In the High Court of Fiji
at Suva
Civil Jurisdiction

Civil Action No. HBC 148 of 2012
Estate Management Services Ltd

Plaintiff

v

Minami Taiheiyo Kaihatsu Kabushiki Kaisha

First defendant

And

Pacific Harbour Resort Company Ltd

Second defendant

Counsel: Mr G. O'Driscoll for the plaintiff
Ms Prem Narayan for the first and second defendants
Date of hearing: 7th, 8th and 9th May, 2018
Date of Judgment: 26th November, 2018

Judgment

1. The plaintiff established the "*Pacific Harbour Scheme of Development Plan*". The first defendant purchased the hotel, golf course and 170 residential lots of the Scheme. The plaintiff claims that the first defendant failed to pay "*Rates, fees and charges*",(rates) for services provided by the plaintiff to the lots of land purchased by the first defendant. The first defendant paid rates until 1996. The amended statement of claim states that the services provided include the disposal of sewerage; collection and deposit of garbage; fire service; cleaning the verges of roads within the scheme and public open space; maintaining roads and the canal system; street lighting and finance. The plaintiff gave the first defendant credit in the sum of US$168,000, to provide power and water services for 80 lots, but the first defendant failed to do so.

2. The amended statement of claim continues to state that the first defendant transferred most of its lots to the second defendant. The second defendant is obligated to pay rates and indemnify the plaintiff, as it enjoys the benefit of the services provided by the plaintiff. The plaintiff claims a liquidated sum of $7,726,554.52 together with per diem for rates and VAT; a declaration that the defendants remain liable for any rates, landfill garbage fees, street lighting, finance charges and value added tax;judgment in the liquidated sum of US$168,000.00 against the first defendant, interest and costs.

3. The defendants, in their amended statement of defence state that the plaintiff agreed that the first defendant will be exempt from payment of rates. The plaintiff is not empowered to charge rates. The claim is illegal. The defendants paid rates, as the plaintiff, which was in control of the sewerage plant, had disconnected sewerage service to its hotel, to extort rates. The defendants feared a repeat of the incident. The defendants, on its investigations became aware the Government had taken over the sewerage plant. The plaintiff, by letter of 1 November, 2002, terminated any responsibility to the defendants. The claim for rates for the period 1996 to 11 May, 2006, is outside the period of limitation. The *"sum of US$168,000.00 was to offset in favour of the First Defendant towards the payment of settlement amount*". It is further contended that only the Water Authority and FEA can provide water and electricity services.

4. The defendants seek a declaration that: the plaintiff is not empowered to charge rates under the Local Govt Act; and the clauses in the Indemnity Agreement, which refer to rates are illegal. The defendants also seek that the plaintiff reimburse all monies it received by the "*forced sale*" of its properties to collect rates.

5. The plaintiff, in its reply to defence joins issue with the defendants and states that its right to collect rates and charge an annual assessment for services and claim US$168,000.00 is derived from various contractual documents,

The determination

6. The plaintiff claims that it is entitled to charge the defendants for providing services, in terms of a Deed of Settlement,(DOS) of 20th March,1990, Deed of Indemnity,(DOI) of 6th May,1990, and a Sale and Purchase Agreement,(SPA) of 23rd May,1990, entered into between the plaintiff and the first defendant.

7. The agreed facts provide that issues had arisen on the handover of the lots of land purchased by the first defendant. The plaintiff and the first defendant then entered into the DOS on 20th March,1990. In October,1998, the first defendant transferred a majority of its 170 residential lots, the hotel and golf course to the second defendant.

Is the plaintiff entitled to charge rates ?

8. I will in the first instance, deal with the contention of the defence that the plaintiff is not entitled to charge rates, as it is not a Municipal Council.

9. PW1,(*James Cirk Creutz,General Legal Counsel of the plaintiff company*) produced a Foreign Investment Certificate of 21st November,2000, from the Fiji Islands Trade and Investment Bureau. This certificate permits the plaintiff to sell and develop land and operate "*Municipality Offering Associated Services*".

10. DW3,(*Azam Khan,Director of Local Govt*) in evidence in chief said that the Local Government Act defined a "*municipality*" as a city or town. The Pacific Harbour Scheme of Development was not declared as a city or town. Its licensing authority was the Navua Rural Local Authority. The Ministry of Local Govt has no jurisdiction over lands outside the boundaries of a city or town. DW3 said that developers outside the boundaries of a city or town can charge for services provided by them.

11. On a review of the evidence on this point, I am satisfied that the plaintiff was entitled to charge for services provided, in terms of the SPA. The words "*Municipality rates*" in the DOS refers to the charges for services.

The claim against the first defendant for rates

12. On 23rd May, 1990, the first defendant had purchased a further 48 lots from the plaintiff, as provided in the SPA. The claim, in this regard, is for 31 lots, since some have been sold.

13. Clause 12(a) of Schedule C of the SPA titled "*PROVISION OF SERVICES AND ASSESSMENT THEREFOR*" states the plaintiff "*agrees to provide the following services*":

> *(i) the operation and maintenance of the Vendor's said plant or the sanitary treatment and disposal of sewage from the lots..;*
> *(ii) the operation and maintenance of such rubbish collection service ...;*
> *(iii) the maintenance of such fire service..;*
> *(iv) the cutting from time to time as may be reasonably necessary of the grass and other growth on the verges of the roads... and at the Vendor's direction the carrying out of any maintenance work on any such roads ..;*
> *(v) ..the cutting of the grass and other growth on and otherwise keeping in a tidy condition the..public open space; and*
> *(vi) ..maintenance and repair work on the canal system ..until such time as all of the said services are taken over or undertaken by the Fiji Government or by a town council township board or other properly constituted authority (the occasion of such taking over or undertaking being hereinafter in this Clause and Clause 13 hereof to as "the termination of the Vendor's services).*

Clause 12(b) provides that the first defendant, as purchaser, will pay-

> *..**in respect of all the services herein before referred to in this Clause**..to the vendor as a contribution towards the Vendor's expenses of providing **the said services** an annual assessment in respect of the said lot at the rate of 2.48 Fiji cents for every Fiji dollar of the amount of the purchase price (hereinafter referred to in this Clause as "the annual assessment")* (emphasis added).

14. It was put to PW1 in cross-examination that although water, fire and sewerage services were taken over by the Government in 1996 and 1997, the plaintiff did not change the structure of the services provided nor the rate charged. PW1's response was that the plaintiff had borne the initial infrastructure costs.

15. In my view, clause 12(a) does not cover initial infrastructure costs.

16. DW1,*(Fujiko Yokota, Director of the second defendant company)* in evidence in chief said that the plaintiff stopped paying rates, after it realized that the sewerage service was taken away from the plaintiff. PW3(*Julian Crocker, Legal & Enforcement Officer of the plaintiff company*) confirmed that the defendant did not pay the assessment for services, due to the sewerage dispute.

17. DW1, by her letter of 14th April, 1997, had requested the plaintiff for a list of the new services, after the water and sewerage services were withdrawn. The letter reads:

> *RE: RATES FOR RESIDENTIAL LOTS"*
>
> ***I still cannot understand why your Company is unable to provide even a simple list of the breakdown of your new services.***
>
> *Our agreement which were done in 1988 about rate including sewerage services and fire service (it is very clear that PH has no fire service because we did not get that services last year for V305 accident, we had to use hotel's water pump) were included.* ***Now although such two major services are cancelled your company insists that agreement is still effective automatically.***
>
> ***I think as the supplier of service your Company should inform us of new service in writing and we shall choose of agreeable and renew or otherwise*****.....**
>
> *Although I am still not satisfied with your Company's explanation, I expect your Company to maintain the services for our residential lots for which I am enclosing payment for this year 1997.* (emphasis added)

18. A letter from "*Universal Management, Inc*" in reply, stated that sewerage was not included in the rates. The letter also stated that part of the rates was contribution for fire services, while stating that the National Fire Authority is responsible for provision of these services.

19. PW2,(*Seth Maharaj, Managing Director of the plaintiff company*) said that the plaintiff mowed the common areas, cleaned drains, planted trees and canals. In re-examination, he confirmed that two services were withdrawn. He said that the plaintiff continued to attend to the road verges and drains of 139 lots of the first defendant.

20. DW1 stated that her contractor cut the grass and cleaned the drains.

21. It is not in dispute that the plaintiff did not provide all the services.The statement of claim states that the Govt "*has taken over..the disposal of sewerage, and the internal road network ..and latterly the street lighting*". The "*claim ..the charges only relate to services provided*".

22. The plaintiff contends that the defendant was required to pay the *annual assessment*", even if at certain times, specific services were not provided

23. In my judgment, the first defendant was required by clause 12(b), to pay the "*annual assessment*" for the totality of the services specified in clause 12(a). The "*annual assessment*" was a payment for "*all the services herein before referred to in this Clause*". The charges for each service is not set out in clause 12(b)

24. In my judgment, the first defendant was entitled to cease paying rates from 1996, when the totality of services were not provided.

25. An email of 27th April,2005, from Carolyn Schnuerie,Director of the plaintiff company(addressed from emsl@conect.com.fj) to DW1 states that the plaintiff ceased to provide all services.

26. The email reads as follows:

> ***RE: V DRAINS & PROPERTY MAINTENANCE - PACIFIC HARBOUR***
>
> *Due to the recent purchase of several properties in 1998 there were no signed Deed of Covenants forwarded to us and no payments have been remitted in regards to the Rates charges since.* ***This has left us with no options but to discontinue all services including attending to Road Verges and cleaning of V-Drains surroundings your properties.*** ..
>
> ***Should there be any complaints from the Health Department or from the owners of the adjacent properties, this will be entirely your responsibility. Any damages caused.. will again be entirely your responsibility..Estate Management will not be held liable for any such damages***...(emphasis added)

27. This email clearly provides that the plaintiff discontinued all services from 2005. The contention that this Director could not bind the plaintiff company is totally untenable and goes against the basic principle of company law.

28. In my judgment, the claim against the first defendant for rates fails.

The claim against the second defendant

29. The amended statement of claim states that the second defendant is obligated to pay rates and "*indemnify*" the plaintiff, in terms of the "*obligations ..found in* (the DOS) *paragraphs 2A, 8E, 8F, 9 B and 9D being the purchaser from the* (first defendant and) *paragraph D* and *paragraphs (1), (4) and (6)* (of the DOI and) *further found in the* (SPA).*paragraphs 2A, 2C and 2.1*" .

30. The closing submissions of the plaintiff submits that the exemption granted to the first defendant by clause 9 A of the DOS ceased, when it transferred the lots to the second defendant. It is argued that the plaintiff was then entitled to charge the second defendant under sub clause 9 B.

31. Clause 9 reads as follows:

> A. *The* (plaintiff) *agrees that .. **the*** (first defendant) ***shall be exempt from the payment of rates..subject however to paragraph 9.B. below.*** *The* (plaintiff) *shall not provide any grass cutting, sewer or rubbish service to all of these properties.*
> B. *General Municipal Rates for the lots shown on Exhibit "F" shall be payable...**any purchaser from the*** (first defendant) *or if the* (first defendant)*builds on this property....*

32. Clause 9 B purports to impose rates on any purchaser from the first defendant. The DOS and DOI were entered into between the plaintiff and the first defendant. I need hardly add that the second defendant is not bound by these agreements.

33. The claim against the second defendant for rates and indemnity fails.

34. I do not find it necessary to determine whether the shareholders and directors of the second defendant appear to be materially the same as the first defendant, as nothing turns on that issue.

35. I do not find that the first defendant has agreed to indemnify the plaintiff,if a subsequent purchaser failed to pay rates, in either the DOS,DOI or SPA.

36. The DOS is concerned with 110 lots. It transpired that 2 of the 110 lots were sold.

37. Clause 2A of the DOS provide that the first defendant would indemnify the plaintiff, if a third party failed to pay any taxes regarding the payment of the settlement amount. In clause 8E, the first defendant agreed to indemnify the plaintiff against claims arising from the first defendant's failure to complete any of the plaintiff's obligations under the SPA .

38. In my view, the first defendant, in clause 9 D, agreed to indemnify the plaintiff from any claim arising from the "*the failure*" of the plaintiff to provide "*any rate-payor service*", in particular, sewerage services to the lots transferred by the plaintiff to the first defendant and the first defendant to the second defendant.

39. In paragraphs 2.1 of the SPA, the first defendant agreed to indemnify the plaintiff, if the first defendant failed to complete its obligations to provide power and water

40. The first defendant, in clause D and paragraphs 1 to 4 of the DOI, agreed to indemnify the plaintiff against failure to meets its "*development liabilities*",responsibilities and obligations, as Pathik J held in ***Eyre v Estate Management Services Ltd and Minami Taiheiyo Kaihatsu Kabushiki Kaisha***, (Civil Action No 47 of 1992) upheld in ***Minami Taiheiyo Kaihatsu Kabushiki Kaisha v Eyre and Estate Management Services Ltd,*** (Civil Appeal No ABU0026U of 1997).

41. Mr O'Driscoll, in his closing submissions relies on that judgment, in support of his proposition that the first defendant has obligations to the plaintiff and the DOS and DOI are continuing obligations.

42. In that case, a purchaser of lots at Pacific Harbour filed action against the defendant, (the plaintiff, in the present case) for failure to survey and execute transfers with "*reasonable speed*", in terms of an agreement of 25th February,1972. The purchaser had paid the purchase price. In 1989, the defendant had agreed to sell some of the lots to another party. The first defendant in the case before me, was made a third party.

43. It was held that the defence of limitation had no application, since as "*soon as the Plaintiff came to know of the transfer, he instituted the ..action*". Pathik J came to a finding that there were "***continuing obligations***", since there was "***no specific time referred to in the contracts***","***by which the defendant's obligations...to carry out the necessary engineering work, to subdivide the land and transfer the lands were to be performed***:."(emphasis added) It was also held that the third party bound itself to indemnify the defendant, as by "*transferring the Lots.. the defendant demonstrated that it had no intentions of fulfilling its obligations under the agreements*".

44. In the instant case, in my view there was no continuing obligation, neither on the plaintiff nor on the first defendant to make payments, when the services were withdrawn. The amended statement of claim reiterates clause 12(a) of Schedule C of the SPA, which states that the plaintiff was obligated to provide services, until it was taken over by the Govt or other authority. The plaintiff clearly informed the first defendant by its email that on discontinuance of its services, it would not be responsible to the Health Dept nor to adjacent properties, for any damages caused.

The plaintiff's action is time barred

45. In any event, I find that the claim was not filed within the prescribed limitation period.

46. The plaintiff's claim is founded on contract. Section 4(1) of the Limitation Act provides for a limitation period of six years in respect of actions in contract and states that an action "*shall not be brought after the expiration of six years from the date on which the cause of action accrued,*".

47. The plaintiff filed writ of summons on 25 May, 2012. It is an agreed fact that the first defendant paid rates until 1996 and failed to pay thereafter. In my view, the breach,(if any) arose when the first defendant ceased paying the rates. I have held that agreements relied on by the plaintiff do not contain continuing obligations.

48. In my judgment, the plaintiff's claim is time barred.

49. The submission of Mr O'Driscoll, counsel for the plaintiff on unjust enrichment does not arise for consideration, as the plaintiff has not pleaded a cause of action in that regard.

The claim against the first defendant for US$168,000.00

50. The plaintiff states that it gave credit of the sum of US$168,000.00 to the first defendant, to provide power and water to 80 lots.

51. Clause 8 D of the DOS provides that the first defendant " *agrees that it shall assume the responsibility for completing and providing power and water services.. In consideration for this,* (the plaintiff) *agrees to credit the (first defendant) the sum of.. (US $ 168,000.00)*".

52. The defendants, in their statement of defence state that the sum of US$168,000.00 was made in its favour, to offset the payment of the settlement amount

53. I am satisfied that the first defendant was required by clause 8D, to obtain power and water services for 80 lots and was given credit in the sum of US $ 168,000.00.

54. Clause 8 D does not set out a time frame within which the first defendant was required to obtain power and water services.

55. The plaintiff did not adduce any evidence to establish that it requested the first defendant to obtain these services. PW2, in cross-examination said that he was unaware, if a specific performance notice was issued.

56. The judgment of the Court of Appeal in ***Minami Taiheiyo Kaihatsu Kabushiki Kaisha v Eyre and Estate Management Services Ltd,***(*supra*) stated:

> *..after,such a delay, apparently acquiesced in by the purchaser, it was incumbent on him to make it clear that he wanted the vendor to complete. This was the obvious intention and effect of his solicitor's letter*

57. The plaintiff is seeking relief after "*26 years have elapsed*", as stated in its amended statement of claim.

58. In my judgment, the plaintiff is guilty of laches and waived his rights to make this claim.

59. Moreover, the plaintiff has not established any loss and damage suffered, as a result of the failure of the first defendant to obtain power and water services.

60. The plaintiff's claim for US$168,000.00 against the first defendant is declined.

The counterclaim of the defendants

61. The defendants seek declarations that the plaintiff is not empowered to charge rates under the Local Govt Act and the clauses in the DOI relating to rates are illegal.

62. In the light of the conclusion I have reached that the plaintiff was entitled to charge for services provided, it is inexpedient to grant the declarations sought.

63. The defendants have not lead any evidence in support of its claim for reimbursement of monies they state the plaintiff received by the "*forced sale*" of its properties. The claim is declined.

64. ***Orders***

(a) The plaintiff's claims against the defendants for rates and a declaration that the defendants remain liable for any rates is declined.

(b) The plaintiff's claims against the defendants for indemnity is declined.

(c) The plaintiff's claims against the first defendant for US $ 168,000 is declined.

(d) The declarations sought by the defendants are declined.

(e) The defendants' claim for reimbursement of monies is declined.

(f) The plaintiff shall pay the defendants costs summarily assessed in sum of $5000.

HIGH COURT OF FIJI
SUVA

A.L.B. Brito-Mutunayagam
JUDGE
27th November, 2018