IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CIVIL APPEAL NO. ABU0041 OF 2007
(On Appeal from Lautoka High Court
Civil Action No. 216 of 2005)

BETWEEN	:	**MOHAMMED SADIQ & SONS LTD.**	*1st Appellant*
AND	:	**VIRENDRA KUMAR**	*2nd Appellant*
AND	:	**EARTHMOVING CONSTRUCTIONS LTD.**	*Respondent*

Coram	:	Byrne JA, Shameem JA, Hickie JA
Counsel	:	R. Gordon for the Appellants H. A. Shah for the Respondent
Date of Hearing	:	24th October 2008
Date of published Judgment	:	29th October 2008

JUDGMENT OF THE COURT

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[1] At the conclusion of argument on the 24th of October the Court stated that the appeal would be dismissed with the Appellant to pay the Respondent's costs to be taxed if not agreed. We stated that we would publish our reasons later which we now do.

[2] **Introduction**

This is an appeal from a decision of Connors J. of the Lautoka High Court who found that the driving of the 2nd Appellant was negligent and thereby the cause of a collision between the Respondent's vehicle and the 1st Appellant's vehicle as a result of which the Respondent's vehicle suffered loss and damage for which the 1st Appellant was vicariously liable. The Respondent and the 1st Appellant were both engaged as haulage contractors on a development at Momi Bay, Nadi.

[3] On the 3rd of March 2005 at about 7.00am the Respondent's vehicle registered number DO177 and the 1st Appellant's vehicle DZ088 had both arrived at the site prior to the commencement of work for the day. The Respondent contended that the vehicle owned by the 1st Appellant and driven by the 2nd Appellant reversed into the Respondent's vehicle causing damage to the cabin of the vehicle. The Respondent claimed the cost of repairing the vehicle and loss of income as the result of the vehicle being unusable.

[4] The Appellants contended that the accident occurred as a result of the vehicle owned by the Respondent colliding with the rear of the 1st Appellant's vehicle which was stationary. The 1st Appellant counter-claimed against the Respondent for the repairs to the rear of its vehicle amounting to $2,000.00.

[5] **The Evidence**

The evidence was given on behalf of the Respondent by its Managing Director, Parmend Chandra Gosai and the Respondent's driver Yogesh

Chand and Amit Chand, a machine operator with the firm of Vuksich and Borich.

[6] Yogesh Chand said that he arrived at the work site at about 7.00am on the 3rd of March 2005 and saw a truck registered number DZ088 already there. It was being driven by Virend Kumar. He said that his truck was in front and he parked behind. He then got out of his vehicle and was fixing his floor mat when he was knocked by the open driver's door. He said that the incident occurred as a result of the 1st Appellant's vehicle being driven by the 2nd Appellant reversing into the Respondent's vehicle as a result of which he was knocked over by the open door.

[7] Amit Chand the machine operator with Vuksich and Borich said that he arrived at work at 7.00am and that the accident occurred at about 7.10am when he was heading towards his digger. He said he saw the front truck reversed and collided with the rear truck.

[8] In cross-examination he was asked this question by counsel for the Appellant who did not appear on this appeal:

> ***"Q: So you didn't see exactly when the two vehicles came into impact or into contact?***
>
> ***A: The incident happened very fast. As I turned my head I saw the truck rolled at the back and hit the other truck and this driver of the truck was wrong".***

[9] On behalf of the Appellants evidence was given by Abdul the driver of the Hitachi Excavator who gave a detailed account of what he said happened.

[10] The learned Judge did not accept this evidence. He said at paragraph 17 of his Judgment:

> ***"I find the evidence of this witness and his observations of what occurred and his ability to describe the movements of the drivers of the vehicles when they are on the other side of the vehicle to which he was located to be quite implausible".***

[11] In paragraph 18 the Judge continued:

> ***"He acknowledged that his machine was on the passenger's side of the trucks but said that he then tried to describe the movement of the drivers when they alighted from the driver's side of the truck. This evidence I do not accept".***

[12] The learned Judge elaborated on those two passages in paragraph 26 of the Judgment where he said:

> ***"As I have said earlier I find that the evidence of the excavator driver most unsatisfactory. His evidence gave the appearance of being given to support the views of the Defendant (1st Appellant). He attempted to give evidence of matters that it was quite impossible for him to see as his machine was on the passenger's side of the two lorries and the activities of the drivers were on either the front or driver's side of their respective vehicles".***

[13] The learned Judge concluded his remarks on liability by saying in paragraph 29:

> ***"Looking at the evidence as a whole, I am satisfied that on the balance of probabilities, the evidence given on behalf of the Plaintiff is sufficient to establish the Plaintiff's claim".***

[14] **The Grounds of Appeal**

The Appellants' Notice of Appeal contains 20 grounds. The first 12 grounds relate to the issue of liability, the next 7 relate to the question of the quantum of damages and the final ground relates to the question of costs.

[15] In the end all those grounds amount really to one that the 1st Appellant did not cause the accident and that the learned Judge was wrong in so finding. The Judge found as a matter of fact that the Appellants' driver reversed on to the Respondent's truck.

[16] Such finding was not perverse and was supported by the totality of the evidence part of which we have quoted above. It is trite law, as counsel for the Appellant readily conceded, that in such cases an appellate Court ought not to overturn a finding of fact by a trial Judge who has had the advantage of having seen and heard the witnesses.

[17] It was held in **Watt (or Thomas) –v- Thomas** in the House of Lords in [1947] 1 All ER 582 that where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different

conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the Judge's conclusion.

[18] In this case we see no reason to over-rule the trial Judge's decision on liability. He saw the witnesses, noted their demeanour and preferred (rightly in our view) the evidence of the Respondent. The appeal on liability therefore must fail.

[19] **Quantum**

The only item allowed by Connors J. was the cost of repairs amounting to $29,722.50. This was the amount stated in a quotation from Niranjan's which was tendered without challenge by the Appellants.

[20] Mr Gordon for the Appellants courageously and perhaps we should add, ingeniously, attempted to persuade us that the learned Judge should have looked beyond this quotation and decided that he should not accept it. He could not refer to any authorities on this point and this Court, with many years experience in the law, has not heard of such a submission previously. Mr Gordon could not cite any authority for it but seemed to suggest that it was proper for the Judge to have analysed it and then rejected it. We are satisfied, with respect to Mr Gordon, that this is not good law.

[21] If the Appellant disputed the correctness of the quotation, then it should have told the Court but it did not. When the document was sought to be tendered, Connors J. asked counsel for the Appellant, ***"Any objection?"*** Counsel for the Respondent replied, ***"No Sir".***

[22] On this material, in our Judgment the Judge had no alternative but to accept the quotation as having been agreed by the parties. He was not under any obligation in law to go behind it.

[23] The Judge rejected a claim by the Respondent for the loss of earnings of its vehicle for reasons which we need not state. He therefore gave a verdict and judgment to the Respondent in the sum of $29,722.50 and we consider that in so finding he committed no error. The appeal is dismissed. The Appellant must pay the Respondent's costs which are to be taxed if not agreed. There will be orders in these terms.

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Byrne, J. A.

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Shameem, J. A.

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Hickie, J. A.

At Suva
29th October 2008