

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 51 of 2016

BETWEEN : B.W. HOLDINGS LIMITED

PLAINTIFF

AND : MAHEND PRATAP SINGH

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr V Felipe for the Plaintiff
Mr A. Nand for the Defendant

Dates of Hearing : 27 and 28 February, 1, 2, and 14 March 2018

Date of Judgment : 27 July 2018

JUDGMENT

1. The Plaintiff says in its Statement of Claim as follows:
 - (1) By a contract dated 26 January 2015 the Defendant engaged the Plaintiff to, inter-alia, construct a sub-division within the Defendant's Property.
 - (2) The Plaintiff duly constructed the sub-division and was paid certain moneys but the Defendant refused to pay the balance outstanding in the sum of \$82,699.63.
 - (3) Alternatively the Plaintiff is entitled to the same sum upon a quantum meruit.
 - (4) Wherefore the Plaintiff claims the sum of \$82,699.63, interest and costs.
2. The Defendant in his Amended Statement of Defence and Counter-Claim says as follows:
 - (1) The Defendant by its letter dated 27 November 2014 accepted the Plaintiff's tender price in the sum of \$183,249.63(VIP).
 - (2) The parties entered into a contract dated 26 January 2015, for the construction of the subdivision of the property and agreed that the total contract price would be \$183,249.63 to be paid in 4 stages after the site engineer had provided its (sic) compliance certificate.
 - (3) The Plaintiff failed to complete the works as per the contract in failing to construct the road and the drainage according to the stipulated plans and supplying and installing 2 fire hydrants only when 3 were required to be supplied and installed.

(4) In his counter-claim the Defendant says:

(a) The execution of the civil works were not fully complied with by the Plaintiff.

(b) The Plaintiff failed to comply with clause G of the contract by failing to make every effort to resolve the dispute before filing this action.

(c) The Defendant Counter-Claims it had to engage sub-contractors to complete the works and had incurred extra costs of \$44,457.

(d) Due to the delay by the Plaintiff in completing, the Defendant claims a daily penalty of \$500 under clause C2 of the contract, for 7 weeks totaling \$24,500.

(e) The Defendant paid the Plaintiff a sum of \$8,625 for 3 fire hydrants but only 2 were supplied and installed. The Defendant claims reimbursement of \$2,875 for one fire hydrant not installed.

3. The Plaintiff in its Reply and Defence to Counter-Claim says as follows:

(1) The Plaintiff did approach the Defendant and the newly appointed Engineer to resolve the dispute but neither was available for meetings.

(2) The terminated consultant Engineer confirmed the works were carried out in accordance with the schedule of rates and scope of the contract.

- (3) The Defendant had always advised the Plaintiff that the terminated consultant Engineer was in charge and that payments shall be released upon his certification.
4. The Minutes of the Pre-Trial Conference dated 28 July 2018 include the following:

Agreed Facts include the following:

- (1) By contract dated 26 January 2015 the Defendant engaged the Plaintiff to construct a sub-division within the property.

Issues to be Determined

- (1) How was the contract sum of \$183,249.63 to be paid to the Plaintiff by the Defendant.
- (2) Was the terminated consultant Engineer the person in charge.
- (3) Who breached the Contract and how
- (4) Is the Defendant entitled to \$44,457 as the costs to complete the project.
- (5) Is the Defendant entitled to claim penalty in the sum of \$24,500.
- (6) Is the Defendant entitled to reimbursement in the sum of \$2,857 for one fire hydrant not installed.
- (7) Does the Defendant owe the Plaintiff the sum of \$82, 699.63.

- (8) Alternatively is the Plaintiff entitled to payment by the Defendant on a quantum meruit of \$82, 699.63.
5. The hearing commenced with the Plaintiff's first witness (PW1) giving evidence. He was Hitendra Pande, the general manager operations of the Plaintiff. They gave a quote and later signed the agreement and started work. The contract sum is \$183, 249.63 and they are paid progressively. The project was completed by the Plaintiff as per the contract except the connection to the water main, which they did not connect because the Defendant did not pay them.
6. The change in the drainage was due to the topography of the site. They carried out the work on the site as per the consulting engineer's instructions. He is hired by the Defendant and any variations to the contract were done in accordance with his instructions. He was the engineer on the site and he is Bobby Anand (Bobby). Only 2 fire hydrants were stated in the drawings. It was a lump sum contract regardless of the number of hydrants. The Defendant personally gave the reasons for refusal to pay the Plaintiff the balance which were the drainage issue, the gravel thickness of the road and the fire hydrants. Bobby agreed that the works had been done in accordance with the contract and the variations he had instructed on the site. They contacted Bobby and he confirmed by email that the contract had been completed.
7. PW1 said the Plaintiff and the Defendant had attempted to resolve the issue, but the Defendant informed their C.E.O. that the matter had been referred to his lawyers for court action.

