

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Consolidated Civil Actions
Nos. HBC 55 of 2001 &
HBC 10 of 2003

BETWEEN : **CREDIT CORPORATION (FIJI) LIMITED** a limited liability company
having its office at Credit House, 4 Gordon Street, Suva.

PLAINTIFF

AND : **MOHAMMED TAZ** T/A Dominion General Haulage Company of
Valebasoga, Labasa.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. A. Ram** for the Plaintiff
Mr. A. K. Narayan for the 3rd Party
No appearance for the Defendant

Date of Hearing : 20th May, 2013
Date of Judgment : 12th August, 2013

JUDGMENT

A. INTRODUCTION

1. This is the consolidated action of HBC 55 of 2001 and HBC 10 of 2003. The order for the consolidation was done in pursuant to an order of Mastermade on 13th November, 2008, by consent of the parties. The action 55 of 2001 was instituted by Credit Corporation (Fiji) Limited, a finance provider, for recovery of certain sums of money from in pursuant to an Asset Purchase Agreement, where it financed a heavy duty vehicle to Mohammed Taz, which met with an accident while transporting logs and the insurance company initially refused to pay for the damage. The vehicle was used for transport of the logs in its usual business, but the insurance Company refused to pay for the damage stating

that vehicle was overloaded. The vehicle was substantively damaged and without repair it could not be used for its purpose and its income was lost, thus monthly premiums were defaulted and the Credit Corporation being the financier seized the vehicle, and negotiated with the insurer to repair the vehicle for a sum, but the insurers informed that certain parts including the gear box of the vehicle was missing and Mohammed Taz, was asked to replace the same, but he did not and later the vehicle was sold and part of the debt was recovered and for the other part HBC 55 of 2001 was instituted. In the mean time the Mohammed Taz, being aggrieved by the refusal of the insurance company to repair the damage to the vehicle initially, that led to the loss of income from the transport of logs and vehicle being sold at its damaged state, which resulted the seizure of the vehicle instituted an action against the insurance company seeking damages. This action was HBC 10 of 2005 and two actions were consolidated by the order of the court on 13th November, 2008.

B. FACTS AND ANALYSIS

2. The Plaintiff in the HBC 10 of 2003 and the Defendant in the case of HBC 55 of 2001 did not appear on the date of hearing of the consolidated action. Before this, on 12th October, 2012 Justice Hettiarachchi had ordered that claim against the third party (i.e. insurance company) been struck off and also ordered that the Plaintiff to conclude the trial by way of formal proof. Before this order was made the on 29th November, 2012 an amended statement of claim was filed, without seeking the leave of the court and this is deemed struck off due to the order dated 12th October, 2012. The Plaintiff was ordered to proceed to formal proof and without seeking leave of the court, no amendment to claim against the insurance company can be made. This amended claim was struck off, on the application of the counsel for the insurance company on the day fixed for formal proof upon the order of 12th October, 2012. There was no appearance for Mohammed Taz at the hearing, before me.
3. In September, 1996 the defendants entered into a hire purchase agreement with the plaintiff for the purchase of a heavy duty, logging truck bearing No DA033.

A comprehensive motor vehicle insurance policy was obtained on the said vehicle. The Plaintiff in HBC 55 of 2001 (herein after referred only as the Plaintiff) held the bill of sale over the said vehicle. Admittedly, the vehicle was utilized for the purpose of logging and this was the purpose of the purchase of the vehicle and all parties were aware of that. Few months after the purchase of the said brand new vehicle, in December, 1996 while it was transporting logs the truck was involved in an accident and substantial damage incurred to the vehicle and it had to be towed and was immobilized, without essential repairs as the accident damaged vital parts including the chassis of the vehicle. This vehicle was parked in the premises of the Defendant in HBC 55 of 2001 (hereinafter referred to as the Defendant) pending repairs to the vehicle. The Defendant made a claim from the insurance company and they allegedly conducted an investigation and did not repair the vehicle, on the basis that it was overloaded at the time of accident.

4. No income was forthcoming from the logging, due to the want of essential repairs of the vehicle parked at the Defendant's premises and the payments in terms of the Asset Purchase Agreement was defaulted and the Plaintiff repossessed the vehicle in its damage state, from the premises of the Defendant. The vehicle was repossessed in May, 1999. The Plaintiff again tried to peruse the claim for the damage of the vehicle from the insurance company and found that certain parts of the vehicle was missing and notified the Defendant to replace them immediately for the repair of the vehicle.
5. No such replacement of the missing part was done and subsequently the Plaintiff and insurance company negotiated for a settlement sum in lieu of the repair of the vehicle and the vehicle was sold by the Plaintiff by way of a public auction without the repair and in its dilapidated condition nearly two years and six months after the accident, and the money for repair given by the insurance company for the repair, as well as the proceeds of the sale of the vehicle, were credited to the loan account of the Defendant.
6. The Plaintiff is now seeking to recover the balance loan outstanding from the Defendant. The Defendant had joined the third party, the insurance company to HBC 55 of 2001. In the analysis of the available evidence the third party had

initially refused to indemnify the damage due to the accident. From the correspondence it seems that this refusal was due the assumption that the vehicle was overloaded. From the available evidence, it seemed that there was no conclusive evidence of overloading to establish that the conduct of the Defendant fell in to the exclusion of the 'Unsafe Condition'. There was no material to support the weight of the logs that were transported, at the time of the accident. In spite of that the insurance Company refused to indemnify under the insurance policy. The refusal to repair the vehicle resulted that it being unutilized for any economic benefit, that resulted the loss of income from the vehicle thus ultimate default and repossession by the Plaintiff in terms of the Asset Purchase Agreement between the Plaintiff and the Defendant.

