

In the High Court of Fiji at Labasa

Civil Action No. 31 of 2012

Between: K Naidu Investment Proprietary Limited

Plaintiff

And: Fiji Pine Limited

First defendant

And: Macuata Forest Company Limited

Second defendant

Appearances: Mr S. Raikanikoda for the plaintiff

Mr F.Haniff for the first defendant

Date of hearing: 9th November,2015

Judgment

1. In these proceedings, the plaintiff states that it entered into two written contracts with the first defendant, to supply logging machines and trucks to the first defendant. The first defendant is a company in the business of planting, growing, harvesting, processing and marketing pine and other species of trees. The plaintiff alleges that the first defendant failed to pay the plaintiff, an estimated sum of \$ 438,655.00 per month for the hire of the machines and trucks, for the period of the contract of ten years. The plaintiff also claims damages for breach of contract, loss of business, future income and loss of assets. The plaintiff further, alleges that the first and second defendants hired the plaintiff to fell, pull and pile pulps from pine trees, but has not been paid for that work. The first defendant denies the claims. Default judgment had been entered against the second defendant.

2. The amended statement of claim states that:

- a. The plaintiff has been in the “*business of substantial earth moving works, hire of heavy machinery, logging and trucking business in Fiji since 2004*”.
- b. By an agreement in writing of 13th February, 2006, the first defendant “*employed*” the plaintiff to supply the first defendant logging machines and trucks for cartage of logs in Vanua Levu for a period of 10 years commencing from 13th February, 2006, to 13th February, 2016, for the first defendant’s new project in Wairiki, Bua.
- c. By a further(undated)agreement in writing between the plaintiff and the first defendant “*on 13th February 2006*”, the plaintiff agreed to supply to the first defendant machines and trucks for cartage of logs.
- d. It was a term and condition of the second agreement that the first defendant would pay the plaintiff an estimated sum of \$438,655.00 per month for the hire of machines and trucks, subject to vagaries of the weather.
- e. The amended statement of claim continues to state that in reliance upon the first and second agreements, the plaintiff obtained finance and purchased logging machines and trucks for supply to the first defendant at a cost of around \$1,522,374.39.
- f. The first defendant was unable to set up its new project on time and hence failed to pay the plaintiff the estimated sum of \$438,655.00 per month under the second agreement.
- g. As a result, the plaintiff was unable to meet its obligation to pay its monthly loan repayments to its borrowers.
- h. Finally, the amended statement of claim states that by an oral agreement made “*around September 2005*”, the first and second defendants employed/hired the plaintiff to fell pine trees, pull and pile pulps from pine trees and supply saw logs to Fiji Forest Industries. The plaintiff carried out the works between September, 2005 to 2008. The first and second defendants owe the plaintiff a sum of \$484,000.00 for that work.

3. *The hearing*

PW1 (Mr K. Naidu, Managing Director of the plaintiff company), in evidence in chief said that the plaintiff entered into two contracts with the first defendant to supply machines and trucks for cutting trees. The first was dated 13th February, 2006. The agreement was for a period of ten years. The contract price was \$438,655.00 per month. PW1 further said that the second, though undated was entered on the same day. The two agreements were produced.

The plaintiff obtained finance for over \$ 2 million from Merchant Finance & Investment Co Ltd, Credit Corporation (Fiji) Ltd and Fiji Development Bank.

PW1 said that the machines were in his yard, because the first defendant's factory/project in Wairiki did not get started. The plaintiff's machines were idle. His machines were seized by the bank, as he did not pay his loan.

The first defendant did not terminate the contracts. PW1 further said that in 2012, he saw another person carrying out the contract for the first defendant.

The plaintiff's loss of income was \$ 438,000 a month for a period of ten years, which amounts to \$ 52,638,600. The plaintiff also claims general damages.

In cross-examination, it was put to PW1 that the first contract marked "PE1" has not been made under the company seal of the first defendant. It has been executed by the Manager, logging of the first defendant. The document does not specify the rates to be paid, nor when the logging machines were to be supplied. The other clauses in the contract were also put to the witness. It was suggested that "PE1" does not constitute an agreement between the parties.

Next, it was pointed out that contract marked "PE2" was undated. The witness said that the machines must be supplied before 31st March, 2006. It was put to PW1, that "PE2" titled "To whom it may concern" is not a contract but Fiji Pine Ltd telling somebody that a contract has been awarded.

In re-examination, PW1 said that the rate given in the agreement was \$ 438,655 per month. He said that the contract was on the letter head of the first defendant and contained the rates .

The defendant did not lead any evidence.

4. **The determination**

- a. My preliminary task is to construe the two written documents relied on by the plaintiff, in support of its claim.
- b. Mr Haniff, counsel for the first defendant contends that the first contract is uncertain and incomplete and the second document is devoid of the essential elements of a contract.
- c. I will reproduce the two written documents produced by PW1, in its entirety.
- d. The first agreement reads as follows:

13/02/06

An Agreement Between Fiji Pine Limited and K Naidu Investment Propriety Limited.

The two parties have agreed to the following condition:

- A. That K Naidu Investment Propriety Limited shall supply all his logging machines for cartage.
- B. That all his machines and trucks are roadworthiness and passed by LTA.
- C. That all his logging machines and trucks are passed by labour for O.H.S...
- D. That he will provide all the necessary safety equipments to the logging team.
- E. That K Naidu Investment Proprietary Limited should adhere to all logging regulation stated in the nation code of logging practice or by any Fiji Pine Official.
- 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.

On Behalf Of

sgd

Fiji Pine Limited
Manager Logging Vanua Levu
Inoke Bolatini
Mobile: 9325700

sgd

K NAIDU INVESTMENT PROPRIETARY LTD
Managing Director
KHRISHNA NAIDU

e. Mr Haniff submits that the first agreement is uncertain and obscure for the following reasons. It is difficult to ascertain whether it is an agreement for cartage or for logging. It does not set out what the plaintiff is required to "cart", from "where to where"; "at what rate or at what price" is to be paid and when "the purported contract commences".

f. I reproduce the cross-examination of PW1 on this point:

Mr Haniff: The first thing I want to put to you is that this document PE1 has not been made under the company seal of Fiji Pine Limited, is that correct?

Mr Naidu: Yes.

Mr Haniff: It's in fact made by Manager logging of Fiji Pine Limited?

Mr Naidu: Yes.

Mr Haniff: There is also no rates mentioned in this agreement, in these documents we don't accept that this is the agreement, I'm putting it to you that there is no rates in this documents?

Mr Naidu: Yes.

Mr Haniff: So do you agree that there is no rates mentioned in this agreement?

Mr Naidu: Yes.

Mr Haniff: And it only has six terms, six, six paragraphs in this document, the first one is that K Naidu which is your company shall supply all his logging machines for cartage, it doesn't say when does it?..

Court: It does not say when cartage shall be supplied on this agreement, yes?

Mr Naidu: Where to yes.

Court: Correct it does not say?

Mr Naidu: Yes its correct.

Mr Haniff: It doesn't say where the delivery is to be made, does it?

Mr Naidu: Yes...(emphasis added)

g. Mr Haniff has cited several authorities in support of the proposition that the first agreement is uncertain and obscure. I do not propose to refer to all of them. I would cite the following passages.

- h. Lord Wright In *G. Scammel and Nephew, Limited v Ouston*, [1941] AC 251 at pgs 268 to 269 Lord Wright said :

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. 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...

*But as Lord Dunedin said in *May & Butcher v. The King..*” To be “a good contract there must be a concluded bargain and a concluded contract is one which settles everything and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be “settled by agreement between the parties. Of course it “may leave something which has still to be determined but “then that determination must be a determination which does “not depend upon the agreement between the parties. (emphasis added)*

- i. Lloyd LJ in *Pagnan SpA v Feed Products Ltd*, [1987] 2 Lloyd’s Rep 601 at 619 said:

It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word “essential” in that context is ambiguous. If by ‘essential’ one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract.....

- j. On a consideration of the contract under review, I find that it is devoid of an essential term of an agreement as regards the rates or any method by which the rates have to be calculated. The words of the contract are “*All rates are VAT exclusive and they shall apply for a period of ten years*”.
- k. In a contract of hire, both parties must at the outset, agree on the rates of hire. Seeing that there is no agreement on so fundamental a matter, there is in my view, no concluded contract.
- l. In this context, I would note that in answer to Mr Raikanikoda, counsel for the plaintiff, PW1 said the machines were not supplied to the first defendant, since the first defendant’s project in Wairiki did not get started.

l. The second document reads:

To Whom It May Concern

K Naidu Investment Proprietary Limited

This is in regards 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.

Machine required:

3 x Excavator (EX60, SEV400, EX100)

2 x tipper trucks

4 x skidder

5 x bell

10 x ten wheeler trucks with carrying capacity of 18-20 tons

3 x loaders (956, 930, 966)

2 x D-6's

2 x twin cab van

*The above machinery must be supplied before March 31st, 2006. Total estimate earnings with this amount of machines are about **\$438,655 per month**.Amount may vary subjected to the weather conditions (this regards to the bad weather conditions which lasts for approximately three months).*

Please do not hesitate to contact us for any queries.

*On Behalf Of
sgd*

Fiji Pine Limited
Manager Logging
INOKE BOLATINI

m. It seems to me that on a reading of this document, it is perfectly clear that the first defendant is informing a third party that it has awarded a contract. This is evident from the opening phrase "**To Whom It May Concern**"(emphasis added). I would agree with the first defendant that the phrase is a formulaic way for starting of a letter or a notice to an unknown third party, not a communication between parties to a contract.

- o. Secondly, the document says “*I have awarded contract for trucks and logging machines*”(emphasis added). This connotes the writer is stating that a contract has been awarded.
- p. Thirdly, the concluding words “*Please do not hesitate to contact us for any queries*”, (emphasis added) confirms beyond doubt that it is a communication to an unknown third party that a contract has been awarded to the plaintiff, a contract which I have found to be an incomplete agreement.
- q. In any event, the plaintiff did not establish its loss. No documentary evidence was produced of its alleged borrowings from financial institutions, contrary to the statement made in the closing submissions filed on behalf of the plaintiff.
- r. The plaintiff did not lead any evidence on its claim against the first defendant on an alleged oral agreement made between the plaintiff and the first and second defendants for felling pine trees, pulling and piling of pulps from pine trees. That claim too fails.
- s. In my judgment, the plaintiff’s claims are without merit.

5. Orders

- a. The plaintiff’s action against the first defendant is dismissed.
- b. The plaintiff shall pay the first defendant costs summarily assessed in a sum of \$ 2000.



19th February, 2016

A.L.B. Brito-Mutunayagam
Judge