

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 246 of 2011

BETWEEN : **COOKE'S UNITED REFRIGERATION AND AIR CONDITIONING LIMITED**

PLAINTIFF

A N D : **FOOD PROCESSORS (FIJI) LIMITED**

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Plaintiff absent and unrepresented
Mr. Ritesh Naidu for the Defendant

JUDGMENT

- [1] This is an application made by the Plaintiff, by way of Writ of Summons. The Writ of Summons was filed in Court on 23 August 2011.
- [2] The Plaintiff is a duly incorporated limited liability company having its registered office in Suva and carries on business of refrigeration and air conditioning installations, maintenance and after sales services. The Defendant is also a duly incorporated limited liability company having its registered office in Suva.
- [3] In the Statement of Claim attached to the Writ the Plaintiff submitted, inter alia, that:
1. On the 28 June 2004, the Plaintiff entered into tenancy within the Defendant for the leasing of their premises at Walu Bay for \$1,000

inclusive of VAT and it was also mutually that the rentals would be increased to \$1,200 plus VAT from the month of November.

2. On or around the 1 July 2009, upon expiration of the existing tenancy agreement, the Defendant drafted fresh tenancy agreement with increased rental amounting to \$2,700 plus VAT which was duly acceptable to both parties.
3. In early 2008, the Defendant advertised Tender for the provision of various civil works inclusive of the supply of all materials, plant, labour and direction for the carrying out of the works described in the drawings and specifications and to the directions and satisfaction of the Engineer. The parties mutually agreed to a tender price of \$128,460.
4. On the 4 May 2009, whilst in the cause of carrying out the works, there were further variations on the work that ought to be carried out. Therefore, both parties mutually agreed to increase the contract sum by a further \$19,556.00.
5. The Plaintiff submits that all work has been completed in full and has been duly certified by the Engineer that it has been completed according to plan and specifications.
6. The Plaintiff claims that there are outstanding payments due from the Defendant in the sum of \$50,922.00; and as such there is a cause of action against the Defendant for breach of contract.

[4] On 16 September 2011, the Defendant filed Statement of Defence and Counterclaim. On 26 September 2011, the Plaintiff filed a Reply to the Statement of Defence and Counterclaim.

[5] However, on 21 January 2014, the Plaintiff's claim was struck out by the Master for want of prosecution, in terms of Order 25, Rule 9 of the High Court Rules 1988. The Master also made order that the matter to take its normal course in respect of the Defendant's Counterclaim.

[6] Therefore, what is remaining for adjudication is the Defendant's Counterclaim.

The Counterclaim made by the Defendant

[7] In its Counterclaim the Defendant states, inter alia, that:

1. The Defendant is the owner of a commercial property commonly known as "Natco building" situated at 24/26 Edinburgh Drive, Suva.
2. The Plaintiff had been a tenant of the Defendant. The Plaintiff terminated its tenancy by issuing to the Defendant one month's notice to vacate by letter dated 25 July 2011.
3. However, the Plaintiff failed and refused to pay the rental due and owing to the Defendant under the terms of the lease. As a result, the Defendant had to recover its rent by a lawful means provided for under the Property Law Act (Chapter 131) and Distress for Rent Act (Chapter 36).
4. On 18 August 2011, the Defendant engaged the services of a licensed bailiff to execute the distress for rent against the Plaintiff as a consequence of which it incurred unnecessary expenditure, in the sum of \$1,200.00.
5. On 18 August 2011, the Defendant engaged the services of security officers to secure possession of the goods and items distrained which resulted in further expenditure by the Defendant, in the sum of \$1,708.67.
6. Since the expiry of the notice to vacate, the Plaintiff has wrongly been in occupation and possession of part of the subject premises and has thereby trespassed and is still trespassing thereon. By reason of this the Defendant has been deprived of the use and enjoyment of the said land and premises, and has thereby suffered loss and damages.

7. The Plaintiff has failed and refused to pay electricity charges to the Defendant for the use of electricity at the Defendant's premises at 24/26 Edinburgh Drive, Suva in the sum of \$7,700.00 and as such, the Defendant claims from the Plaintiff the sum of \$7,700.00.
8. The Plaintiff has failed and refused to pay the Defendant the money which the Plaintiff borrowed from the Defendant around 9 October 2008. The Defendant claims from the Plaintiff the sum of \$3,391.50, being moneys payable by the Plaintiff to the Defendant for money lent and advanced by the Defendant to the Plaintiff.
9. Accordingly, the Defendant Counter claims:
 - (1) Judgment in the sum of \$14,000.17
 - (2) General damages for trespass
 - (3) Interest
 - (4) Costs on an indemnity basis
 - (5) Further or other reliefs

[8] On 2 September 2015, Counsel for the Plaintiff, Vakaloloma & Associates filed an Ex-parte Notice of Motion, which was supported by an Affidavit, seeking to withdraw as Counsel for the Plaintiff, due to the lack of instructions from the Plaintiff.

[9] Having considered the Ex-parte Notice of Motion, this Court made order, on 18 November 2015 that the said Notice of Motion be struck out.