8. The Plaintiff submitted their final claim to the Defendant but he did not pay. The Defendant terminated the services of Bobby on 29 September 2015. The Defendant appointed Mahendra Singh of Pacific Civil & Engineering Designs Limited (Pacific) to replace Bobby. The new Engineer raised issues of incomplete work. The Plaintiff advised that the works the Defendant wanted was not part of the scope of work.
9. PW1 said that they agreed at the site where the Defendant was present that the contact had been completed except for some items which the Plaintiff rectified. The Defendant still owes the Plaintiff the balance of \$82, 699.63.
10. Under cross-examination PW1 said river gravel was part of the contract though it would not be approved by the Fiji Roads Authority. The Plaintiff was responsible to get the water connected while the Defendant was to organize the commissioning of the water supply. He said they quoted for 3 fire hydrants but this was not part of the contract.
11. Any defects have to be rectified by the Plaintiff even if payment made. The roads were completed but it is not in compliance with the requirements of the Fiji Road Authority because it was not in the contract. The Plaintiff merely carried out what the client requested. The Defendant is required to get the local council's approval. He agreed the Defendant had to retain subcontractor to do additional works outside the contract. The Plaintiff did the road works and did rectify the drainwork.

12. In re-examination PW1 said there were variations orally which the engineer would later confirm in writing. It has a lump sum contract; the Plaintiff was paid \$106,550.00 with \$82,699.63 remaining. The Plaintiff completed the project as per the contract and that is the amount owing. Regarding the drain, the switch was agreed to by all parties and the engineer said this is what the Defendant wanted.
13. The next witness was Bobby Vijay Anand (PW2). He said he was retained by the Defendant to do the design for subdivision and then the Defendant retained him to do the construction supervision, and the supervision of the project – drainage, roads, allocation of lots and utilities. He drew up the contract. The schedule of payments facilities the bank in making payments.
14. He was appointed project manager by the Defendant. It was his responsibility to supervise and approve the project at every stage. The Defendant as the owner of the project was his client. All site inspections were done with the Defendant being present. There were defects during the project which they noted when doing the site inspections. The Plaintiff rectified all the defects..
15. PW2 said the drainage was revised at the request of the Defendant because of the project budget. The drawing was based on the old plan and when the land was cleared, they discovered it was not flat land and so a revision was necessary. The Plaintiff rectified the minor defects and some the Defendant had agreed to ignore. In his opinion the Plaintiff had completed the project.
16. During cross-examination, PW2 said he was the authorized person to sign and lodge the drawings. He was obliged to report to the Defendant all inspections on site done by all parties. The Defendant will be notified of any changes to the

drawings prior to construction. The scheme plan was approved by the local authority. Approval for the Scheme was given by the Town and Country Planning department. The drawings were made according to the scheme. He is authorized to waive the retention period. He did not authorize payment until the ducts defects were rectified.

17. The Defendant agreed to waive the retention period and he wrote on behalf of the Defendant. It was compulsory for the Plaintiff to complete each and every item under the schedule of works. It only matters that the total contract amount is fulfilled.
18. PW2 said the Defendant chose the Plaintiff. \$183, 249.63 is the lump sum amount. As long as the project is completed the lump sum will be paid. The items are then not relevant. The National Fire Authority said 2 fire hydrants were sufficient. He said the works were completed. Whatever was required to be done as per his report were done. The payment is to be released at completion of each stage of work. Prior to meeting him, the arrangements had been done between the Plaintiff and the Defendant. The advance was only for mobilization. Thereafter the payment was only for completed work.
19. PW2 said the letter of termination to him states that the Defendant will take everything on his own shoulders and would do everything. The Defendant did not retain him to attend to the tender exercise. The documents were only prepared for the financial institution. Until PW2's termination all the work had been completed according to the site meeting and instructions. When changes were made, emails were sent to notify everyone and no objections were received.

