

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CIVIL APPEAL ACTION NO. 081 OF 2018
[High Court Civil Case No. 51 of 2016]

BETWEEN

MAHEND PRATAP SINGH

Appellant

AND

B W HOLDINGS LIMITED

Respondent

Coram

Prematilaka, RJA
Qetaki, JA
Clark, JA

Counsel

Ms. A Singh for the Appellant
Mr.V Filipe for the Respondent

Date of Hearing : 12 November 2024

Date of Judgment : 28 November 2024

JUDGMENT

Prematilaka, RJA

[1] I agree with the judgment of Clark, JA

Oetaki, JA

[2] I have considered the judgment of Hon. Justice Clark, JA in draft, and I agree with it, the reasoning and the orders.

Background

[3] The appellant, Mahend Singh, is a business man and company director. In January 2015 he contracted with the respondent, B W Holdings Ltd (BWH) to construct a subdivision at Koronivia Road, Nausori for which Mr Singh was to pay BWH a total sum of \$183,249.63. The works were to be overseen by Mr Singh's appointed engineer, Bobby Anand.

[4] Some five months later BWH reported that the project was completed. Mr Singh took a different view. He regarded the works as incomplete and he withheld payment. The parties were unable to resolve their dispute and BWH sued for the monies it said were owed under the contract. Mr Singh counter-claimed for costs he said were incurred having to engage sub-contractors to complete the work.

[5] Following a five-day hearing, his Honour Justice David Alfred issued a judgment in which he found that BWH had completed the contract and was entitled to the balance of payment due to it under the contract. Mr Singh has appealed the High Court decision.

The High Court judgment

[6] The claims were heard over five days in February and March 2018. On 27 July 2018 Justice David Alfred delivered his judgment. He found the evidence showed BWH had completed the contract and was entitled to the balance of the contract sum which his Honour characterised as "the unalterable consideration".¹ Mr Singh was ordered to pay to BWH the sum of \$82,699.63 with interest at 4 percent p.a. from the date of judgment

¹ *Singh v BW Holdings Ltd* [2018] FJHC 692; HBC51.2016 (27 July 2018) [**the High Court Decision**].

to the date of payment and costs of \$4000.00 for the claim and the counterclaim which was dismissed.

The appeal

[7] Mr Singh advances 11 grounds of appeal. Each ground will be addressed but the essence of the appeal is that the Judge erred in finding the project had been completed. Several of the grounds particularise this principal theme in contending the Judge gave no or insufficient weight to evidence showing that defects had not been attended to and other matters had not been completed. Other grounds of appeal are similarly said to be based on judicial error of law and fact in not accepting some evidence and not giving any weight to other evidence.

Observation about missing transcript of evidence

[8] Unfortunately, this Court did not have the benefit of a transcript of the five-day hearing during which five witnesses gave evidence. BWH's General Manager of Operations, Hitendra Pande, and Bobby Anend were called by BWH. Mr Singh gave evidence and called two further witnesses: Mahendra Singh who "owned" Pacific Civil & Engineering Designs Ltd (PCED) and Patel Faizaan the manager of the laboratory where samples of river gravel were tested on 14 November 2015.

[9] Prior to the hearing of the appeal attempts were made to locate the notes of evidence but the Court was advised they did not exist. Not having the transcript of the evidence given at a trial or during a hearing has the potential to significantly impede the appeal process. That is particularly so when a party appeals on the grounds evidence has been overlooked. In hearings involving oral testimony it would be prudent for counsel to ensure a transcript of the proceedings is made available during the course of the hearing.

[10] In this case, the High Court Judge was engaged in a fact-finding exercise. He recorded in his judgment that he had "reproduced in extenso the evidence recorded in court" because whether the contract had been completed and whether BWH was "entitled to

the balance of the ‘unalterable consideration’” came down to the weight the Court would place on the respective testimonies of the witnesses.² The High Court Judge took detailed notes and these have been of some assistance to the hearing of this appeal. There was also extensive contemporaneous documentary evidence.

[11] All in all, this Court considered it was able to give proper consideration to all grounds of appeal notwithstanding the lack of a transcript.

