

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 425 of 2003

BETWEEN : **DANIELLE VAKATAWABAI**

PLAINTIFF

AND : **MOHAMMED SAFAR ALI** of 123 Vula Street, Makoi,
Nasinu trading as **COASTAL DEVELOPMENT** of 18-
19 Arora Street, Makoi, Nasinu

DEFENDANT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr I. Fa for the Plaintiff

: Mr G. O'Driscoll for the Defendant

DATE OF HEARING : 14 April, 2014

DATE OF JUDGMENT : 26 March, 2015

JUDGMENT

1.0 Introduction

- 1.1 On 15 October 2003, Plaintiff filed Writ of Summons and Statement of Claim alleging that two new Turbo Chargers bought by Plaintiff from Defendant on or about 6 February 2003 were defective and not of merchantable quality.
- 1.2 Plaintiff claimed for following relief from the Defendant:-
- “1. The sum of \$5,900.00 (Five thousand nine hundred dollars) as the costs of the Turbo Chargers;**
 - 2. Damages in the sum of \$49,600.00 (Forty nine thousand six hundred dollars) for breach of contract;**
 - 3. Interest at the rate of 12% per annum;**
 - 4. Costs of this action;**
 - 5. Any other relief that this honorable court may deem just.”**
- 1.3 On 4 November 2003, Defendant filed Statement of Defence denying the allegations in the Statement of Claim and seeking an Order that Plaintiff’s claim be dismissed with costs.
- 1.4 On 28 January 2004, Order on Summons for Directions was made whereby parties were ordered to file their Affidavit Verifying List of Documents within fourteen (14) days.
- 1.5 On 21 May 2004 **(after lapse of almost four (4) months)** Defendant filed his Affidavit Verifying List of Documents.
- 1.6 On 28 May 2004 **(after lapse of almost four (4) months)** Plaintiff filed his Affidavit Verifying List of Documents.
- 1.7 Thereafter no action was taken by Plaintiff and/or his Solicitors to prosecute this matter and as a result on or about 6 November 2006 **(almost two and half years later)**, Notice to show cause as to why this matter should not be struck out pursuant to Order 25 Rule 9 of the High Court Rules was served on the parties.

- 1.8 **Notice to show cause was called before his Lordship Justice Coventary (as he then was) on 29 November 2006 when Plaintiff's action was struck out with liberty to re-instate if Application to Re-instate this action was filed by 15 December 2006.**
- 1.9 On 15 December 2006, being last day for filing of the Application to re-instate this matter, Plaintiff by his Solicitors filed the Application.
- 1.10 On 31 January 2007, Application to re-instate this action was called before Master Udit (as he then was) when Defendant was directed to file Answering Affidavit, both parties were directed to file Submissions and Application was adjourned to 27 February 2007 to refer to Justice Coventary to fix hearing date.
- 1.11 Defendant and Plaintiff failed to file Affidavit and Submissions as directed by the Master on 31 January 2007. The then Master adjourned this matter to be called before Justice Coventary on 6 March 2007.
- 1.12 On 6 March 2007, his Lordship Justice Coventary (as he then was) re-instated this action with conditions and directed parties to hold Pre-Trial Conference, file minutes and adjourned this matter to be called before the Master of the High Court on 11th April 2007.
- 1.13 This matter was next called on 17 April 2007 before the then Master who directed parties to hold Pre-Trial Conference by 8 May 2007, and adjourned to 25 May 2007 for further direction.
- 1.14 **Parties again failed to comply with direction to file Pre-Trial Conference Minutes** and on 29 May 2007, parties were directed to file Pre-Trial Conference Minutes by 16 July 2007 and Agreed Bundle of Documents by 24 July 2007 and this matter was adjourned to 30 July 2007.
- 1.15 On 27 July 2007, Pre-Trial Conference Minutes were filed and on 30 July 2007, Court directed Plaintiff to file and serve Copy Pleadings and Agreed Bundle of Documents by 31 August 2007.
- 1.16 **Parties again failed to comply with Court directions by failing to file Copy Pleadings and Agreed Bundle of Documents by 31 August 2007** and on 10

September 2007, parties were directed by Court to review Pre-Trial Conference Minutes and for Plaintiff to file Copy Pleadings, Order 34 Summons and Agreed Bundle of Documents by 15 October 2007 and adjourn this matter to 16 October 2007 for mention.