It is wrong to say the Defendant needed to get sub-contractors to do the road works.

20. In re-examination PW2 said on his last inspection, 90% of the defects had been rectified leaving a few small items that the Defendant had to supervise. With that the Plaintiff closed its case and the Defendant opened his.
21. The Defendant (DW1) gave evidence. He said he entered into a contract with the Plaintiff. He had sought tenders from 6 other contractors. The Plaintiff's was accepted on the recommendation of his project engineer, Bobby Anand (Bobby/PW2). Exhibit P1 is the agreement signed by both parties. The contract price is a lump sum. DW1 went every Sunday to check on the progress. The Plaintiff left without completing the works. DW1 had to sub-contract (1) the civil works (2) the road works (3) the drainage and leveling of the land to 3 different sub-contractors. He is also seeking the cost of 1 fire hydrant not installed.
22. Under cross-examination, DW1 said the drawing SK05 shows only 2 fire hydrants and is correct. SK05 was approved by the fire authority. He did not know the Plaintiff before he employed them. The Plaintiff's was the best offer. The Plaintiff offered the cheapest price. DW1 instructed Bobby to retain the Plaintiff. He chose the Plaintiff because of the price. He employed Bobby to supervise the project. He told Bobby he had accepted the tender and all works were to be according to the sub-division plan and engineering plan. Bobby acted on his instructions.
23. During the week DW1 did not visit the site as he was running a company. During the week Bobby was responsible for supervising the site. He terminated

the services of Bobby because he was not committed to DW1's project plus Bobby is in full time employment by Kelton Marketing Ltd. DW1 said he made payment on Bobby's decision.

24. In re-examination DW1 said he paid for 3 fire hydrants but only 2 were installed.
25. The next witness was Mahendra Singh (DW2). He said Pacific is his company. He was hired by the Defendant to look at why the project was not going further. The progress report was prepared on the instructions of the Defendant. According to his report there were shortfalls towards the end of the project. Exhibit D14 is a certificate confirming to the Nausori Rural Authority that the works had been completed.
26. During cross-examination DW2 confirmed Exhibit D14 was issued by him. He said although other companies were involved, as an engineer he only looked at the principal and did not look at the sub-contractors. These companies were involved at the behest of the Defendant. The engineer only communicates with the main contractor and not with the sub-contractors. His report does not show that the Plaintiff did not complete the project. He had no communication with the previous engineer. If any changes were made he would not be aware of it.
27. The next witness was Patel Faizaan (DW3). He is the laboratory manager where the samples were tested on 14 November 2015. He said river gravels can be used on roads but has to be first approved by the engineer.
28. Under cross-examination DW3 said he did not go to the site.

29. With the Defendant closed his case and both Counsel made their oral submission.
30. Counsel for the Plaintiff submitted the issue was whether the court believes the engineer (PW2) or the Defendant himself (DW1). PW1 said the Plaintiff completed the work. PW2 (the engineer) said there was an agreement but also there were agreed variations to it. The variations were due to the site condition and the Defendant's budget. It was a budget cutting exercise. The engineer told the Plaintiff to attend to the defects. Exhibit P12 was the engineer's letter that these had been completed satisfactorily. There was no rebuttal of the engineer's (PW2) report. At no point did the Defendant make any issue with the engineer's decision at the site. There was no questioning of the engineer's decisions. Variations were made which agreed to by the Defendant. The Court should accept the Plaintiff's version that the works were completed as per the agreement and agreed variations.
31. Counsel then submitted on the Defendant's Counter-Claim. The Final Completion Certificate does not say the Plaintiff left without completing the job, and does not say Central Eastern Construction Ltd came in and completed the work. It refers to only one contract that with the Plaintiff. The sub-contract referred to extra works. Finally he said regarding the penalty of \$500 per day there was no evidence as to the period of delay.
32. Counsel for the Defendant now submitted. He said the question was whether the parties complied with the agreement. No written amendments were provided to the Court. DW1 said the engineer (PW2) had no authority to consent to any changes to the drawings or the specifications on DW1's behalf. The

engineer never issued the final completion certificate to the Plaintiff. Counsel said a penalty will be imposed and will start on Day 8. The Defendant wants reimbursement from the Plaintiff for one fire hydrant.

