IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CIVIL APPEAL NO.ABU 0016 of 2016
(High Court of Labasa Civil Action No. ABU 31 of 2012)

BETWEEN : **K. NAIDU INVESTMENT PROPRIETARY LIMITED**
Appellant

AND : (1) **FIJI PINE LIMITED**

(2)**MACUATA FOREST COMPANY LTD**
Respondents

Coram : **Basnayake JA**
Almeida Guneratne JA
Seneviratne JA

Counsel : **Mr. D. Sharma for the Appellant**
Mr. F. Haniff for the respondent

Date of Hearing : **18 August 2017**

Date of Judgment : **14 September 2017**

JUDGMENT

Basnayake JA

[1] This is an appeal to set aside the judgment of the learned High Court Judge dated 19 February 2016. Pending the appeal, the appellant (plaintiff) filed an application on 17 May 2017 seeking leave to adduce fresh evidence.

[2] The parties had filed written submissions on the appeal as well as the leave to lead fresh evidence application prior to the date fixed for argument. However the learned counsel for the appellant tendered in open court a summary of the oral submissions that he would be making in court. He had completely discarded what was filed earlier. The learned counsel for the 1st respondent/1st defendant (hereinafter referred to as respondent) too was allowed to file written submissions if he so desired within three days, which he complied with.

Leave to adduce fresh evidence

[3] The learned counsel for the appellant submitted that if the trial had been concluded at the time of making the application to lead fresh evidence, the Court of Appeal may consider granting leave on special grounds (Rule 22 (2) of the Court of Appeal Rules). The learned counsel submitted that normally three grounds have to be satisfied:

(i) Evidence could not have been obtained with reasonable diligence for use at the trial.

(ii) Evidence would have an important influence on the result of the case.

(iii) Such evidence must be credible.

[4] The learned counsel in the synopsis that was submitted in open court dealt with grounds (ii) and (iii) above. He did not make submissions with regard to ground (i) above. The application to lead fresh evidence is with regard to the documents disclosed in the list at page 46 of the Record of the High Court (RHC Tab 11). The learned counsel submitted in court that these documents existed at the time of the trial and they were discovered documents. The learned counsel specifically stated to court that the documents although in existence, were not in the possession of the appellant. If the documents were in his possession, that itself would disqualify him from making an application to seek fresh evidence and the appellant would be found fault with for not producing them in evidence.

The affidavit to the contrary

[5] The appellant has filed an affidavit on 10 August 2012 verifying the appellant's list of documents. These documents are found at page 46 (Tab 11) of the RHC. These are the very documents that the appellant is seeking now to lead in fresh evidence. The appellant states as follows in a list of documents filed on 10 August 2012 with regard to the existence of these documents:

> *"The following is a list of documents relating to the matters in question in this action which are or having been in the possession, custody or power of the above named plaintiff and which is served in compliance with Order 24 Rule 2 of the High Court Rules 1988.*
>
> 1. *The plaintiff has in his possession, custody or power, the documents relating to the matters in question in this action enumerated in schedule one hereto* (schedule one is at page 46 of the RHC containing 11 documents).

[6] An affidavit (pg. 44 of the RHC) was filed by the appellant vouching for the truth of the statements made in the list of documents. The affidavit states in paragraph 2 that, "The statements made by me in paragraphs 1, 3 and 4 of the list of documents.....are true". The learned counsel for the respondent disclosed the appellant's above affidavit to counter the submission of the learned counsel for the appellant that these documents were not in the possession of the plaintiff. When confronted, the learned counsel for the appellant retreated leaving the court to make a suitable order thus almost abandoning his application to lead fresh evidence.