- 1.17 On 7 September 2007, Plaintiff filed Supplementary Affidavit Verifying List of Documents and Copy Pleadings.
- 1.18 On 16 October parties were once again directed to file Order 34 Summons and Agreed Bundle of Documents by 24 October 2007 and this matter was adjusted to 5 November 2007 to refer file to a Judge.
- 1.19 On 18 October 2007, Plaintiff filed Summons to Enter Action for Trial and on 5 November 2007, parties were directed to file Agreed Bundle of Documents and this matter was adjourned to 4 December 2007, to refer file to a Judge.
- 1.20 On 21 November 2007, Agreed Bundle of Documents was filed on 4 December 2007 this action was entered for trial.
- 1.21 On 4 December 2007, this matter was adjourned to 23 January 2008 before Justice Jitoko to fix trial date but was not called on that day.
- 1.22 On 6 February 2008, this matter was called before Justice Jitoko and adjourned to 22 and 23 July 2008 for trial.
- 1.23 **On 22 July 2008, Plaintiff by his Counsel sought an adjournment and as such this matter was adjourned to 9 and 10 December 2008 for hearing and Plaintiff was Ordered to pay \$250.00 cost to the Defendant.**
- 1.24 This matter did not proceed to trial on 9 and 10 December 2008 and was adjourned to 25 and 26 March 2009 for hearing and was subsequently adjourned to 26 and 27 March 2009 for hearing.
- 1.25 This matter was not called on 26 and 27 March 2009 and was next called on 22 October 2010 before Justice Hetteriachchi who adjourned it to 21 and 22 March 2011 for trial.

- 1.26 On 21 March 2010, Mr I. Fa **appearing for Plaintiff informed the Court that Plaintiff's witness was discharged from hospital just prior to trial and sought an adjournment. Hence, the trial date was vacated and matter listed for trial on 20 September 2011.**
- 1.27 **On 20 September 2011, Plaintiff by his Counsel sought an adjournment of trial date as Mr Isireli Fa had some personal difficulty and by consent of Defendants Counsel this matter was adjourned to 1 February 2012 for trial.**
- 1.28 Trial date of 1 February 2012 was vacated and on 21 February 2012, this matter was re-listed for trial on 13 and 14 June 2012.
- 1.29 This file was next called in Court on 6 June 2013 to fix trial date. **However, due to Plaintiff's Counsel not being in Court this matter was adjourned to 29 July 2013 to fix trial date.** It is noted that on this day Mr O'Driscoll on behalf of Mr Fa informed the Court that Mr Fa needed time to take instructions from Plaintiff as to whether Plaintiff intends to proceed with this matter or not.
- 1.30 On 29 July 2013, Mr Fa informed Court that Plaintiff intends to proceed with this matter and applied for this matter to be heard on 2 December 2013. On Mr Fa's application and with consent of Defendant's Counsel this matter was listed for trial on 2 December 2013.
- 1.31 Trial date of 2 December 2013 was vacated and this matter was called on 5 December 2013 to fix trial date.
- 1.32 On 5 December 2013, Plaintiff appeared in person without Counsel and informed Court that Mr Fa can take dates in 2014 **and with consent of the Plaintiff and Defendant's Counsel this matter was set down for trial on 14 April 2014.**
- 1.33 At Plaintiff's request by letter addressed to his Lordship, the Chief Justice this matter was re-called on 28 January 2014 to assign early trial date.

1.34 **On 28 January 2014, Plaintiff's Counsel informed the Court that he does not have trial dates available until April 2014 and as such trial date of 14 April 2014 was confirmed.**

1.35 Trial completed on 14 April 2014 and parties were directed to file Submissions by 16 May 2014 and any Reply to Submissions by 6 June 2014 and this matter was adjourned for Judgment on Notice. Defendant filed his Submission as directed by Court whereas Plaintiff filed his Submission on 16 July 2014, two months after the due date for filing.

2.0 Background/Agreed Facts

2.1 Plaintiff operated a digger/excavator for hire.

2.2 Defendant is a Building and Civil Engineering Contractor and also carries on as part of his business sale of spare parts for machinery and heavy equipment.

2.3 On or about 6 February 2003, Plaintiff bought two turbo chargers for \$2,950.00 and \$3,200.00 each for installation in his digger.

3.0 Issues to be Determined

3.1 Issues to be determined by this Court and agreed by the parties is stated in the Pre-Trial Conference Minutes as follows:-

"1. Whether the sale of the two turbo chargers by the Defendant to the Plaintiff was on a "as is where is" basis?

2. Were there implied conditions of the purchase of the two turbo chargers in that:-

(i) The turbo chargers should be reasonably fit for the purpose for which the Plaintiff required it, for installation into his commercial digger?

(ii) That the turbo chargers were to be of merchantable quality?

3. *If the answer to the above is affirmative, whether there was a breach of the said conditions in that the two turbo chargers were not reasonably fit for its purposes or of merchantable quality in that:-*
 - (i) *Upon installation of both the turbo chargers, they could not work;*
 - (ii) *Both turbo chargers were defective.*
4. *Is the Plaintiff entitled to reject the turbo chargers and record the purchase price of \$5,900.00?*
5. *If agreed issues 2 & 3 is affirmative, whether the Plaintiff is entitled to claim damages in the sum of \$49,600.00 as per the Plaintiff's Claim which are as follows:-*
 - (i) *Loss of income from the use of the digger from the 7th of January 2003 – 30th June 2003 in the sum of \$48,000.00;*
 - (ii) *Costs of mechanics to inspect and install Turbo Chargers to the Digger \$1,600.00.”*

4.0 Plaintiff's Case

4.1 Plaintiff gave evidence himself and called one witness.

4.2 During examination in chief, Plaintiff gave evidence that:-

- (i) In 2002/2003, he was conducting his business under the name Danielle Vakatawabai Enterprise and was operating his digger from Namosi;
- (ii) He is landowner and member of Mataqali Nabukebuke, landowning unit in Namosi;
- (iii) Nittetsu Mining Co. Ltd (“**Nittetsu**”) was carrying out special Project in Mataqali land;

- (iv) He entered into contract with Nittetsu for construction of road by using his digger (Exhibit P4);
- (v) On or about 6 February 2003, he went with his mechanic's son to Coastal Development shop to purchase a turbo charger for the digger;
- (vi) He was sent to Coastal Development by his mechanic;
- (vii) Mechanic's son described the digger to Coastal Development;
- (viii) He then purchased new turbo charger for \$2,900.00;
- (ix) At the time digger was in the bush at work-site and he took the turbo charger to worksite and it was installed there;
- (x) After 1 to 2 weeks digger broke down and digger had some problem;
- (xi) He together with his mechanic and mechanic's son took out the turbo charger and took it back to Coastal Developments;
- (xii) Coastal Development staff told him that turbo charger was new and asked him to buy a new turbo charger;
- (xiii) Mechanic's son told owner of Coastal Development that Shaft of second turbo charger was faulty;
- (xiv) He did not check the shaft for first turbo charger;
- (xv) He bought second turbo charger and his mechanic fitted the second charger to the digger;
- (xvi) Digger stopped after operating for four hours;
- (xvii) His mechanic checked and said digger had similar problem;
- (xviii) He went back to Coastal Development and was told that turbo charger was not good and that the digger was playing up;
- (xix) Coastal Development sent two of their mechanics with him and his mechanic's son;

- (xx) Coastal Developments mechanic adjusted the hydraulic pump and informed him that there was something wrong with the digger and they cannot do anything else;
- (xxi) He returned turbo charger to Coastal Developments and was told by the owner that he will send it to supplier and get new one;
- (xxii) He did not fix his digger, nor did he go anywhere else to get his digger repaired or find out what was wrong with the digger;
- (xxiii) However, when he was asked if he remembered one Shankat Ali he said he did remember him and was a mechanic from one company;
- (xxiv) Shankat Ali told him that digger was okay and only needed turbo charger;
- (xxv) Bought turbo charger from Diesel Turbo (Exhibit P11);
- (xxvi) After turbo charger was fitted digger was working;
- (xxvii) Bought turbo charger after long time because he had no money to buy turbo charger;
- (xxviii) He is claiming damages in the sum of \$49,000.00 for the period digger was not operational plus what he paid for turbo chargers.

4.3 During cross examination Plaintiff confirmed that he was sent to Coastal Development by his mechanic Umar Khan whom he had known for 35 years and that Umar Khan fitted the turbo chargers in his digger.

4.4 Plaintiff's evidence leading to purchase of turbo charger from Coastal Development was not any different to his evidence during examination in chief.