33. Counsel for the Plaintiff in his reply said this was a lump sum contract and no breakdown was needed. The Defendant agreed to accept 2 hydrants.
34. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my judgment. The pivotal issue here is this. Did the Plaintiff complete the works and is therefore entitled to full payment of the balance of contractual sum?
35. I shall start by going to the root of the matter which is the Agreement made on 26 January 2015 (Exhibit P1). The second preamble states the employer (Defendant) has awarded the works to the Contractor (Plaintiff) and the contractor has accepted the Employer's offer. Clause B.1 provides that in consideration of the faithful performance of this Agreement by the contractor, the Employer shall pay to the Contractor the total sum of \$183, 249.63 VIP. This total amount shall be split into four stages.
36. Clause B.2 states "The Contract Amount shall be a fixed and lump sum and therefore shall not be subject to any fluctuation or variation.
37. To my mind this means that when the contract is completed the contract sum of \$183, 249.63 VIP is payable. Here I shall refer to Construction Contracts, Law and Practice, By Richard Wilmot-Smith where at para 2.28 it is stated "in

standard lump sum contracts the standard forms.....do state that the contract sum is the unalterable consideration for the completion of the works”.

38. So I turn to consider whether the works have been completed and shall peruse the Defendant’s Exhibit D14. This is the Final Completion Certificate issued on 25 January 2016. It states quite unequivocally that all work for the (project) “has been satisfactorily completed as designed and approved by Town & Country Planning Department”, that the date of final completion.....is 22nd January 2016” and that “the Defects Liability Period is 6 months as stated in clause D.1 of the contract agreement with B. W Holdings Ltd and will end on 22nd July 2016”.
39. In my view this is tantamount to the Defendant’s own engineer (DW2) fixing ownership and responsibility exclusively on the Plaintiff and not partially or at all on Central Eastern Construction Ltd and that the sub-division has been finally completed by the Plaintiff.
40. The Defendant’s constant reference to a 3rd fire hydrant not being installed rather suggests a need to bolster his tenuous claim when it is noted that his own originally appointed engineer, Bobby Anand in his letter to the Plaintiff dated 16 July 2015 (Exhibit P10) states at the final para on page 2 that “The other item was that as per the original contract you had quoted for three Fire Hydrants but we revised it later to two thus there was some saving on this as well which as per our third site meeting the client agreed not to pursue for your benefit:” Since the Defendant’s own engineer states this, the Court has to accept that his claim for one fire hydrant falls to the ground.

41. Based on the above evidence the court is satisfied that the Plaintiff has completed the contract and is entitled to the balance of "the unalterable consideration".
42. This is a factual situation for the Court to decide based on the weight it gives to the respective testimony of the parties' witnesses. This is why I have reproduced in extenso the evidence recorded in this court. At the end of the day the Court opines that the Plaintiff has satisfied the burden of proof cast on it in a civil claim and is entitled to judgment against the Defendant. It, thus follows that the Defendant's Counter-Claim has failed. A finding by the court that the Plaintiff had completed the project must necessarily mean that there is nothing for the Defendant to retain sub-contractors to complete.
43. In any event, even if the court is wrong in its above finding, this is of no avail to the Defendant because on the same civil standard of proof I find he has failed to prove his Counter-Claim. He did not call any witness from the alleged sub-contractors to prove they did works which the Plaintiff had allegedly failed to carry out. He failed to prove the alleged extra costs. Finally he failed to prove the alleged period of delay for which he was claiming a penalty. I may be repeating here but I have already alluded to the Defendant's lack of entitlement to be reimbursed the cost of one fire hydrant.
44. In the light of the decision I have arrived at, it is unnecessary to consider the Plaintiff's alternative claim for a quantum meruit, which in English means "what it is worth".

45. In the result I make the following orders:

- (1) The Defendant is pay the Plaintiff the sum of \$82,699.63 together with interest thereon at 4% p.a. from the date of judgment to the date of payment.
- (2) The Defendant's Counter-Claim totaling \$71,832 is dismissed.
- (3) The Defendant is to pay the Plaintiff costs summarily assessed at \$4,000 for the claim and the Counter-Claim.

Delivered at Suva this 27th day of July 2018.



David Alfred

JUDGE

High Court of Fiji