Rule 22 (2) of the Court of Appeal Rules

[7] The Rule is as follows:

> "*The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner;*
> *Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than the evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except upon special grounds.*"

[8] The provisions in Rule 22 (2) are more or less the same as in England (**ANZ Banking Group Ltd v Merchant Bank** [1994] FJCA 51). The following principles are well established in England in **Ladd v Marshall** [1954] 3 All ER 745 where three conditions have to be satisfied to consider an application to lead fresh evidence, namely;

(i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(ii) The evidence must be such that, if given, it would probably have an influence on the result of the case, though it need not be decisive.

(iii) The evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.

[9] These conditions have been adopted in Fiji. (**Chand v Chand** [2012] FJCA 22, **Western Marine Limited v Kelera Ledua Levakarua and another** (Civil Appl. No. ABU 90 of 2010 (30 May 2013)). However the case under consideration comes under the proviso to Rule 22 (2) where the application to lead fresh evidence was made in an appeal after trial on merits. Under the proviso, an application of this nature could be considered only on

the availability of special grounds. The appellant in this case did not urge any special grounds for the court to consider his application. Apart from that it is evident that the appellant was in possession of the evidence that he proposed to lead as fresh evidence at the time of the trial. Therefore he disqualifies himself from making an application to lead fresh evidence. This may have been the reason for the learned counsel for the appellant to abandon the application to lead fresh evidence. Hence the application to lead fresh evidence is refused.

The case of the appellant

Pleadings

[10] In an originating summons dated 22 May 2012 the appellant filed action against the 1st defendant/1st respondent claiming a sum of $53,122,600.00. The appellant claims that, on 13 February 2006 the 1st respondent (hereinafter referred to as the respondent) by an agreement employed the appellant to supply the respondent with logging machines and trucks for cartage of logs for a period of 10 years commencing from 13 February 2006 to 13 February 2016 for the respondent's new project at Wairiki, Bua, Vanua Levu. The appellant identified this agreement as "the first agreement".

[11] The appellant claims that by a further agreement which is identified as the "second agreement" the appellant entered into with the respondent on 13 February 2006, the appellant agreed to supply the respondent with machines and trucks for cartage of logs. The appellant averred that the appellant was required by a term and condition of the second agreement to supply the respondent with the specified machines before 31 March 2006. The appellant said that it was a term and condition of the second agreement that the respondent would pay the appellant an estimated sum of $438,655.00 per month. Upon reliance on the first and the second agreements the appellant had obtained finances and purchased machines and trucks before 31 March 2006, for a sum of $1,924,983.00.

[12] The appellant states that the respondent commenced his new project in April 2012. The appellant averred that due to this reason the appellant was unable to pay the loan instalments and as a result the machines and the trucks of the appellant were repossessed due to which the appellant suffered loss. The respondent has commenced the new project in Wairiki in April 2012 and engaged another party to supply logging machines and trucks without notice to the appellant, hence, terminating the contract with the appellant. The appellant also claims another sum of $484,000.00 for piling of pulps from trees totaling $ 53,122,600.00. The appellant claims general damages for breach of contract together with interests and costs.

The amended writ of summons

[13] The appellant filed an amended writ of summons (Tab 8) on 14 November 2013 wherein the 2nd defendant/2nd respondent was brought in. In paragraph 11 of the amended writ the value of the machinery purchased has been reduced to $1,522,374.39 from $1, 924,983 (paragraph 10 of the original statement of claim (Tab 15)). The amended statement of claim contained the particulars of loans and the machines and trucks purchased; details of machines and trucks repossessed and the particulars of loss and damage. The amount claimed from the respondent was $52,983,733.91. The appellant claimed against the respondent and the second respondent jointly and severally in a sum of $484,000.00.

The Appellant's Evidence

[14] According to the appellant's evidence, he had a business of logging, earthmoving, cartage and trucking. The appellant states that he entered into an agreement with the respondent on 13 February 2006 to supply logging machines and trucks for carting logs. The contract was for $438,000.00 per month for a period of 10 years. The appellant states that he entered into two written agreements. One is dated 13 February 2006 marked P I. The other agreement is undated. This was produced marked P II. He said that he got financial assistance for over $2 million. The machines had to be supplied to Wairiki site. However, the Mill at Wairiki site was not completed. Hence the machines were parked in his yard

and the Bank seized them as he defaulted payment. He said that the respondent never terminated the contract. In 2012 he said that he saw another person engaged in the work. He said that he suffered loss and claimed $52,638,600.00 together with general damages and costs. He did not give evidence with regard to the $484,000.00 claim made against the respondent and the 2nd respondent jointly and severally.

[15] Under cross examination he admitted that the document P I does not mention the rates. It does not state when the logging machines for cartage should be supplied. He said that he had been in the earthmoving and cartage business for a period of nine years. He also admitted that what P I states is that "all rates are VAT exclusive for a period of 10 years". He did not agree that PI does not constitute an agreement.

[16] He admitted that P II is undated. He said that both agreements were made on the same day. He claimed that P II formed a contract. At page 106 of the proceeding the plaintiff gave the following answers:

"Mr. Naidu: According to me this is a contract (referring to P II). I signed.

He also admitted (to) not having produced any documents with regard to the Bank loans.

(At page 107)

Mr. Haniff: I am not asking you that so far you not produce. Is that correct?

Mr. Naidu: Yeah is no never proceed (produced) but I have a document."

With that evidence the plaintiff's case was closed. The defendant did not call any witnesses.

Judgment

[17] The learned Judge has looked into the validity of the two documents produced in court marked P-I and P-II. The learned Judge found the document P-I devoid of an essential term of an agreement as regards rates or any method by which rates are to be calculated.

The learned Judge said that, *"In a contract of hire, both parties must at the outset agree on the rates of hire"* (Pg. 9 RHC). Finding that there is no agreement on so fundamental a matter, the learned Judge found that there is no concluded contract. The document marked P-II has been considered as not a communication between the parties to a contract. The learned Judge said that it is a communication to an unknown party that a contract has been awarded to the plaintiff, *"a contract which I have found to be an incomplete agreement"*. The court further found that the plaintiff also failed to prove his loss. The learned Judge had observed that the plaintiff did not adduce any evidence with regard to the claim for felling pine trees, pulling and piling pulps for pine trees. This was referred to as the third agreement in the amended statement of claim. Hence the action was dismissed with costs.

Grounds of Appeal

[18] 1. That the High Court Judge erred in law in reaching its decision which is bias(ed).

2. That the High Court erred in law in its decision which is one sided and is a miscarriage of justice where the learned Judge (has made the) make ruling on (the) evidence of the plaintiff/Appellant only. The defendant did not give evidence or produce any witnesses during trial which is an abuse of the court process.

3. That the matter is a high profile (one) concerning the State and the Administration of Civil Justice must positively and fairly find its cause as it is also (of public) a public concern and interest.

4. That the learned judge failed to properly evaluate the matter before the Court thus making erroneous findings without looking into the supplementary evidence of the Plaintiff/Appellant which is prejudice (prejudicial) to the Appellant to have his matter determined with fairness.

Submissions of the counsel for the appellant

[19] The learned counsel for the appellant did not make any written or oral submissions with regard to grounds of appeal Nos. 1, 2 and 3. From the submission made in court orally I will presume that the learned counsel addressed only on ground No. 4. As no submissions were made on grounds 1, 2 and 3, I reject those grounds at the outset and consider only the remaining ground.

[20] The learned counsel for the appellant submitted to consider P-I and P-II together and as one document as both these were made on the same day. The learned counsel submitted that the appellant had borrowed money and hired machinery. The loss suffered was the money spent on the machinery. The learned counsel strenuously submitted that the appellant had supplied machinery to the respondent in terms of the contract which evidence he said *"is unchallenged"*. He further submitted that the machinery were seized while they were parked in the respondent's premises. If this position is correct, the chances of victory for the appellant would be within reach. Unfortunately I find that the learned counsel is not correct on this point.

[21] The learned counsel for the appellant while making oral submissions, tendered in open court written submissions containing 7 pages with the heading, *"Summary of oral submissions that will be made by counsel for the appellant"*. A copy of it was handed over to the learned counsel for the respondent too. He states as follows in page 5 under the heading, "Key points in Judge's notes" in paragraph 16;

"16. If I can take your Lordships to the following parts of the Judges (Judge's) Notes
p.95: *Mr Naidu said he supplied the machines; not challenged on this"*.
At page 6 the learned counsel for the appellant while referring to page 104 of the proceedings;

"p. 104: *Mr. Naidu said in his evidence that he complied with the Fiji Pine condition and supplied the machines.* ***It was not disputed that he had supplied the***

machines to Fiji Pine. *It was not disputed that he at his own expense supplied the machines to Fiji Pines within the time frame stipulated".*

Distortion

[22] I do not find anything similar to what is reproduced above. What a witness says has to be gathered from the entire evidence. If the appellant supplied any machinery under P-I or P-II, he could have said so in the statement of claim (Tab 15) or the amended statement (Tab 8). The appellant does not say so in evidence either at page 95, 104 or anywhere else in the proceedings. If he did supply machinery to the respondent, this would prove that it is not only that the appellant entered into a contract with the respondent but he had also complied with its terms as far as the appellant was concerned and the respondent failed to make payments as agreed.

Reproduction of some portions of the evidence of the appellant

[23] **Page 92**:

(bottom) *Mr. Raikanikoda:* *What were you suppose to do to the 1st defendant?*
*Mr. Naid*u : *To supply the machines and do the service for the pine.*

Page 93:

Mr. R : *Did you carry out those duty as agreed under the 1st dated and 2nd undated agreement?*
Mr. Naidu : *Yes Sir.*

Page 94:

(bottom) *Mr. R:* *Witness did you honor this agreement and comply with the terms in it and supplying all these machines to the 1st defendant?*

Page 95:

Mr. Naidu : *Yes………*
Mr. R : *How long did you comply to honor the agreement?*
Mr. Naidu : *On the, on the before March 2006 with saying you have to compile* (may be supply*) all the machines, I have to supply the machines.*
Mr. R : *And witness this machines were suppose to supply at a respective sites or?*
Mr. Naidu : *Suppose to in Wairiki site but the………*

Mr. Naidu	:	*We have to supply the machine to Wairiki then after that the Wairiki mill, Wairiki mill there was a time some time consume then they drag for repair your further development you know and they given me job for cut the pine and supply to FFI……..*
Judge	:	*First you have to supply to Wairiki?*
Mr. Naidu	:	*I supply the machine.*

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Judge	:	*Yes then.*
Mr. Naidu	:	*But unfortunate they not completed their mill.*
Judge :		*What was not completed?*
Mr. Naidu	:	*The mill was not completed, the project.*
Judge	:	*So?*
Mr. Naidu	:	***Then my machine was idle and parked**………*
Judge	:	*Now that's not the answer now your question was this machine to be supplied at Wairiki.*
Mr. Naidu	:	*Yeah.*

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Mr. R	:	*Did the project in Wairiki got started when your machines were in Wairiki?*
Mr. Naidu	:	***Not in Wairiki in my yard because the factory was not made**……..*
Mr. Naidu	:	*The factory was not made.*
Judge :		*In Wairiki?*
Mr. Naidu	:	*Wairiki………*
Mr. R.	:	***Witness can you tell the court what happen when the project in Wairiki did not start?***
Mr. Naidu	:	***After a while my machine was cease (seized) by bank.***

[24] The above evidence shows that there was no delivery. No machines were supplied to the respondent. The machines were parked at a premises belonging to the appellant. The machines were later seized by the finance institutions that lent money to purchase them. They were seized while they were with the appellant. The learned counsel for the appellant said in his submissions that the machinery were seized while they were parked in the respondent's premises. That is to make this court believe that the machines were in fact supplied. The appellant said in evidence that the machinery were seized while they were parked in the premises of the appellant.

P-I and P-II

[25] **P-I**

P-I and P-II are found under Tab 17 of the RHC. Both these documents are made on letter heads of the respondent company. P-I contained the signatures of the manager, logging of the respondent company and the appellant. It is dated 13/02/06. The heading is, "*An Agreement between Fiji Pine Limited and K. Naidu Investments Propriety Limited*". The next line states that, "*the two parties have agreed to the following condition (*s*)*: There are six items numbered as, "A-F". The important conditions are found under condition "A" and "F".

> *A."**That K. Naidu Investment propriety limited shall supply all his logging machines for cartage**".*
>
> *"F"-"All rates are VAT exclusive and they shall apply for a period of ten (10) years commencing 13th of February 2006 to 13th February 2016. All Payments will be made within thirty (30) days from the end of each month"*

[26] **P-II**

P-II is under the heading, "***To whom It May Concern***". Under this heading appears, "***K. NAIDU INVESTMENT PROPRITY LIMITED"*** The body of the documents states, "*This in regard to the million-dollar project that will be completed dated June 1st, 2006 at Wairiki, Bua (Vanua Levu)***.** *I have awarded contract for trucks and logging machineries. The contractor subject to the following items wholly owns the contract.*

Machines required:

1. *3 x Excavator (EX 60, SEV 400, EX 100)*
2. *2 x tipper trucks*
3. *4 x skidder*
4. *5 x bell*
5. *10 x ten wheeler trucks with carrying capacity of 18-20 tons.*
6. *3 x loaders (956, 930, 966)*
7. *2 x D-6"s*
8. *2 x twin cab van*

Underneath it states, "*The above machinery must be supplied before March 31st, 2006. Total estimate earnings with this amount of machines are about $438,655 per month (four hundred thirty eight thousand six hundred fifty five dollars only).*

Submissions of the counsel for the respondent

[27] The learned counsel for the respondent submitted that the appellant himself treated P-I and PII as separate contracts and to consider the two documents separately. When P-I is considered separately it only states that the appellant shall supply all his logging machines for cartage. It does not state whom to supply and when and where to supply, what exactly the appellant should supply, and at what rate the payments should be made. The learned counsel further submitted that the appellant has failed to prove the loss. Referring to P-II, the learned counsel submitted that this cannot be considered as constituting a contract. It is only a letter giving information that a contract had been awarded.

[28] In **Hillas & Co. Ltd. V Arcos Ltd** (1932) Com Cas 23 (Law of Contract by Cheshire, Fifoot & Furmstone (Sixteenth Edition) Pg. 54-6 Fn 63) the House of Lords held that the language used, interpreted in the light of previous course of dealing between the parties, showed a sufficient intention to be bound. In Naidu's case there is no evidence of any previous dealings between the parties for the court to consider in favour of the appellant.

Uncertainty

[29] In Naidu's case one serious difficulty is with regard to its terms. Even if P-II is considered as a document that supports P-I there are uncertainties with regard to its performance. Although the appellant placed reliance on P-II as constituting a contract, the appellant failed to prove that any of its conditions were acted upon. It (P-II) required the appellant to supply the machinery mentioned in that prior to 31 March 2006. That has not been done. The appellant said in evidence that the machinery was parked in his yard as the Waikiri Mill, where the machinery was to be supplied, did not get off the ground until

2012. The appellant in the amended statement of claim mentioned the machinery that he had purchased. It is evident from the amended statement that the appellant was not in possession of the machinery as per P-II by 31 March 2006 or even thereafter.