7. After the vehicle was repossessed by the Plaintiff, the insurance company changed its position, for whatever reason, and assessed the vehicle for repair and found certain parts of the vehicle including the gear box missing and informed that to the Plaintiff. It was presumed that those vital parts of the vehicle was removed by the Defendant and accordingly notified the Defendant to replace the same in order to start the repair of the vehicle. These requests went unheeded, and the Plaintiff even tried to enter the premises of the Defendant to recover the said parts of the vehicle, but these parts were never recovered and the repair of the vehicle did not eventuate and it was sold in its dilapidated condition, nearly 2 years and 6 months after the accident. The Plaintiff and the insurance company negotiated for a sum of money in lieu of the repair to the vehicle due to the damage from the accident.
8. Unfortunately, the there were no evidence before me in support of the claim against the third party by the Defendant. I say unfortunately because it seems that insurance company's refusal to indemnity timely had led to this predicament. If the insurance company had evidence of overloading that allowed them to claim for exclusions they would not have later change its mind to pay for the repair, but much water had gone under the bridge by that time and there are allegations of even removal of vital parts of the vehicle by the Defendant by this time, though there were no such allegations initially. The vehicle was towed to the Defendant's premises and remained there till it was repossessed by the Plaintiff. The refusal to repair the vehicle by the insurance

company remained till the vehicle was repossessed and negotiations started with the Plaintiff to that effect. I cannot say more on the said refusal to indemnify the damage to the vehicle since the Defendant did not pursue, his claim against the third party, the Insurance Company.

9. The Plaintiff led evidence of one witness. This witness was not cross –examined. Mr. Sathyan Prasad gave evidence on behalf of the Plaintiff. He stated the Defendant had purchased the vehicle from a reputed agent of motor sales and the entire sum of the said vehicle was financed through an asset purchase agreement between the Plaintiff and the Defendant. In terms of the said asset purchase agreement the owner of the vehicle was the Credit Corporation (the Plaintiff) and the hirer was the Defendant. The said asset purchase agreement was marked as P1 and the clause 4(i) states as follows

“The Hirer agrees;-

.....

- (i) To insure and keep the goods insured against fire accident and theft and such other risks as the Owner may require for an amount equal to the full insurable value of the goods and to insure and keep the owner insured against all liability (or liability limited to such extents as the Owner may approve in writing) howsoever arising in respect thereof with reputable responsible and solvent insurer in the name of the Owner and Hirer of their respective rights and interests.”

10. The Plaintiff has signed the said Asset Purchase Agreement on 16th October, 1996 and the Defendant had paid two installments as per the agreement, and the vehicle was met with an accident that resulted the vehicle being immobilized and had to be towed to the premises of the Defendant. Nearly after one year from the accident, while the third party was in denial of their liability to indemnify the damage, the Plaintiff repossessed the vehicle on 17th September, 1997. On or around this time the third party insurance company had indicated its desire to repair to the Plaintiff after the repossession. The

delay to repair thereafter, was mainly due to the failure to return the parts that were missing from the vehicle. When this was informed to the Defendant he did not deny the removal, but remained silent, and no such replacement was done.

11. Finally, the Plaintiff decided to sell the vehicle 'as is where is' basis through a public auction and received the money for the repair of the vehicle. By this time the Defendant had lost income from the vehicle and was not responding to the correspondence from the Plaintiff. The proceeds of the auction of the vehicle as well as the money received in lieu of the repairs were credited to the loan account of the Defendant. The Details of the said loan account is marked as P 27. I have not referred to all the documents that were marked as some were marked 'without prejudice' and had analysed only the relevant admissible evidence.
12. The loan account of the Defendant is marked as P 27 and apart from the receipt of the money from the auction of the vehicle as well as the receipt of the money from the insurance company the Defendant's loan account was granted a rebate of \$7,641. The cash advanced for the purchase of the vehicle was 81,000 and the interest for the said amount is 38,904.00. The interest was added to the loan account at the beginning and any payments made before the stipulated time received a rebate. The time period for the Asset Purchase Agreement was from 15th November, 1996 to 15th November, 2000.
13. The total credits

Payments (2,498 x 2)	4,996.00
Receipt from the insurance company for damages	32,000.00
Proceeds from the auction	12,000.00
Rebates	<u>7,641.85</u>
Total -	<u>56,637.85</u>

Debits

Cash Advance & the interest on that (81,000+ 38,904.00) = \$119,904.00

Other Debits including the repossession charges at the November, 2000 is \$3,823.60

Total outstanding at the conclusion of Asset Purchase Agreement on 15th November 2000 was $113,727.60 - 56,637.85 = \$57,089.75$

The Plaintiff is entitled for a sum of \$57,089.75 as at the 15th November 2000 and an annual interest of 4% thereafter till full settlement of that, sum by the Defendant interests of Law Reform (Miscellaneous Provision) (Death and Interest) Act. The Plaintiff is also given a cost of \$2000 assessed summarily.

C. FINAL ORDERS

- (a) The Plaintiff (Credit Corporation) is entitled for a judgment against Defendant (Mohammed Taz) for a sum of \$57,089.75.
- (b) The Plaintiff is entitled to an interest of 4% on the said sum from 15th November 2000 till final settlement of the sum.
- (c) The Plaintiff is also granted a cost of \$2000 assessed summarily.

Dated at **Suva** this **12th day** of **August, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva