

*Civil Action No. HBE 08 of 2017: Ba Holding Company Limited vs Bianka K. Kumar Trading as
4 K Construction*

In the High Court of Fiji
At Suva
Civil Action No. HBE 08 of 2017

Ba Holding Company Limited
Applicant
vs
Bianka K Kumar trading as 4 K Construction
Respondent

COUNSEL: Mr K.Vuataki with Mr I.Tikoca for the applicant
Mr I. Fa for the respondent
Date of hearing: 14th September,2017, 23rd and 30th October,2017
Date of Judgment: 28th February, 2018

Judgment

1. The applicant, by its originating summons seeks to set aside a statutory demand served on the applicant by the respondent under section 515 of the Companies Act, 2015. The respondent filed her reply to the affidavit in support of the summons. The applicant filed its response. The parties filed written submissions. I held that there is a genuine dispute as to the amount that is owing to the respondent, which was required to be calculated by Court, as provided in section 517(2) of the Companies Act. I directed that the case proceed to hearing.

2. *The hearing*

(a) On 14th September,2017, the following witnesses gave evidence for the applicant:

- (i) AW1,(*Bilash Prasad, Infrastructure Construction Monitor,AQEP*)
- (ii) AW2,(*Netani Vuatalevu, AQEP Engineer*)
- (iii) AW3,(*Ronil Raj,Manager,Manager(Design & Projects at USP, formerly of AQEP)*)

(b) The hearing resumed on 28th September,2017. On that date, Mr Fa, counsel for the respondent moved for an adjournment on the ground that he was indisposed. The case was fixed for continued hearing on 23rd October,2017. On that date, the following witnesses testified for the plaintiff:

- i) AW4,(*Rakesh Prasad, Manager,Works and Project of the applicant*)
- ii) AW5,(*Isimeli Bose,CEO of the applicant*)

(c) The hearing was fixed for continuation on 24th October,2017. On 24thOctober,2017, Mr Fa moved for an adjournment on the ground that he was indisposed. The hearing resumed on 30th October,2017.On that date, the evidence of the following witnesses was led for the respondent:

- (i) RW1,(*Anand Kumar, Managing Director of the respondent*)
- (ii) RW2,(*Rakesh Deo, Supervisor & Foreman of the respondent*)

The determination

3. The applicant subcontracted its “Access to Quality Education Programme”,(AQEP) contract to the respondent. The Memorandum of Agreement,(Agreement) required the respondent to carry out the Scope of works for 8 months commencing on 28th November,2016, and terminating on 28th July,2016, for Nacamaki District School,(NDS) and Qalivakabau District School,(QDS). The total value of the NDS project was \$852,300.00VIP and QDS was \$646,200.00VIP.
4. On 13th February,2017,the applicant gave the respondent notice of termination of the Agreement stating that the “*progress of works is very slow compared to the timeframe given and unavailability of materials on site..work should be completed by the 20th of February,2017...a detailed list of defects, delays and breaches in contract will be provided..*”.
5. On 15th February,2017,the applicant informed the respondent that it was exercising clause 6 of the Agreement titled “*Termination*” and stated further:

Please note that unless the required works are completed in the given timeframe which is the 20th of February, 2017 or a genuine and acceptable timeframe is agreed upon between both parties this notice will be activated. As of the quality of work, you are aware that all your webs i.e. struts were rejected because of the spacing as in the report given to you in our meeting in Laucala Beach Estate but we spoke with the Engineer who accepted the works as it was to save time and costs. Also find attached a new list of defects in the last inspection.

As you are aware all repairs works for classrooms was to be completed by the 16th of January, 2017 prior to the opening of the school year on the 17th of January, 2017. Therefore the suspension of works is not an issue as it was imposed on the 16th of January, 2017 and cleared for works to commence on the 2nd of February.

As for the availability of materials that again is not an issue as all other contractors have all materials on site and each week I have been receiving from you in regards to the roofing iron being loaded on the next vessel but to date it has not eventuated and after going through your procurement plan received just this hour it seems it will also not be delivered this week.

As you have mentioned earlier the suspension or the tropical depression did not have any effect on the procurement and delivery of materials as the vessels were all on schedule.

Please note that there are other breaches on the contract from your end like Clause 15, 19, 24 & 25. *Your site is the only site at present which is not OHS Compliant.*

*None the less, I do accept the **date of Completion** as the end of February which is on the **28th of February 2017** and not the 30th of February as stated on the condition that your roofing iron and other materials is transported on the 20th of February 2017 and a new contract will be awarded to you for all remaining works....*

6. The reply sent on behalf of the respondent reads:

..As a matter of fact the repairs and maintenance cannot be completed by the 20th of February 2017 as you all know the project was suspended for three weeks which is well known to all stake holders.

We have given a quality work with very less defects and yet we are been issued with a letter showing us indirectly that we are incompetent.

We have also reiterated that there is a shortage of materials in the whole Fiji market and yet very little understanding is been shown. This was also raised in the weekly meeting with the client, keeping in mind we cannot compromise in the quality of work and materials used. A tropical depression was also in place for whole of Fiji (TD04F) and currently other tropical depression is forming which does not allow us to carry out works outside as safety is paramount.

We have yet to finish the school which we are getting all roofing iron on the 20th of February, 2017 which should allow us to complete the school building by the 30th of February, 2017...
(emphasis added)

7. The respondent, by her statutory demand of 17th March, 2017, claims a sum of \$ 306,062.04 for services performed from 1 December, 2017, to 20th February, 2017, on a monthly basis, in terms of the Terms and Conditions of Services attached to the Agreement.

8. Clause 1 of the Agreement provides:

the Contractor will perform, for the Client the Services listed in the provided AQEP Scope of works.

9. Clause 2 :

The client will pay the Contractor for services, fees and expenses indicated in the Terms and Conditions of Services. (emphasis added)

10. The Terms and Conditions of Services (conditions), as so far as are relevant, are as follows:

(a) Condition 3:

- i. ***Payments will be made on monthly basis divided equally less 10% Retention.***
- ii. *Retention was to be paid after the 12 MONTHS defects liability period.* (emphasis added)

(b) Condition 4 e):

The aggregate total liability of Contractor to Client shall be limited to:

- i. *The re-performance of the Services to rectify any defect..such defect is capable of remedy, up to the value of the Services actually paid for by the Client.* (emphasis added)

(c) Condition 6 c) :

If this Agreement is terminated, Client must pay for the services performed up to the date of termination, reasonable demobilization costs, any related costs or expenses Contractor is legally liable to pay, and the portion of any fee earned by Contractor to the date of termination. (emphasis added)

(d) Condition 24 :

Ensure quality finish, professional workmanship, completion of assigned project within budget. (emphasis added)

(e) Condition 25 :

Uphold Principal Contractor's (BPHCL's) and Clients (AQEP) rules, regulations and guidelines ensuring transparency, accountability, reliability and project delivery with commitment. (emphasis added)

11. In my view, it is evident that payment would be made on a monthly basis in terms of condition 3 above, provided the services are carried out in accordance with the other conditions therewith. I note that the respondent had not provided the applicant with invoices on a monthly basis.

12. The case for the applicant, as stated in its affidavit in support of summons, is that the respondent failed to perform its obligations and is in breach of contract. School building 1 of NDS was to be completed on 17th January, 2017. Upon site inspection, AQEP Engineers noted that 80% of the works carried out by the respondent had to be re-done at the applicant's costs, due to poor workmanship. It was not up to the required standard. The respondent did not complete and abandoned the works before 20th February, 2017. AQEP's Progress Report of 7th February, 2017, provides that the respondent has only performed 2% of works at NDS and 0% at QDS. The applicant is required to pay the respondent \$17,046.00 for 2% work done. Since the applicant paid the respondent a sum of \$60,000 to procure materials, the respondent owes the applicant \$42,954.00.

13. The position of the respondent, as stated by RW1, in his affidavit in reply is that the respondent started work on school building 1 of NDS as per the Scope of Works and 80% of that building was completed. *“School buildings 2, 3 and 4, Dining Hall, Teachers Quarters 1,2, 3 and 4, Ablution block, Engineering room and kitchen could not be done as no building plans and permits were provided by the Applicant”*.

14. The Scope of Work for NDS, as so far as relevant, reads as follows:

1. School Building 1 – 3 Classrooms and office with extensively damaged roof

- *Demolish existing roof structure and verandah.*
- *Design and construction of new roof structure and verandah for the School building as per NBCF.*
- *Repairs to damaged wall beam which has visible crack on it at the barge end.*
- *Replace damaged doors and windows.*
- *Supply and install new corrie tiles for the classrooms.*
- *General painting of the School Building.*

.....

15. The Scope of Work for QDS was also for several school buildings and teachers quarters.

16. RW1, in cross examination, said that he received an email dated 5 December, 2016, from AW4 forwarding the Scope of Works. RW2, in cross examination, said that AQEP had explained its contents and informed him that their work would be checked in accordance therewith.

17. AW1 produced the following report of the progress of work in NDS, consequent to his visit on
17th January, 2017:

School Building 1

Work on school building 1 has started as the contractor have removed the existing roof structure. Workers have installed the roof truss with temporary roofing iron.

Issues

Major issues during the installation of roof truss on School Building 1 are:

- i. *Quality and the grade of timber used for rafters. As shown in (Figure 2) **Northpine SG8** does not meet the minimum requirement of F7 grade/local hard wood according to the contract document for Koro Island. (large knots can be seen as circled in figure 4).*
- ii. *As per issued for tender drawing the required grade for purlin is F8 but on site H3, 75 x 50 timber was installed as shown in (Figure 4).*
- iii. *Web brace was not fixed according to the issue for tender drawing as shown in (Figure 6). Our recommendation is to use 2-M12, s-bolt on each connection with 100 x 50 struts instead of 1-M12 on 75 x 50 struts to prevent movement during high wind speed.*
- iv. *Number of clout nails on all the strapping needs to be re-checked and no clout nails should be bent as shown in (Figure 5).*
- v. *M. S plate needs to be painted before installation as shown in (Figure 3). Our recommendation is to use M12 s-bolt instead of threaded rod on all connections. (4 photographs)*

Other issues that was noticed during site inspection were:

Deformed bars present on site has started to rust which needs proper attention (photograph)

- i. *All the construction area needs to be barricaded. There is no design plan for 3 new classroom building but the contractor has started to dig the footing on the existing blown away ECE building, IT/Library building. (photograph)*

Material on Site

1. *Northpine SG8 timber*
2. *LTH pine F7, 150 x 50mm timber*
3. *Deformed bars*
4. *M. S plate*

Summary

The stakeholder was informed about the AQEP Construction monitors daily visit on site from late of January or early February. The foreman informed us that more building materials will be arriving this week but the major issue was all construction work was suspended as of 16th January 2017 due to no permit available for Koro Cluster. Safety for children needs to be taken as the school has resumed for a new calendar. No work has started on the teacher's quarters and other building.

18. The report contains several photographs highlighting the stated defects under the heading
“Major issues during the installation of roof truss on School Building 1”.

19. The Report of 7th February,2017, for NDS prepared by AW2, reads as follows:

1. School Building 1 (SBI)

Work is progressing on SBI roof works. The contractor have completed applying the first coat on the ceiling for the first two classroom and installing the ceiling on the third classroom. The contractor was advice to stop the ceiling installation works and provide the approval from the Engineer in regards to the complete roof structure works. There were few construction issues identified and the contractor was advice to rectify the defects and comply with design specification. (photograph)....

Issues

School Building 1

1. *Install top and bottom chord missing 200mm x 150mm nail plate connection... (photograph)*
2. *Damaged purlin timber to be replaced.(photograph)*
3. *Rehabilitate the end wall damaged top beam.(photograph)*
4. *Ceiling installation works is on hold. Engineer needs to approve the completed roof truss structure works prior to the ceiling installation.*
5. *Rafter to wall connection missing and to be installed according to drawing specs.*
6. *Quality paints shall be use on site.*
7. *Fix the building concrete column top damaged section.(photograph)*

Material on Site....

Summary

Three (3) workers were on site and less physical work progress compared to the last visit (17/1). This is due to the stop work notice issued to the contractor earlier for not complying with a work permit on site. The contractor did not comply with few design specifications and the ICM will monitor the works carefully. All yellow cautioned tapes fence shall be replace with the orange barricade nettings and safety signs attached. The contractor lacks in work planning management, and lack of materials on site. There is a lot of work requires to improve the site management and provide the quality deliveries. The certified construction drawings to be on site and the workers to comply with safety during working hours.

20. This report also contains photographs highlighting the issues in School Building 1.

21. AW1 produced the following report of the work progress in QDS, consequent to his visit on 17th January,2017.

Work Progress

1. Teachers quarters 3 & 4

There was negative work progress for the teacher's quarters as the contractor has demolished the temporary roof structure while the material was not available on site.(Photographs of 3 & 4)

Issues

- i. *All workers and personals entering the site needs to be in proper PPE as we noticed children and adults were entering the construction area bare foot in the presence of the contractor and AQEP personals.*
- ii. *No separate washroom for teachers and children available on site.*

Material on Site

1. Northpine F7 H3.2 timber

Summary

The stakeholder was informed about the AQEP Construction daily visit on site from late of January or early February. The major issue was all construction work was suspended as of 16th January 2017 due to no permit available for Koro Cluster. Safety for children needs to be taken as the school has resumed for a new calendar and temporary tents has been provided for the children to start classes. No major work has started on any buildings.

22. Admittedly, the delay in obtaining the permits contributed to the slow progress of the work in the “Koro Cluster”, as provided in the above reports and minutes of the project meeting of 10th February, 2017. The applicant states that it sub-contracted its responsibility of obtaining building permits to the respondent. This is denied by the respondent.

23. This application is not concerned with issues relating to the obtaining of permits, design plans and material left at the site. I am required to “*calculate the substantiated amount of the demand*”, to ascertain “*If the substantiated amount is less than the statutory minimum amount for a Statutory Demand*”, in terms of sub-sections (2) and (3) of section 517 of the Companies Act titled “*Determination of application where there is a dispute or offsetting claim*”.

24. I turn to the evidence.

25. AW1 and AW2 testified that the demolition, ceiling, roofing and tiling work carried out at NDS was defective, as detailed in their reports reproduced above. There was “*negative work progress for the teacher’s quarters*” at QDS.

26. AW2 said that he was asked to monitor the progress of the works by AW3. He said that the respondent completed the truss of the roof of school building 1 of NDS, but the work did not comply with the design specification. He explained with reference to the photographs in his report that the quality and grade of timber used for rafters: Northpine SG8 did not meet the local requirement of F7 grade, according to contract documents. The respondent was informed by AQEP to rectify the defects and replace the timber, as there were lot of knots on the timber. The beam at the end of the building was not done. The respondent was required to stop the ceiling installation works and provide approval from the Engineer, because of defects in the truss. AW2 stated that when he visited QDS, there were no workmen on site. The tiles and timber were on the site. The tiling did not meet their standards as they were not levelled, and was rejected. The respondent was advised to replace the tiles.
27. AW3 said that the construction site monitors at NDS and QDS were AW1 and AW2. There were 5 major issues in the work of the respondent, as stated in the report made by AW1 for NDS. He used it as a base to update the project schedule. The overall percentage of the respondent's work was 2% in NDS and zero per cent in QDS. The work was to be completed on 20 January, 2017, according to the schedules given to the respondent.
28. The evidence of AW4 was that the works were to be carried out according to the time schedule contained in "*Gantt charts*". These charts were given with the Agreement and put up on notice boards at the sites, as was confirmed by AW5. RW1 and RW2 were evasive on this matter. RW1 was "*not sure*" whether he was given these documents. He said that it must have been given to the Supervisor. RW2 said that he was not given the "*Gantt charts*". He said that it was not necessary to have charts, in order to follow the progress of the works, since there was no new construction and the respondent focused on the maintenance of the school building.

29. RW1 and RW2 said that 90 % of the works were done at NDS. The roof of two staff quarters at QDS was demolished and remade with the existing roofing iron. Tiles were laid. Both these witnesses referred to photographs produced in evidence.
30. In evidence in chief, when RW1 was asked to comment on the report prepared by AW1 on NDS, he said that the respondent followed instructions from Chands Engineer, the Engineers for the projects. Chands Engineer determined if their work was in accordance with the Scope of Works. Avinesh of Chands Engineer gave verbal approval for the timber used. It transpired that RW1 had never visited Koro Islands.
31. RW2, in cross examination said that Chands Engineers had approved their work on the rafters and truss and gave a letter of approval. He was referred to the defects pointed out in AW1's report. He said that he followed the drawings given with the tender. Chands Engineers asked him to work on the tender drawings. He briefly saw these drawings when it was brought to the site by Chand Engineers. The construction drawings came in January, by which time the work on the trusses was done.
32. I find that the respondent has failed too adduce any cogent evidence to controvert the evidence of AW1, AW2 and AW3, the Engineers of AQEP that its work was defective. The evidence of RW1 and RW2 that their work at NDS was approved by Chands Engineers is unsubstantiated.
33. I note that the respondent, in her letter of response to the letter of termination, accepted that there were defects in the works.
34. On a review of the evidence as a whole, I accept the evidence led on behalf of the applicant.

35. In my view, the respondent is entitled to a payment of \$17,046.00 from the applicant for the 2% work done at NDS, as certified by AQEP Engineers.

36. Section 515(a) of the Companies Act states that a company is deemed to be unable to pay its debts, if it has failed to pay a demand in a sum exceeding \$10,000 within a period of 3 weeks of the date of notice. The respondent admittedly, received \$60,000 as demobilization costs from the applicant. The sum of \$17,046.00 must be offset from the demobilization costs paid, as provided in sub-section (2) of section 517. It follows that there is no debt due and owing from the applicant to the respondent and the statutory demand must be set aside.

37. Order

- (a) The statutory demand served on the applicant by the respondent is set aside.
- (b) The respondent shall pay the applicant costs summarily assessed in a sum of \$ 4500.

A circular stamp of the High Court of Sri Lanka is visible on the left. To its right is a handwritten signature in blue ink, followed by the printed name 'A.L.B. Brito-Mutunayagam' and the title 'Judge'.

A.L.B. Brito-Mutunayagam

JUDGE

28th February, 2018