[10] Thereafter, on 30 November 2015, the Counsel for the Plaintiff filed an Inter Parte Notice of Motion, which was supported by an Affidavit, seeking to withdraw as Counsel for the Plaintiff, due to the lack of instructions from the Plaintiff.

[11] Being satisfied that the Plaintiff had been duly notified of the Notice of Motion, on 10 December 2015, this Court permitted the application made by the Counsel for the Plaintiff to withdraw as Counsel for the Plaintiff.

- [12] Thereafter, the matter was fixed for hearing on 23 March 2016. Although notices had been duly served on the Plaintiff, they were absent and unrepresented on that day. The matter was next fixed for hearing on 10 June 2016, which date had also to be vacated by Court.
- [13] The matter was re-fixed for hearing on 15 July 2016. On this day, Mr. Joseph Wise, a Director of the Plaintiff Company was present in Court. The Plaintiff Company was also represented by Counsel Ms. L. Malani. The Counsel sought an adjournment on the basis that she had been retained only a few days before. In the circumstances, Court reluctantly granted an adjournment and the Plaintiff was ordered to pay costs in the sum of \$1500.00.
- [14] This matter was then called in Court on three more occasions (on 28 September 2016, 17 October 2016 and 28 October 2016) for the new Solicitors for the Plaintiff (Nawaikula Esquire) to regularize their appearance. The matter was re-fixed for hearing on 27 January 2017.
- [15] On 27 January 2017, Mr. S. Raikanikoda appeared on behalf of the Plaintiff and moved for an adjournment of the hearing, so as to enable him to file a Notice of Change of Solicitors. He submitted that he had received the brief from Mr. Nawaikula only that morning.
- [16] The Counsel for the Defendant strongly objected to the matter being adjourned any further. I too was in total agreement with the Counsel for the Defendant that no further adjournments should be granted. As such, I refused the application made by Mr. Raikanikoda for adjournment of the matter.
- [17] Thereafter, Mr. Raikanikoda sought permission to leave Court. He was permitted to do so. In the circumstances, the matter was taken up for hearing in the absence of the Plaintiff or Counsel on their behalf.
- [18] For purpose of clarity, it must be stated that, Nawaikula Esquire, remain on record as the Solicitors for the Plaintiff.

THE DEFENDANTS' CASE

[19] Mr. Naushad Ali, the former Chief Operating Officer of the Defendant Company, testified on behalf of the Company.

[20] The defence also tendered the following Exhibits:

- **D1** - Company search on Cooke's United Refrigeration and Air Conditioning Limited.
- **D2** - Lease Agreement between Food Processor's (Fiji) Limited and Cooke's United Refrigeration and Air Conditioning Limited.
- **D3** - Distress for Rent notice.
- **D4** - Naidu Law invoice dated 24 August 2011 together with Receipt No: 685.
- **D5** - Beekay's Security and Consultancy Services invoice no: 01/2011.
- **D6** - Consent Order made on 26 August 2011.
- **D7** - ANZ Bank Cheque No: 262142
- **D8** - BSP Bank Cheque No. 335485
- **D9** - Letter from Defendant to Plaintiff dated 08 September 2011.
- **D10** - Letter from Plaintiff to Defendant dated 19 September 2011.
- **D11** - Letter from George Small Engine Repairs to Naidu Law dated 22 August 2011.
- **D12** - Letter from Defendant to Plaintiff dated 18 December 2006.
- **D13** - Letter from Plaintiff to Defendant dated 11 January 2007.
- **D14** - Letter from Defendant to Plaintiff dated 15 January 2007, together with receipt no: 71578.
- **D15** - Agreement dated 9 October, 2008 between Plaintiff and Defendant together with payment vouchers, receipts and breakdown of outstanding loan amount.
- **D16** - Invoices for Legal Costs incurred by the Defendant Company.

- [21] Naushad Ali testified that he was employed at the Defendant Company for 12 years, since 17 January 2005. In 2011, he functioned as Chief Operating Officer. He was the Officer who was personally handling this case on behalf of the Defendant.
- [22] The Plaintiff was a limited liability company. As per the company search carried out (Defence Exhibit D1), its Directors were Joseph Lum Kon Wise and Emily Manaseitava.
- [23] He further stated that the Defendant had entered into a Lease Agreement with the Plaintiff to lease out a commercial building known as "Pacific Crown Complex" with office and warehouse space, situated at 24/26 Edinburgh Drive, Suva. A copy of the Lease Agreement was tendered to Court as Defence Exhibit D2.
- [24] Since the Plaintiff was in arrears of rent, the Defendant issued Distress for Rent Notice against the Plaintiff in the sum of \$23,356.85 (Defence Exhibit D3).
- [25] The Defendant paid Naidu Law \$1,200.00 in legal fees for matters pertaining to the Distress for Rent Notice (Defence Exhibit D4).
- [26] The Defendant hired Beekay's Security and Consultancy Services for providing security services at the distrained premises. For this service the Defendant had paid Beekay's Security \$1,708.67 (Defence Exhibit D5).
- [27] The distress for rent was resolved when the Plaintiff and Defendant entered into a Consent Order, on 26 August 2011, pursuant to which the Plaintiff paid the Defendant the sum of \$23,356.85. The Consent Order dated 26 August 2011, was tendered to Court as Defence Exhibit D6; and the two cheques whereby payment was made to the Defendant, were tendered to Court as Defence Exhibits D7 and D8 respectively.
- [28] Furthermore, the Plaintiff had given an undertaking that they would vacate the premises by 25 August 2011. However, the Plaintiff had failed to vacate the premises within the stipulated time frame. A letter from the Defendant to the Plaintiff, dated 8 September 2011, was tendered to Court as Defence Exhibits D9. Therein, the Defendant informs the Plaintiff that since they have still not vacated the premises, the