Ground one

[12] Ground one states:

The learned Judge erred in law and fact in holding that the project was completed by [BWH] as per the contract except the connection to the water main which did not connect because [Mr Singh] did not pay them, whereas as per the contract clause B1 Mr Singh was to pay [BWH] the total amount of \$183,249.63 into four stages and was to be paid out once inspections have been carried out to verify the claims and mutually agreed by the Engineer and [Mr Singh].

[13] Ms Singh, counsel for the appellant, took the Court to the following contractual provisions as having particular relevance to this first ground of appeal:

- [a] Consideration for “faithful performance” of the contract was to be \$183,249.63 paid in four stages upon inspection and mutual agreement by the engineer and Mr Singh: (cl B.1).
- [b] The project was to be completed within eight weeks from the date of signing of the contract being 26 January 2015: (cl C.1).
- [c] A penalty of \$500.00 per day was to be paid by BWH for each calendar day of delay: (cl C.2).

² High Court Decision above, fn 1, at [41]-[42].

- [d] Any request for extension of the completion date was to be made in writing to Mr Singh and the engineer: (cl C.3).
- [14] Counsel referred to Mr Singh's advice to BWH following his visit to the job site. He sent BWH a one-page "Progress Report" summarising the works he regarded as incomplete and pending. As well, counsel referred to a three-page letter to BWH from Bobby Anand, the consulting engineer, dated 16 July 2015 addressing the partial completion of the subdivision.
- [15] Counsel also relied on a report by PCED dated 20 November 2015. This engineering company was brought in following Mr Singh's release of Bobby Anand as the consulting engineer. PCED concluded that 80 percent of works had been completed.
- [16] Counsel for BWH, Mr Filipe, took the Court to evidence demonstrating the works had in fact been completed.
- [17] In oral evidence Bobby Anand said Mr Singh wanted the road to accord to Fiji Roads Authority (FRA) standards. However, Mr Anand had taken the view a private road did not need to conform to FRA standards and in his opinion BWH had completed the project. There is contemporaneous documentary evidence supporting Mr Anand's oral testimony that the project was completed. On 22 October 2015 BWH emailed Mr Singh in regard to "the drainage issue that has been raised today". The email was copied to Bobby Anand. BWH wrote:

The road side drainage falling into the lot side drains as per the design did not meet appropriate falls therefore it was instructed by the Engineer, Mr Bobby Anand, on site to excavate this straight to achieve required falls. We had numerous occasions contacted the Client to sort this out and he had been advising us that carry out works as per Bobby's instructions. Upon his confirmation and acceptance we then demobilized machines from the site.

- [18] The email concluded that the works had been carried out as per the engineer's on site instructions, and to his satisfaction but if Mr Singh intended to amend the instruction,

BWH requested to be given “the scope so that we could issue a variation price for this item”. Meanwhile BWH sought release of payment.

- [19] In his email response to BWH a few hours later, which was copied to his client Mr Singh, Bobby Anand confirmed the issue with the drains was raised by the client when he was involved in the project and that, in accordance with his instructions, BWH re-mobilised on site and rectified the problems. Further, at a meeting with the client and BWH, the client “agreed the works had been completed to an acceptable standard therefore payment for these was released”. Mr Anand’s email stated:

In summary when BWH moved away from the site for the second time all works as stated in the revised scope were completed satisfactorily and the pending items included the water main connection and gravelling to the road only. The preparation of the road base, water reticulation, open drains and lot finishing were completed as per our defects listing that was provided when BWH had demobilized from the site for the first time.

- [20] The email is yet further evidence that the works had been completed satisfactorily. I have quoted from the documentary evidence at some length because it shows the number of occasions on which both BWH and Mr Singh’s original “consulting engineer” (as Bobby Anand was termed in the contract) confirmed the project was completed to a satisfactory standard. Conversely, there was no document in evidence showing Mr Singh rebutted the repeated contentions.

- [21] In the 16 July 2015 letter on which Ms Singh relied, Bobby Anand emphasised that the connection to the water main was still pending. Mr Anand wrote [emphasis added]:

*This project was always progressive payment orientated therefore we always refrained from advance payments ... **In this case your current claim includes the connection for the water main that is still pending.** Actually you should have completed this and claimed for this item but do understand that you had requested for advance payment to pay the relevant authority. I would suggest that the client pay you partial payment of the justified payment due and remainder upon getting the certificate of connection.*

***I had visited the site last week and would like to comment that currently the works have been completed in an acceptable standard** and we shall not have too much problem getting the completion certificate from the relevant*

authorities as well. However, there are still some minor areas that the client highlighted but agreed to ignore it and go ahead with the processing with the payment for what is justified and due.