[30] The learned counsel for the respondent submitted that there is no mention of rates of payment in the two documents P-I and P-II. The appellant had placed his reliance on the amount mentioned in P-II as the amount that was due. P-II refers to estimated earnings. The amount mentioned is $438,655.00 per month. Even if one considers this amount as the rate of payment, that payment would be subject to a condition. A payment cannot be made until the supply of machinery. In the event of failure to supply machinery as per P-II what happens? The appellant may not supply all the machines by 31 March 2006 as per P-II. Then how are the calculations to be made? I am of the view that the learned Judge had correctly found that the contract is lacking in an important limb, namely the rate of payment.

[31] The offer should, in addition to being a serious one, also contain definite terms of performance. A vague and an indefinite offer cannot by its acceptance give rise to a contract. If the agreement is vague and indefinite a court of law cannot say what was actually sought to be enforced and therefore cannot enforce it (Law of Contract by C. G. Weeramantry (Vol. I, p. 111 quoting Wille, Principles of South African Law 5th ed., p. 297, **Treadwell v Roberts** (1913) W.L.D. 54 at 59, **Beretta v Beretta** (1924) TPD 60). The court will presume in such a case that there was no serious intention to establish a legal bond and therefore no binding contract (Weeramantry quoting Wessels S. 77).

[32] According to P-II the machinery mentioned from item No. 1 to 8 containing 31 machines had to be supplied before 31 March 2006. According to the amended statement (Tab 8) the appellant had purchased only 3 excavators before 31 March 2006. Thus the appellant was not in a position to supply the machines mentioned in P-II by 31 March 2006. The appellant also states that the respondent in violation of the terms of contract handed over the work to another party in 2012 and breached the contract. It is the appellant's position that the appellant waited until the project in Wairiki started. The project according to the

appellant had started in 2012 April. However by then the appellant did not have any machinery and was not able to supply any machinery to the respondent.

[33] The appellant did not produce any document in proof of his loss at the trial. He says that he was in possession of the documents. The appellant states that he entered into a contract with the respondent to supply machinery at a monthly payment of $438,655.00. In terms of P-I (F) all payments were to be made within 30 days from the end of the month. According to the appellant the date of commencement is 13 February 2006. Machines had to be supplied before 31 March 2006. However no machines were ever supplied and no payments ever made. The appellant filed the writ of summons on 22 May 2012. That is more than six years after the date mentioned in P-I. Although payments were to be made within 30 days from the end of the month the appellant did not complain of non-payment.

[34] Assuming that the terms were not clearly set out as the document was not drawn up by a lawyer, is there any evidence of the parties acting in terms of those uncertain terms? In **Brogden v Metropolitan Ry Co** (1877) 2 AC 666 Brogden had for years supplied the defendant company with coal without a formal agreement. As the parties decided to regularize their relations, the company's agent sent a draft form of agreement to Brogden and later having inserted the name of an arbitrator in a space which had been left blank for this purpose, signed it and returned it marked 'approved'. The company's agent put it in his desk and nothing further was done to complete its execution. Both parties acted thereafter on the strength of its terms, supplying and paying for the coal in accordance with its clauses, until a dispute arose between them and Brogden denied that any binding contract existed. The House of Lords held that a contract came into existence either when the company ordered its first load of coal from Brodgen upon these terms or at least when Brogden supplied it.

[35] In Naidu's case there is no evidence of any party acting in terms of either P-I or P-II. The submission of the learned counsel for the respondent is that there never was a contract. In **G Scammel and Nephew, Limited v Ouston** [1941] AC 251 at 268, Lord Wright said,

"If there never was a contract, they could not be made liable for breach of contract. There are in my opinion two grounds on which the court ought to hold that there was never a contract. ***The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention****. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract (*emphasis added*).*

[36] Where the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intentions the courts have found that there is no binding agreement (**Thorby v Goldberg** (1964) 112 CLR 597 at 607, **Anaconda Nickel Ltd v Tarmoola Australia Pty** [2000] WASCA 27). The court also found that a contract is affected by uncertainty only if it's essential terms are uncertain or lacking (Barwick CJ in **Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd** (1968) 118 CLR 429 at 436, **Pagnan Spa v Feed Products Ltd** [1987] 2 Lloyd's Rep 601 at 619, **Parke & Parke** [2005] FCCA 1692).

[37] What McLure JA in **Australian Goldfields NL v North Australian Diamonds NL** [2009] WASCA 98 said is relevant.

"There are two limbs to uncertainty doctrine. A contract (or a term thereof) is void for uncertainty if (1) ***all the essential and critical terms of the bargain have not been agreed upon*** *or (2)* ***the language used is so obscure and incapable of***

any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention: ***Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*** *(1968) 118 CLR 429, 436-437;* ***Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*** *(supra). Under the first limb, the contract is incomplete. Under the second limb, the contract is unable to attribute a meaning to the language used by the parties. I refer to the latter as linguistic uncertainty. Both limbs apply only to essential terms*"

[38] I am of the view that P-I is lacking in the essentials that are required to form a contract. It is an unintelligible document. The document does not give any particulars to show a serious intention for the parties to bind each other. It only states that the logging machines for cartage should supply. However it should carry more information. The types of machines to supply, the quantity, the rate of payment, when to supply and where, are essentials to form this contract.

[39] The payment involved is massive. Considering the monetary value of the contract, I am of the view that P-I is something that was made not to create a binding agreement. It may be that the appellant was able to obtain financial assistance with the help of these two documents. But the document itself has not created any obligation. According to the appellant the respondent is bound to pay $438,655.00 per month for a period of 10 years; the first payment to be made within 30 days from the end of each month. The goods, namely, machinery was never supplied. Payments never made. There is no evidence of a demand for payment having been made either. It appears that the appellant, like in a fairy tale, woke from his slumber to find that the respondent had breached the contract.

[40] Whatever the difficulties, the judge must either upon oral evidence or by the construction of documents find some act from which the intention of the parties could be inferred. (**Robphone Facilities Ltd v Blank** [1966] 3 All ER 128). Having considered all the aspects I am of the view that P-I cannot be considered as having constituted a contract.

[41] P-II too cannot be considered as having created a contract. The appellant wanted P-II to be considered as a separate agreement. Whether considered separately or together, the difficulties with the document P-II still remains. It only contained information to a third party that a contract had been entered into. P-II may have been of some assistance if P-I could be considered as a contract. P-I and P-II are not acted upon. Not acted upon as they (P-I & P-II) were not meant to be acted upon. They could not be acted upon. Therefore, I am of the view that the learned Judge was correct in rejecting both the documents as they have not created contracts.

The second defendant/2nd respondent

[42] The 2nd respondent had been brought in by the amended writ of summons. By the amended statement of claim (Tab 8-pgs. 31 to 35) judgment was sought against the 1st and the 2nd respondents jointly and/or severally in a sum of $484,000.00. According to paragraph 16 of the amended statement of claim, the said amount is based on a "third agreement". In terms of paragraph 18 of the amended statement of claim, the appellant had been paid by the respondents for the felling of saw logs under the "third agreement". The appellant did not give evidence with regard to this claim and the learned Judge had correctly dismissed the appellants claim based on this cause of action as well. If the appellant had been paid by the respondents for felling logs, I do not understand the reason for making this claim. I am of the view that this appeal is lacking merit. Therefore the appeal is dismissed with costs in a sum of $5000.00 payable by the appellant to the 1st respondent.

Almeida Guneratne JA

[43] I agree with the reasoning and the conclusions arrived at by Basnayake JA.

Seneviratne JA

[44] I agree with the reasoning and findings of Basnayake JA.

The Orders of the Court are:

1. *Leave to lead fresh evidence refused.*
2. *Appeal dismissed*
3. *Costs in a sum of $5000.00 payable to the 1st respondent.*

....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

....
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

....
Hon. Justice L. Seneviratne
JUSTICE OF APPEAL