the respondent since they are profits from carrying on its business. The respondent must therefore include the damages when received, in its tax returns. References to cases about interest on loss of earnings in personal injury cases are not helpful in this context.
- (c) The appellant is entitled to reduced costs because the damages awarded by the Judge have had to be reduced.
A sum of \$500 is appropriate.

Decision

- (a) The appeal as to quantum is allowed in part.
- (b) The appeal as to liability is dismissed
- (c) The damages to be paid by the appellant to the respondent are reduced to \$57,266.49.
- (d) Interest on \$57,266.49 at 10.5% is payable by appellant to respondent from 1 January, 1995 to 19 October 2000.
- (e) Respondent is to pay \$500 to appellant for the costs of this appeal plus disbursements as fixed by the Registrar.
- (f) The order costs for in the High Court must stand.



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 Hon. Justice J. R. Reddy
 President

.....
 Hon. Justice Sir Ian Barker
 Justice of Appeal

.....
 Hon. Justice Daryl Davies
 Justice of Appeal

Solicitors:

Messrs. R. Patel and Company, Suva for the Appellant
 Cromptons, Suva for the Respondent