[22] The appellant relies on the 15 July letter from Bobby Anand as evidence that the project was incomplete because the water connection was pending. The difficulty for the appellant in relying on the 15 July letter to show the water connection was incomplete arises from his own second engineer's communication to opposite effect. PCED prepared its first progress report on 20 November 2015. PCED concluded that progress of the work was "unsatisfactory" and itemised matters it considered were incomplete. It assessed the works as being 80 percent completed. Significantly for this ground of appeal, however, under the heading "Water Reticulation" PCED recorded "**water main installation complete**" [emphasis added].

[23] The appellant has not succeeded in showing that the water main connection was incomplete and that, therefore, the Judge erred in holding the project was completed in accordance with the contract. There is no merit in the first ground of appeal.

Ground two

[24] Ground two states:

The Learned Judge erred in law and in fact in not giving due weight to the Plaintiff/Respondent Exhibit 10 being the Engineer Bobby's letter dated 16 July 2015 at page three that the connection for the water main was still pending and this was to be completed prior to requesting for advance payment by the Plaintiff/Respondent to Defendant/Appellant.

[25] For this ground of appeal Ms Singh relied upon the letter of 16 July 2015 from Bobby Anand. Counsel drew particular attention to the first of the paragraphs which I have quoted above at [21]. However, the real significance of the 16 July letter is the final full paragraph (also set out above at [21]) where Bobby Anand confirms that "currently the works have been completed in an acceptable standard ...".

[26] The letter and issue have been closely examined in the discussion of the first ground of appeal. The same reasoning applies to the second ground of appeal which, similarly, has no merit.

Third ground of appeal

[27] The third ground of appeal states:

The learned Judge erred in law and in fact in holding at Paragraph 6 of the Judgment that they had contacted Bobby and he confirmed by email that the contract had been completed when in fact Bobby did not issue any final completion certificate.

[28] The first point is that paragraph [6] of the judgment contains no decision or finding of the Judge. From paragraphs [5]-[33], the Judge set out the evidence of each party. The Judge did not begin his analysis of the evidence until paragraph [34] following which, his Honour set out his reasoning and conclusions.

[29] Putting aside the fact paragraph [6] of the judgment contains no finding, I will address the arguments made in support of ground three.

[30] Ms Singh emphasised the fact that from 29 September 2015 Bobby Anand was no longer the consultant engineer for the project and PCED was appointed to continue the project. Ms Singh submitted that Bobby Anand failed to issue a certificate of completion, and that the project was ultimately completed not by BWH but by subcontractors retained for the purpose of completion. PCED issued a final completion certificate on 25 January 2016 and the receipts in evidence show that all the works pending were ultimately only completed because Mr Singh engaged new contractors to complete the work. Mr Singh's solicitors gave notice to BWH on 19 November 2015 to complete the works within seven days or incur the penalty fee under the contract. Counsel submitted that as BWH failed to act on the notice Mr Singh had no option but to complete the work on his own accord.

[31] Mr Filipe drew the Court's particular attention to Bobby Anand's email on 22 October 2015. I addressed that communication in my discussion of the first ground of appeal, at [19] above. Mr Filipe also referred to Bobby Anand's email dated 23 October 2015 to the appellant. It is an important document but too lengthy to reproduce. I set out the main points that Bobby Anand made in his email:

[a] Mr Anand explained that he had been occupied for the past two months with work projects and also a bereavement and illness in the family.

[b] Although his services had been terminated he was writing the email to set out how the project had developed.

[c] Mr Anand referred to his and Mr Singh's mutual understanding that the project should be completed at the earliest and at minimal cost. There had been initial concern that the amount of the loan would not be enough to complete the entire project but they got the best offer from BWH. However, although with Mr Singh's limited funding they started cutting expenses including the surveyor's charges.

[d] Mr Anand reminded Mr Singh of his (Mr Anand's) earlier advice that they needed to do all they could to avoid delays and changes and avoid the consequence of variations.