4.5 During cross-examination he stated that:-

- (i) He did not know the Defendant as he dealt with Defendant's son;
- (ii) He denied seeing Proforma Invoice No. EO102 from Soon Aik Auto Parts Trading Co. Pte Ltd ("Soon Aik") (Exhibit 2) even though it was disclosed to his lawyers;

- (iii) He also denied seeing Proforma Invoice NO. EO307/03 from Soon Aik (Exhibit 6), Coastal Developments Delivery Docket NO. 931105 (Exhibit 7) and e-mail dated 9 April 2003 from State Transport to Neo Chee Eng. (Exhibit 8);
- (iv) In answering question as what was his income in two weeks after first turbo charger was fitted he stated there was no income and only when he was asked “why not” that he said it was very less because of rainy days;
- (v) No demand in writing has been made by him to the Defendant for refund of monies paid for the turbo;
- (vi) He had invoice books from Nittetsu in respect to payments made by Nittetsu but they were stolen;
- (vii) Construction of the road was still going on by a new company;
- (viii) Nittetsu paid him fortnightly by cheque and he issued receipt for payments;
- (ix) Cheque under the contract included Value Added Tax (“**VAT**”);
- (x) He has no bank records to show payment received from the Company.

4.6 Plaintiff’s next witness was Mohammed Javed Khan of Lot 1 Nomililau, Veisari, Lami, Businessman/Mechanic.

4.7 Mr Khan during examination in chief stated that:-

- (i) In 2003, he worked for Umar Khan Motors (“UKM”) as an Assistant;
- (ii) UKM is owned by his father Umar Khan;
- (iii) UKM was engaged in business of general mechanical works;
- (iv) He knew Plaintiff as Plaintiff was his father’s customer for about 30 years;

- (v) He is aware that Plaintiff had an excavator and he assisted his father to carry out repair works to the Excavator;
- (vi) At request of Plaintiff he assisted his father carry out overhaul of the Excavator and Excavator was chewing oil;
- (vii) Excavator was fully functional for 3 months when turbo charger gave up.
- (viii) Plaintiff bought new Turbo charger from Coastal Development in his presence;
- (ix) He did not know Coastal Developments and was not aware whether his father knew them or not;
- (x) New Turbot Charger was installed in the excavator by his father and he assisted his father in installing the same;
- (xi) He came to know turbo gave up from his father
- (xii) He went with Plaintiff and driver to Coastal Development and saw Defendant's son who told them that he will return turbo charger to supplier and until then he has to purchase another turbo charger;
- (xiii) Plaintiff bought second turbo charger;
- (xiv) His father asked him to check if shaft was working and if it was not then he was not to fit it;
- (xv) Defendant's son stated that it will work for three months and as such they took the second turbo charger;
- (xvi) Second turbo charger was installed by his father and he assisted him;
- (xvii) After four hours digger operator called and said smoke was coming out of the digger;
- (xviii) He went and checked to find out turbo gave same problem;

- (xix) He then asked Plaintiff to take the second turbo charger to Coastal Development;
- (xx) After four days Defendant sent two mechanics who picked them up from workshop and inspected the digger and dropped them back;
- (xxi) One week later the two mechanics went with them and adjusted the hydraulic pump, after which right hand side track of the digger stopped working;
- (xxii) Two weeks later they brought digger to their workshop;
- (xxiii) One Shanket Ali, who passed away three years ago came to their workshop and adjusted the hydraulic pump which was working except for emitting smoke;
- (xiv) After six months Plaintiff bought new turbo charger which was installed in the digger;
- (xv) After that digger ran for almost a year without any problem;
- (xxvi) Turbo chargers were never replaced by Defendant;
- (xxvii) He is 28 years old (at the time) and back in 2003 he was 18 years old.

4.8 During cross-examination Mr Khan stated:-

- (i) that at the time of the incident 11 years ago he spent time in his father's workshop;
- (ii) maintained that he went to Coastal Development with his father;
- (iii) Agreed that he is not a qualified mechanic;
- (iv) Could not say if the signature on letter written by UKM was his father's;
- (v) At Coastal Development he saw Defendant's son
- (vi) When they carried out overhaul work on digger there was no need to do anything to turbo as it was fully operational;

- (vii) After first turbo charger was fitted digger operated for two weeks before giving problems;
- (viii) When reminded that he said four weeks in his examination in chief he recalled it was two weeks;
- (ix) After being shown a similar turbo charger he explained how it is fitted to the engine;
- (x) Prior to digger being brought to their workshop digger was situated alongside Wainitaka Road in Namosi which was a feeder road.

4.9 Defendant gave evidence himself and called another witness.

4.10 Defendant during examination in chief gave evidence that:-

- (i) In 2003, he was operating business under name of Coastal Development which is now incorporated as a limited liability company;
- (ii) His son Mohammed Makshodl Ali who worked for him dealt with the Plaintiff in 2003;
- (iii) He only met Plaintiff in Court ;
- (iv) In 2003, Plaintiff purchased turbo charger for Kato 400 Excavator;
- (v) He left school at age of 16 years and joined his family business, Royal Transport Limited in Labasa;
- (vi) Coastal Development is involved in the business of civil engineering and subdivision works;
- (vii) He and his sons have following related business:-
 - (a) State Civil;
 - (b) Tyam Contracting;
 - (c) Hardong Hydraulic (Fiji) Ltd; and
 - (d) State Transport Ltd;

- (viii) He does not have any formal qualification but has experience in the field of transport and civil engineering;
- (ix) He has his own fleet of machineries and have a 12 tonne Kato HD 400 Excavator which is almost similar to that owned by Plaintiff;
- (x) Coastal Development only sold parts to people he knew at prices cheaper than that of the dealers;
- (xi) Turbo charger is received by DHL Courier and once received package is opened and Turbo charger is kept in office;
- (xii) He does not check Turbo charger to see if it is working;
- (xiii) There is no guarantee or warranty given on turbo charger;
- (xiv) Turbo charger was sold to Plaintiff by his son and he came to know about it later;
- (xv) When turbo charger is to be fitted the practice by his mechanic and workers is to bring the machine to workshop, clean chrote, remove bolts;
- (xvi) Turbo charger gets bad if:-
 - (a) it is not primed by putting oil inside before installation;
 - (b) if fitted in remote area by uplifting it up and without opening the menaphose side;
 - (c) In remote areas, you need gas and other equipment to remove bolts which will take long time;
- (xvii) Turbo is a fine equipment and lot of care should be taken when installing it and ideally it should be fitted in a garage;
- (xviii) One reason supplier changed turbo charger was because of long-term business relationship he had with supplier and supplier said there was no guarantee on turbo charger.

4.11 During cross-examination Defendant stated that:-

- (i) All dealings in respect to sale of turbo charger by Coastal Development to Plaintiff was handled by his son Makshodl Ali;
- (ii) Coastal Development ordered for replacement turbo charger as a matter of Company policy even though there was no guarantee given by supplier.

4.12 Defendant's other witness was Mohammed Makshodl Ali of 123 Vuda Street, Suva, Company Director ("**DW2**").

4.13 Mr Ali during examination in chief stated that:-

- (i) In 2003, he worked for Coastal Development and recalled selling two turbo chargers to the Plaintiff for \$2,900.00 and \$3,200.00 on two separate occasions;
- (ii) No guarantee is given in respect to turbo chargers;
- (iii) Plaintiff complained about first turbo charger three to four weeks after purchase;
- (iv) As soon as he received complaint he sent e-mail to supplier;
- (v) On 15 March 2003, he said second turbo charger to Plaintiff for \$3,200.00 of which he paid \$2,900.00 leaving balance of \$320.00;
- (vi) He received complaint about second turbo after a week;
- (vii) Turbo charger supplied were new and in the box;
- (viii) He had no knowledge about as to whether anyone from Coastal Development went to check the machine;
- (ix) Turbo chargers are not tested before it is sold;
- (x) According to supplier there were no defects in the turbo charger;
- (xi) He knows Umar Khan (mechanic) but not his son.

4.14 During cross-examination he stated that:-

- (i) He received complaint about first turbo charger from the Plaintiff;
- (ii) Plaintiff was not refunded the price for first turbo charger;
- (iii) Plaintiff bought second turbo charger;
- (iv) Plaintiff lodged complaint about second turbo charger but did not bring it to him;
- (v) Turbo charger was not tested by him and he was informed by supplier that it was good;
- (vi) Defendant bought turbo charger for his own fleet and if someone is in need of it then they sell it;
- (vii) Plaintiff took back second turbo charger but he has no knowledge if Plaintiff took first turbo charger.

4.15 Defendant did not call any other witness and at the close of parties case they were directed to file Submissions.

4.16 Both parties relied on the provision of Sales of Goods Act.

Whether Sale of Turbo Chargers were on “as is, where is” basis

4.17 After analyzing both oral and documentary evidences I find that both turbo chargers were new and as such there is no need to consider whether they were sold on “as is, where is” basis.

Whether Turbo Chargers were of Merchantable Quality

4.18 Section 16(1) to (3) of the Sales and Goods Act provides:-

“16.-(1) Subject to the provisions of this or any other section of this or any other Act, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition –

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.”

- 4.19 The turbo chargers when sold by Defendant to the Plaintiff were new and were bought by Plaintiff in presence of his mechanic.
- 4.20 I accept Defendants evidence that Turbo charger cannot be tested by a dealer prior to it being sold as no contrary evidence has been provided by the Plaintiff.
- 4.21 I also accept DW1's evidence in respect to circumstances under which turbo chargers can go bad while it is installed.
- 4.22 From the evidence given in Court, I find that the Plaintiff's mechanic by fitting the turbo charger at the job site and not at a workshop or garage was negligent which resulted in the turbo charger not working.
- 4.23 This is evidence from the fact that when new turbo charger purchased from Diesel was fitted in UMK's workshop the excavator operated without any problem for almost a year (PW2's evidence).
- 4.24 In the event there was inherent manufacturing defect which could not be detected on reasonable inspection then the dealer in the absence of any

mechanism to check for defects prior to selling the turbo charger as is the case here is not liable for loss sustained by such defects.

4.25 I find that both turbo chargers were of merchantile quality.

Whether Plaintiff is entitled to recover the sum of \$5,900.00 and Mechanic's Charge of \$1,600.00

4.26 The first turbo charger was returned by the Plaintiff to the Defendant, who bought the second turbo charger as replacement.

4.27 It is undisputed that Defendant did not refund the monies paid to Plaintiff for the first turbo charger.

4.28 I find that the Defendant kept the first turbo charger but not the second turbo charger.

4.29 This finding is based on the evidence of PW2 who stated that when Shankat Ali inspected the excavator he stated that turbo charger had problem. This means turbo charger (second one) was still installed in the excavator when Shankat Ali inspected the excavator.

4.30 I therefore hold that Plaintiff is only entitled to refund of \$2,900.00 for the first turbo charger as Defendant obtained replacement from supplier.

4.31 As for second turbo charger I note that Plaintiff owed the balance of \$320.00 to Defendant and kept the second turbo charger with him. I therefore reject Plaintiff's claim for refund of \$2,900.00 paid for second turbo charger. Since Defendant did not file any counter-claim I do not consider it appropriate to deal with the issue of balance \$320.00.

4.32 In view of any finding as to merchantable quality of the turbo chargers I reject Plaintiffs claim for \$1,600.00 being mechanic's charges.

Whether Plaintiff is entitled to damages in the sum of \$48,000.00

- 4.33 It is trite law that it is for the party who claims damages to provide evidence in support of his claim.
- 4.34 In this instance Plaintiff only provided copy of Road Construction Agreement dated 18 October 2011 between Plaintiff and Nittetsu Mining Company Limited and Breakdown of loss of Income prepared by him.
- 4.35 Apart from these two documents no other form of evidence such as invoices, receipts, bank account detail, Value Added Tax Return and Income Tax. Returns were tendered in evidence to prove Plaintiffs average net income.
- 4.36 Having found that both turbo chargers were of merchantable quality, above comments are my observations only because even if I found that that turbo chargers were not of merchantable quality Plaintiff would not have been awarded any damages on the basis of evidence tendered in Court.

5.0 Costs

- 5.1 On the issues of costs I have taken into consideration my finding that turbo chargers were of merchantable quality and that Defendant upon receipt of replacement from supplier, did not arrange to deliver the turbo charger to the Plaintiff or refunded the monies paid for first turbo charger.
- 5.2 I also take similar consideration in awarding interest.

6.0 Conclusion

- 6.1 In conclusion I summarise my findings as follows:-
- (i) Both turbo chargers were of merchantable quality and in compliance with s16(2) of the Sale of Goods Act Cap 230;
 - (ii) Turbo chargers stopped functioning after a while because of it being installed without proper care and attention;

- (iii) Plaintiff is entitled to refund of monies paid for first turbo charger;
- (iv) Plaintiff's claim for refund of monies paid for second turbo charger and costs of repair to excavator paid to UKM fails;
- (v) Plaintiff's claim for loss of \$48,000.00 fails.

6.2 I make following Orders:-

- (i) Defendant do pay Plaintiff a sum of \$2,900.00 within fourteen days from date of this Judgment;
- (ii) Defendant do pay interest on the sum of \$2,900.00 to the Plaintiff at the rate of 8% per annum from 15 October 2003 to date of this Judgment;
- (iii) Defendant do pay Plaintiff's costs assessed in the sum of \$2,000.00.



K. Kumar
JUDGE

At Suva

Fa & Co. for the Plaintiff

O'Driscoll & Co. for the Defendant