Defendant will now deduct rental from the bond deposit for the number of days the Plaintiff occupies the premises after the expiry of the notice period.

- [29] The Plaintiff responded by letter dated 19 September 2011, explaining the reasons why they could not vacate the premises within the time stipulated (Defence Exhibit D10).
- [30] The witness testified that the Plaintiff formally vacated the premises around October 2011.
- [31] It was also found that the Plaintiff had sublet part of the leased premises to George Small Engine Repairs without the Defendant's consent (Defence Exhibit D11).
- [32] Mr. Ali further testified that the Plaintiff owed the Defendant \$13,000.00 for unpaid electricity bills. The Plaintiff and the Defendant reached an agreement for the Plaintiff to pay the Defendant \$8,000.00, out of the \$13,000.00, by monthly repayments of \$300.00. The Defendant considered the balance \$5,000.00 as a loss in its books. However, the Plaintiff only paid the Defendant \$300.00 and \$7,700.00 is outstanding (Defence Exhibits D12, D13, D14).
- [33] The witness further submitted that the Defendant advanced the sum of \$5,000.00 to the Plaintiff. Out of the said sum advanced, a sum of \$3,391.50 is outstanding (Defence Exhibit D15).
- [34] The Defendant is also claiming costs for the legal fees it paid to its Solicitors. As per Defence Exhibit D16 a sum of \$7,428.40 had been paid to their Solicitors Naidu Law, as at 22 January 2014. Since that day, the Defendant has incurred further legal cost in the sum of \$1,968.60, as at 21 October 2016, and \$3,493.30 from 22 October 2016 until the date of trial (Invoice No's 894 and 924 from Naidu Law- attached to the written submissions filed by the Defendant). Thus the total sum of legal fees paid by the Defendant to its Solicitors Naidu Law amounts to \$12,890.30.

ANALYSIS AND DETERMINATION

- [35] The evidence of Mr. Naushad Ali was unchallenged. As stated before, during the hearing of this matter, the Plaintiff was absent and unrepresented. This is despite Nawaikula Esquire being on record as the Solicitors for the Plaintiff.
- [36] From the testimony of Naushad Ali and the documents tendered in support of their case (Defence Exhibits D1 to D16), Court is satisfied that the Defendant has succeeded on a balance of probabilities in proving their Counterclaim.
- [37] Accordingly, this Court grants judgment in favour of the Defendant in the sum of \$14,000.00, as prayed for in the Counterclaim.
- [38] In terms of Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Chapter 27 of the laws of Fiji), I order that interest at 6% per annum on the Judgment sum of \$14,000.00 be paid to the Defendant from the date the Defendant filed its Counterclaim (which was on 16 September 2011) to the date of this Judgment.
- [39] During the hearing of this matter, the Counsel for the Defendant informed that Defendant is not pursuing its claim for general damages for trespass.
- [40] However, the Defendant is seeking to recover costs it incurred in these proceedings from the Plaintiff on an indemnity basis. As referred to at paragraph 34 of this Judgment, the total sum of legal fees paid by the Defendant to its Solicitors Naidu Law amounts to \$12,890.30. The Defendant is seeking an order from Court that the Plaintiff pay the Defendant at least \$8,000.00 in costs.
- [41] Considering all the facts and circumstances of this case, this Court is of the opinion that this is a reasonable claim made by the Defendant. Accordingly, I make order that the Plaintiff should pay the Defendant \$8,500.00 in Costs.
- [42] Further, in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act No 46 of 2011, I order post judgment interest at 4% per annum on

the Judgment sum of \$14,000.00, the interest thereon, and the costs of \$8,500.00 from the date of Judgment until the date of settlement.

FINAL ORDERS

Accordingly, I order the Plaintiff to pay to the Defendant:

1. \$14,000.00 as claimed in the Counterclaim.
2. Interest at 6% per annum on the Judgment sum of \$14,000.00 from the date the Defendant filed its Counterclaim to the date of this Judgment.
3. Costs of \$8500.00.
4. Post Judgment Interest at 4% per annum on the Judgment sum of \$14,000.00, the interest thereon, and the Costs of \$8,500.00, from the date of Judgment until the date of settlement.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Dated this 5th day of March 2019, at Suva.