[e] BWH was described as always being on Mr Anand's back because they had the impression his instructions "were mostly biased" and leaned towards favouring Mr Singh. BWH had said as much during a meeting and blamed Mr Anand for inconsistent instructions. Mr Anand said he had undertaken the project as a personal favour to Mr Singh and he sought Mr Singh's assistance in safeguarding him from legal disputes with BWH.

[f] Adjustments to the drawings and the scope of works had been made for Mr Singh's benefit. The works on the drain had not been perfect but BWH re-mobilised and carried out the works to his and Mr Singh's satisfaction. However it did not appear

Mr Singh had informed the local authority about the revised drain crossing or submitted a build plan (as Mr Anand had asked) and BWH now wanted Mr Anand to attend a site meeting about the issue. Mr Anand wrote: “Please resolve this”.

[g] Mr Anand concluded by asking Mr Singh to inform him of anything he had done wrong or any respect in which he had not acted on Mr Singh’s behalf by “enforcing your instructions”. He took responsibility for stating in his original drawings that the subdivision lots were flat when in reality there was a fall towards the lake and some difference in topography generally over the entire site —

... as you had always told me the land was flat and I accepted it. Actually because of this I had requested that I take the blame but you did not want me to do this but made arrangements with BWH and revised the design to gradually fall the road towards the lake.

[32] As with other similar communications to Mr Singh, there is no evidence that Mr Singh disputed Mr Anand’s account of the course which the project had taken and the many changes that were agreed, confirmed and executed in pursuit of Mr Singh’s cost-cutting goal.

[33] As to the completion certificate Bobby Anand did not issue a certificate because his services had been terminated. The completion certificate issued by PCED on 25 January 2016 shows the project was completed. The certificate records the contractors as being BWH and Central Eastern Construction Ltd. PCED certified that all drainage, water reticulation and lot levelling had been satisfactorily completed. Importantly, the defects liability period provided for in the contract with BWH would end in six months’ time on 22 July 2016.

[34] There is no merit in ground three. The appellant has not shown the Judge erred in holding BWH completed the contract.

Ground four

[35] The fourth ground of appeal states:

The Learned Judge erred in law and in fact in not giving any weight to the evidence given by [Bobby Anand] that on his last inspection, 90% of the defects had been rectified leaving a few small items that the Appellant had to supervise when in fact [Bobby Anand] admits the defects were still remaining to be completed by BWH.

[36] In submissions, Ms Singh relied on the Judge's notes which record: "Tab 6: this threat to plaintiff not to demobilize but return to rectify defects only, on my last inspection 90% of the defects had been rectified leaving a few small items that defendant had to supervise".

[37] Mr Filipe submitted that Bobby's statement should be considered in the context of all the evidence and not taken in isolation.

[38] One of the most helpful documents in evidence is a detailed letter from BWH to its lawyers, Haniff Tuitoga. BWH had taken steps to recover the \$82,699.63.00 it was owed for works completed. Mr Singh responded, through his lawyers, with a penalty claim relying on Mr Singh's letter of 11 June 2015 in which he refuted BWH's advice that the project had achieved completion. The letter from BWH to its lawyers is dated 4 December 2015. It is helpful evidence because it charts the course of the project not simply by assertion but by attaching documents which support BWH's narrative. It is not necessary to rehearse the detail. The task for this Court is to assess the nature of the evidence available to the Judge and determine whether he failed to take into account relevant evidence or took into account irrelevant matters. The weight to be given to the evidence was a matter for the Judge who, as the primary finder of fact, heard the witnesses and was in a position to assess the nature, relevance and credibility of the evidence.

[39] The letter of 4 December 2015 and the documents attached to it showed the works had been completed. The only contestable item was the diversion of the drains which had not been done in accordance with the drawings. BWH maintained that it had been for Mr Singh to contest that issue with Bobby Anand as Mr Singh authorised the revision of the original drawings which were then issued to Mr Singh in order for him to liaise with the local authorities for approval. This account of the situation is evidenced in a

contemporaneous document namely, an email dated 22 October 2015 from Bobby Anand to BWH and copied to Mr Singh. The email stated what I have just set out. There is no evidence in the record that Mr Singh refuted what was set out. Nor was there any suggestion in the course of the appeal hearing that Mr Singh rebutted at trial the assertions in the 22 October email.

[40] BWH's 4 December 2015 letter to Haniff Tuitoga described the position with regard to defects. BWH said upon rectification of defects identified in site visits Mr Singh would come up with a new defects list. Again, documents were attached supporting BWH's narrative and there was no evidence to the contrary.

[41] To the extent there was dispute about Mr Anand's role or authority during the course of his oversight of the project an email from Mr Anand to Mr Singh on 24 September is revealing. Mr Singh had replied to email confirmation from BWH that it would go ahead with completion of work. In his reply, Mr Singh asked for BWH's work programme so he could "inform Opus International Laboratory for progressive testing of average compaction etc so there is no delay from the laboratory". Mr Singh's email was copied to Mr Anand who wrote back within minutes to the effect he had already been liaising with BWH regarding its programme and he would therefore appreciate it if Mr Singh would go through him —

... rather than jumping in and sending emails asking for timeframes. Once I get their email confirmation I will inform you accordingly to make arrangements thus please refrain from jumping the gun and creating more emails and correspondence.

BWH had stated in their last email that they will inform us when they have made the payment for the gravel and depending on the weather will draw up a program. It has been raining for the past few days thus how do you expect them to give you a start date??? Please decide whether correspondence like this goes through me or you want to address them directly with BWH.

[42] Similarly, following his termination Mr Anand wrote to Mr Singh on 29 September 2015 hoping the best for the project and asking him to "please liaise professionally with all parties and in writing to avoid any further problems." Mr

Anand's email of 29 September expressed a personal relief at being taken off the project because of Mr Singh's tendency to make changes to matters that had been arranged, and thus cause further delays which led to increased prices of gravel over the delayed period.

[43] Although the 4 December 2015 letter and attachments from BWH to its lawyers supports BWH's position in other respects it is not necessary to address every point. A remaining important point to be made, however, concerns PCED, the project engineer appointed to replace Mr Anand. BWH disputed PCED's progress report suggesting it had been "filed up in order to build up a case against BWH". BWH described the second engineer as unprofessional and attached a contemporaneous document evidencing its position. Hitendra Pande, BWH's General Manager, wrote to Mahendra Singh, the new engineer, on 27 October 2015 expressing disappointment with PCED's unprofessional approach.

[44] Mr Pande referred to Mahendra Singh's confirmation of a meeting on site at 8.00am that morning. All BWH personnel were there but, Mr Pande wrote, Mahendra Singh did not turn up. The issue with delay on the client's side was described as "ongoing since the beginning of this project". Mr Pande advised Mahendra Singh that BWH's plants had been idle since the previous day and if there was no action from PCED they would demobilise.

[45] The appellant has not shown the Judge gave no weight to Mr Anand's evidence that on his last inspection 90 percent of the defects had been rectified leaving a few small items for supervision by the appellant. The Judge referred specifically to this evidence in his judgment. And it is apparent from his reasoning that he considered the totality of the evidence in concluding that the contract had been completed and that the sum owing to BWH under the contract was payable.

[46] Ground four has no merit.

Ground five

[47] Ground five states:

The learned Judge erred in law and in fact in not giving any due weight to the Project Progress Report No 1 dated 20 November 2015 prepared by Pacific Civil and Engineering Designs Limited which reveals that the Plaintiff/Respondent had only completed 80% of the works and was required to attend to the defects listed in the report.

[48] In support of this ground Ms Singh submitted CPED's report was not discussed by the Judge.

[49] Ms Singh is correct. The report itself is not the subject of actual discussion by the Judge but his Honour's summary of Mahendra Singh's evidence about the report was fulsome. Mahendra Singh, the second engineer, said he prepared the report on the instructions of the appellant. He had no communication with Mr Anand and accepted that if there had been any changes he was unaware of them. Importantly, he said his report did not show that BWH did not complete the project.³

[50] As well, the Judge's notes record Mahendra Singh's evidence that his report did not show BWH did not complete the project. It appears from his Honour's notes that Mahendra Singh's evidence in re-examination was to the effect he looked at the design and there were shortfalls and the project was not completed according to the design. But the report did not show BWH did not complete the project.

[51] It is apparent that the Judge was cognisant of the report and the evidence about the report. The complaint is that he did not discuss it. But a Judge is not required to discuss every item of evidence adduced in a trial or hearing. What is important is the Judge's reasoning process and the extent to which the Judge's reasons are apparent. The weight to be given to the report was for the Judge's assessment in light of the totality of the evidence.

³ High Court decision at [25]-[26] and Judge's Notes at Record p 290.

[52] No error is shown. Ground five has no merit.

Ground six

[53] Ground six states:

The learned Judge erred in law and in fact in paragraph 39 of the judgment when it stated that the Defendant's own engineer fixing ownership and responsibility exclusively on the Plaintiff/Respondent and not partially or at all on Central Construction Ltd whereas it was to be seen from the Final Completion Certificate that the Contractor named in the certificate were BW Holdings and Central Eastern Construction Ltd

[54] The Judge noted that the final completion certificate issued on 25 January 2016 stated unequivocally that all work for the project had been satisfactorily completed as designed and approved by Town and Country Planning Department; that the date of completion was 22 January 2016 and that the "Defects Liability Period is 6 months as stated in cl D.1 of the contract agreement with BW Holdings and will end on 22 July 2016".⁴

[55] The most Ms Singh could put forward in support of this ground of appeal was that in the case of defects the contractors would be liable to rectify and the final completion certificate specified both BWH and Central Eastern Construction Ltd as the contractors.

[56] The argument overlooks the contract. The completion certificate expressly notes that the defects liability period is "as stated in cl D.1 of the contract agreement with BW Holdings...". On the appellant's argument the contract with BWH would govern the defects liability period yet not liability for remedying the defects.

[57] The Judge, with respect, was entirely correct to take the view that —⁵

this was tantamount to the Defendant's own engineer [Mahendra Singh] fixing ownership and responsibility exclusively on the plaintiff and not partially or at all on Central Eastern Construction Ltd and that the sub-division has been finally completed by the plaintiff.

⁴ High Court Decision at [38].

⁵ High Court Decision at [39].

[58] Ground six has no merit.

Ground seven

[59] Ground seven states:

That the Judge erred in law and in fact in not accepting the evidence of DW2 at Paragraph 26 of the Judgment when there was clear evidence that there were other sub-contractors involved and as an engineer he only looked at principal and not the sub-contractors when issuing the Final Completion Certificate.

[60] It is difficult to discern the point behind this ground of appeal which relies on the evidence of Mahendra Singh in cross-examination. It seems from the Judge's notes Mahendra Singh was taken to a payment schedule which included "other companies". He said as an engineer he looks only at the principal engineer not sub-contractors. He noted Central Eastern Construction and Road Sealing were involved and were included at the behest of his client.

[61] As Mr Felipe submitted, there is no evidence of any report from PCED outlining any works by sub-contractors nor is there any scope of works. No contract was produced for works by Central Eastern Construction nor any scope of works.

[62] A letter from the Secretary, Nausori Rural Local Authority to the Director Town and Country Planning on 26 January 2016 pursuant to the completion certificate for the subdivision advised a final inspection was conducted on 26 January 2016 and revealed satisfactory compliance with all stipulated conditions of approval. Water supply, power and roadings and all necessary amenities had been provided by the applicant to the satisfaction of the Nausori Rural Local Authority. Consequently, the Authority had no objection in recommending the release of the Final Survey Plan for approval.

[63] Ms Singh accepted the letter showed that by 26 January 2016 the local authority was satisfied there had been compliance with all necessary conditions. However Ms Singh's

point was that that outcome was because the appellant retained another engineer and as a consequence the work was completed.

[64] The Judge determined that the evidence showed the subdivision was finally completed by BWH upon whom the second engineer fixed ownership and liability for rectification of defects. The Judge's finding was available to him on the evidence.

[65] This ground of appeal has no merit.

Ground eight

[66] Ground eight states:

That the Learned Trial Judge erred in law and in fact in not giving any weight to the evidence of DW3 (Patel Faizaan) particularly to Defendant/Appellant's exhibit No's 15, 16 and 17 the lab reports of Opus which confirmed that the Plaintiff/Respondent did not attain to 98% Maximum Dery Density (MDD) AS PER Drawing No.CW-SK06

[67] Ms Singh referred to the test results reported by Opus Material Testing Laboratory which, in November 2015, had tested samples of river gravel at the appellant's request. The Judge's notes record the laboratory manager's evidence as follows:

4 test points reached about 98% out of 35 test points.

All test points should achieve that specified compaction percentage.

Engineer then direct it be reworked.

Page 58 only one achieved. More than 98% dry density: EX D17

Test requirements similar to FRA follows. We can use river gravel on roads but has to be approved by engineer.

Cross exam of DW3 [laboratory manager]

I did not go to site. My lab staff did. It states name of project. Test is to determine softness or hardness. Rain would affect the test. Near to river has no effect.

[68] The Judge's notes show he was attentive to the evidence given by the laboratory manager and to the laboratory's test results. The weight he ultimately gave to the evidence, in the context of all the evidence adduced at the hearing, was a matter for his Honour.

[69] I add this: the road works were completed to the specifications in the contract. Stage three of the contract provided for placement and track rolled compaction of gravel (for \$75,000.00). Once again, it appears original specifications were modified to meet site conditions and Mr Singh's budget. The revisions and decisions taken were set out in yet another email to Mr Singh from Bobby Anand on 30 October 2015. As Mr Filipe submitted, there was no rebuttal from Mr Singh at the time of the email nor at trial.

[70] The eighth ground of appeal has no merit.

Ground nine

[71] Ground nine states:

The Learned Trial Judge erred in law and in fact in holding at Paragraph 40 OF THE SAID Judgment that the Defendant/Appellant had agreed not to pursue for the costs of one fire hydrant whereas no written communication of foregoing the costs of one fire hydrant was made by the Defendant/Appellant and the letter dated 16th July 2015 was written by Bobby Anand to be Plaintiff/Respondent on which the Appellant/Defendant was copied.

[72] On the issue of reimbursing the cost of a fire hydrant, BWH has always relied on the letter from Bobby Anand dated 16 July 2015. This letter has already been referred to. It covered many topics. One of the topics was the fact that Mr Singh had revised the original quotation from three fire hydrants to two resulting "in some savings ... the client agreed not to pursue for your benefit".

[73] The gravamen of the ninth ground of appeal appears to be that the letter was written by Bobby Anand not by the appellant and therefore BWH cannot rely on the letter to deny

the appellant is entitled to reimbursement. Implicit in the ground is an argument that Bobby Anand lacked the authority to speak on Mr Singh's behalf.

[74] Counsel referred to Mr Singh's evidence in the High Court to the effect that BWH only installed two hydrants and Mr Singh therefore sought reimbursement of the third hydrant.

[75] The first point is that Bobby Anand was not making a decision about reimbursement but simply recording and advising "that as per our third site visit meeting the client agreed not to pursue for your benefit". The second point is that Bobby Anand's many written communications including to BWH are sent with the authority he clearly had to speak on behalf of his client. For example, in the same 16 July letter, Mr Anand says: "...please be advised that your failure to complete all the tasks would force me to get rid of the current schedule of payment summary ..."

[76] As the Judge stated, since Mr Singh's own engineer advised BWH "that the client agreed not to pursue for your benefit" Mr Singh's claim for one fire hydrant "falls to the ground".

[77] There is no merit in the ninth ground of appeal.

Ground ten

[78] Ground ten states:

The Learned Trial Judge erred in law and in fact in awarding the Respondent/Plaintiff the sum of \$82,699.63 when in fact there were no details of the executed works as per Bill of Quantities and prices approved in the contract given by the Respondent/Plaintiff as was required of it as per Clause B3 of the Contract

[79] Ms Singh relied on cl B3 of the contract which obliged the contractor to provide with any invoice, details of the executed works "as per bill of quantities and prices approved

in the contract”. Ms Singh submitted that BWH did not comply with cl B3 when making demands for these payments.

[80] Mr Filipe submitted BWH had been paid for the previous contractual stages in like manner and it was strange the appellant now sought a bill of quantities.

[81] The preamble to the contract incorporated and made specified documents “an integral part of this agreement”. One of the documents integral to the agreement was a schedule identifying the four stages during which progressive payments would be made at each of the four stages. Stage four “Services Construction and Completion” detailed the services required before the final step of “Site Clearance and Handover to Employer”. At this final stage, and as the schedule showed, the total contract sum of \$183,249.63 would have been met.

[82] BWH did provide a progress claim for the period ending 10 November 2015. It was in the Record before this Court. Apparently, it was in the same form submitted for BWH’s previous claims and it was in accordance with the schedule to which I have referred. As Mr Felipe submitted, throughout the course of the project BWH had been paid in accordance with the claims it had submitted.

[83] The agreement between the parties being a “lump sum contract” the Judge adopted the view of the learned author of *Construction Contracts, Law and Practice* Wilmot-Smith that the contract sum is the “unalterable consideration for the completion of the works”.⁶ The works having been certified as completed BWH was entitled to the balance of the contract sum.

[84] The tenth ground of appeal has no merit.

⁶ At High Decision [37] where the Judge cited Wilmot-Smith, *Construction Contracts (Oxford University Press, 2006,)* at [2.28].

Ground eleven

[85] Ground eleven states:

The Learned Trial Judge erred in law and in fact there was clear admission by the Plaintiff/Respondent Witness Hitendra Pande that no Certificate of Initial Handover was issued by the Consultant Bobby to him which reveals that the project has been satisfactorily completed.

[86] In support of this ground of appeal, Ms Singh relied on the following notes recorded by the Judge during the course of Mr Pande's cross-examination:

*final hand over certificate was never done.
Projects went beyond 8 weeks delays and weather.*

[87] But the Judge also noted on the next page of his notes:

we did all works but defendant's obligation is to organize and commission water supply

[88] It is not in contention that Bobby Anand did not issue a certificate of completion but, as stated previously in this judgment, he did not do so because his services were terminated.

[89] The evidence shows the following three facts to be unarguable.

[a] The only matter ever tagged as outstanding was the water main connection. This issue is discussed above at [21]. Importantly, although the connection of the water main was "pending" as at 17 July 2015 Mr Anand's assessment, nevertheless, was that as at 17 July the works had been completed to an acceptable standard and payment should follow.

[b] Thus, the only element of the project that could have been seen as incomplete (on the basis of Mr Anand's "pending" assessment) was the water main connection for which BWH had sought advance payment. As against the "pending" status as at

July 2015, PCED recorded in its first progress report that the water main installation was complete.

[c] Ultimately, the works which BWH contracted to complete were certified to be satisfactorily completed.

[90] Mr Singh argues the project was completed because he engaged subcontractors for the purpose. At trial, however, Mr Singh produced no evidence of any contract with the new engineer nor any agreements with any contractor including as to scope of work. In answer to this Court's questions about whether there was evidence at trial showing payment to new contractors, Mr Felipe (who was also counsel in the High Court) accepted receipts were put in as part of the defendant's bundle but there was no evidence showing what they were for.

[91] It is also obvious from the Record that although the second engineer reported the project was only 80 percent complete, there is no report, or invoice or other evidence to substantiate the appellant's claim that he engaged other contractors to complete the project. Both BWH and Central Eastern named on the completion certificate. There was no evidence that BWH left the site without completing. And no report or evidence to show Central Eastern completed the project.

Conclusion

[92] Ultimately the issue before the Judge fell to be determined on the basis of the evidence before him: which party adduced the most relevant and compelling evidence on the key issue of completion. In the fact-finding exercise in which the High Court Judge was engaged, unless his conclusion was clearly insupportable, the conclusion he reached was a matter for the Judge. The discussion of the New Zealand Supreme Court as to what constitutes appealable questions of law is relevant:⁷

⁷ *Bryson v Three Foot Six* [2005] NZSC 34; [2005] 3 NZLR 721 at [26].

An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in Edwards v Bairstow, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.


[93] In this appeal, the appellant has not met the test – however propounded – of showing that the Judge’s approach to the evidence was flawed or that his conclusion was clearly insupportable.

[94] For these reasons the appeal must be dismissed.


ORDERS

- (1) The appeal is dismissed.
- (2) The appellant is to pay costs in the sum of \$5000.00 to the respondent within 21 days from the date of this judgment.





Hon. Mr. Justice Prematilaka Chandana
RESIDENT JUSTICE OF APPEAL



Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL



Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL