

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CIVIL JURISDICTION

High Court Civil Action No. 141 of 2011

BETWEEN : MEAT CUISINE FIJI LIMITED (In Receivership) a duly incorporated limited liability company having its registered office in Nadi.

Plaintiff

AND : CARPENTERS FIJI LIMITED a duly incorporated limited liability company having its registered office in Suva, trading under the name and style of MORRIS HEDSTROM

Defendant

Solicitors : Mr Siwan K. for the Plaintiff  
Mr Narayan E. for the Defendant  
Date of Trial : 28.11.2018 & 11.02.2019  
Date of Judgment: 25.09.19

## JUDGMENT

### INTRODUCTION

1. Meat Cuisine Fiji Limited ("MCFL"), for many years, supplied meats, vegetables and other foodstuffs to its clientele in Fiji. MCFL had a supply agreement with every one of its client. As a competitive marketing strategy, and to encourage sales, MCFL had a rebate clause in every supplier agreement it had with its clients.
2. The company's clientele included some supermarkets. One such supermarket client was the chain which operated under the business name and style of Morris Hedstroms ("MH").
3. Carpenters Fiji Limited ("CFL"), the defendant, is a limited liability company. CFL was the proprietor of the MH chain.
4. Any reference in this judgement to MH or CFL, is a reference to the same party.

5. What MCFL is seeking to recover from CFL in this case are some outstanding payments for certain deliveries made.
6. There were only two witnesses called in this case, one for the plaintiff (MHCFL) and one for the defendant (CFL). For the plaintiff, Keith Travis (PW1) gave evidence. He was formerly a director of MCFL. For the defendant, Reginald Vikash Prasad (DW1), the Deputy Financial Controller for CFL t/a MH Tacirua Heights, gave evidence.

## TWO AGREEMENTS

7. There are two supply agreements at issue in this case. Both agreements were confirmed by DW1.
8. The first is the Morris Hedstrom Supplier Agreement dated 23 March 2010 ("**2010 Agreement**"). Clauses 1 and 2 of the 2010 Agreement provides as follows:
  1. *The parties acknowledge that the "Terms" are the following:*
    - a. *20 days from statement date.*
  2. *The parties acknowledge that the rebate terms are the following:*
    - a. *\$ not filled out (rebate amount) **or** a not filled out % of purchases for the period specified in (c) below. This rebate is based upon the following;*  
*\$1.00 - \$1.0m is 6% Rebate*  
*\$1.0m Above is 10% Rebate*
    - b. *% of monthly purchase*
    - c. *This rebate shall be for the period 1<sup>st</sup> February 2010 to December 2010*
    - d. *Rebate targets will be adjusted retrospectively in the month, which (sic) the new slab is reached, and reconciled from the first Fijian dollar purchases.*
9. The second is the one dated 03 February 2011 ("**2011 Agreement**").
  1. *The parties acknowledge that the "Terms" are the following:*
    - a. *15 days from statement date.*
  2. *The parties acknowledge that the rebate terms are the following:*
    - a. *Total some illegible handwriting 5% rebates*  
*Rebates to be collected on monthly basis*
    - b. *% of monthly purchase*
    - c. *This rebate shall be for the period 1<sup>st</sup> January 2011 to December 2011*
    - d. *Rebate targets will be adjusted retrospectively in the month, which (sic) the new slab is reached, and reconciled from the first Fijian dollar purchases.*

*To ensure rebates are met, payment must be made by 15<sup>th</sup> to 20<sup>th</sup> of the sentence not completed (all handwritten)*

10. Both Agreements were tendered through PW1 and marked PEX1 and PEX2 respectively.

### **HOW SUPPLIES DELIVERED & REBATE IS CLAIMED AND CALCULATED**

11. As I have shown above, both Agreements had a rebate clause designed to promote sales and timely payment for supplies. This clause allowed CFL to claim a certain specified percentage refund at the end of a certain specified supply-period depending on (i) volume of sales to MH at the end of the supply period and (ii) timely payment for supplies by MH to CFL during the supply-period.
12. The rebate, of course, is calculated retrospectively at the end of the specified supply-period.
13. PW1 gave evidence on the procedure for both agreements as follows:
  - (i) MCFL sends Price List.
  - (ii) CFL places Orders from price list for each MH supermarket door.
  - (iii) MCFL makes invoice accordingly for each MH-supermarket door order.
  - (iv) MCFL delivers goods to each specified MH supermarket door, with invoice.
  - (v) Goods received at MH by Receiver Clerk. Receiver Clerk checks goods to verify supply quantity and condition and then stamps invoice with MH stamp if all is in order.
  - (iv) after delivery, MCFL feeds their copy of invoice into computer accounting system. There are four or five copies of every invoice issued.
    - (a) 1<sup>st</sup> stamped copy is kept by MCFL
    - (b) 2<sup>nd</sup> stamped copy is kept by the store that accepted delivery which they then pass on to CFL head office
  - (v) MCFL automated rebate management process prints out statement from computer accounting system at end of each month.

- (a) MCFL Payment Office will then check every invoice referred to in the Statement to check if they have been stamped by the MH store that took delivery.
  - (b) after confirmation that every invoice has been stamped, the Payment Office will then process for payment.
  - (c) processing for payment entails sending the Statement to CFL together with a stamped copy of every corresponding invoice.
  - (d) in other words, what is sent to CFL is the Statement which will have been reconciled with all the stamped invoices, together with a copy of these invoices. A statement can, for example have 150 to 200 invoices attached to it.
- (vi) for the 2010 Agreement, the prompt-payment terms provide as follows. Rebate discount will be activated if amount due is paid within 20 days of receipt of Statement. It is MCFL which activates the rebate discount
- (vii) the rebate discount is as follows:
- (a) 6% rebate for purchases up to \$1million
  - (b) 10% rebate for purchases in excess of \$1million
- (viii) the rebate for the 2010 Agreement was for the period 01 February 2010 to December 2010.
- (ix) as for the 2011 Agreement, the rebate period was from 01 January 2011 to December 2011. To attract rebate, payment must be made within 15 days of receipt of Statement from MCFL.

### UNPAID SUPPLIES

14. MCFL claims two things:

- (i) unpaid supplies for the month of March and April 2011 as follows:

January 2011	\$92,000	paid	Paid late
February 2011	\$79,000	paid	Paid late
March 2011	\$47,016.53	unpaid	
April 2011	\$38,051.04	unpaid	

- (ii) deductions which CFL made which resulted in a shortfall on some payments.

15. At paragraphs 22 to 24 of their written submissions, the defendant's counsel concedes that:
  22. *...pursuant to the Second Supplier Agreement, from the period of January to March of 2011, the Plaintiff had supplied goods worth of \$260,184.57.*
  23. *The Defendant accepts that it has not made payment for the supplies made during the months of March (\$47,016.53) and April (\$38,051.04) in total amounting to \$85,067.57 due to the fact that the Plaintiff owed the Defendant balance rebate sum of \$95,085.03.*
  24. *We submit that due to the rebate payment still owing, the Defendant had to contra the payment with the debt owing which amounted to still rebate balance owing of \$10,017.46 (\$95,085.03 - \$85,067.57)*
16. As I have set out above, CFL acknowledges in their written submissions that under the 2011 Agreement, MCFL had supplied goods to CFL worth \$260,184.57.
17. At paragraph 22 of his written submissions, CFL's counsel concedes that MCFL did supply CFL a total of \$85,067.57 of goods in the month of March and April 2011 and that this amount has not been paid to MCFL by CFL.
18. At paragraph 23, CFL's counsel submits that the reason why CFL has not paid MCFL the sum of \$85,067.57 is:

*due to the fact that the Plaintiff owed the Defendant balance rebate sum of \$95,085.03*
19. It appears that CFL wishes to offset the \$85,067.57 owed to MCFL against the sum of \$95,085.03 which it claims is owed to CFL by MCFL in unpaid rebates.

## ISSUES

20. The issues are:
  - (i) did CFL make some deductions which resulted in a shortfall in some payments? If so, for which period of time and was CFL entitled to make those deductions? If not, should those deductions be reimbursed to MCFL?
  - (ii) given that CFL has already acknowledged that:



- (a) MCFL did supply CFL a total of \$85,067.57 of goods in the month of March and April 2011 and
  - (b) that this amount has not been paid to MCFL by CFL –  
is CFL entitled to offset that against the sum of \$95,085.03 which CFL claims is owed to CFL by MCFL in unpaid rebates?
- (iii) the answer to the above depends on whether MCFL actually owes CFL \$95,085.03 in unpaid rebates.

### DEDUCTIONS MADE BY CFL

21. The deductions were made by CFL pursuant to clause 2(d) of the 2010 agreement. In his evidence, DW1 said that clause 2(d) of the 2010 Agreement entitled CFL to deduct 3% on every monthly payment.
22. He gave the following illustration:
- e.g. if CFL purchased \$100,000 worth of goods from MCFL for any particular month, CFL is entitled under clause 2(d) to withhold 3% in rebate and pay MCFL \$97,000 only.*
- CFL will take 3% every month from January to December. If by December CFL has purchased over \$1million in goods from MCFL, then it would be entitled to 10% rebate. Since CFL has been deducting 3% every month, it will only be entitled to 7% rebate at the end of the year which will be paid by MCFL in January the following year.*
23. DW1 said that as far as he is aware, in 2010, MCFL made a total of \$1.3 million dollars in sales to CFL. Accordingly, based on clause 2(d), CFL is entitled to 3% deduction. This amounts to \$40,750. This is the amount which CFL deducted from its payment to MCFL. This is also the “shortfall” which MCFL claims.
24. DW1 then said that, because the total sales to CFL by MCFL for the 2010 period was \$1.35 million, which exceeded \$1 million, CFL was entitled to a 10% rebate under clause 2 of the 2010 Agreement. This 10% rebate was payable to CFL by MCFL at the end of the 2010 period, that is, at some point in January 2011.
25. DW1 said that since CFL had already deducted 3% in rebate on a monthly basis, all it would be entitled to at the end of the year would be 7% rebate (i.e. 10% less 3%), which, in this case, amounted to \$95,085.03.

26. This \$95,085.03, according to DW1, is what MCFL owed CFL in unpaid rebates for the year 2010.

**IS CFL ENTITLED TO OFFSET THE \$85,067.57 OF GOODS SUPPLIED BY MCFL IN MARCH AND APRIL 2011 AGAINST THE \$95,085.03 IN UNPAID REBATES ALLEGEDLY OWED TO CFL BY MCFL?**

27. DW1 confirmed in his evidence that MCFL supplied CFL goods in January, February, March and April 2011 to the total value of \$260,000.
28. After that, MCFL made no further supplies.
29. DW1 confirmed that CFL has settled the January and February 2011 accounts. However, as I have said, CFL chose not to settle the March and April 2011 Accounts because CFL wanted to offset that against the \$95,085.03 allegedly owed to CFL in unpaid rebates.
30. Mr. Siwan's cross-examination of DW1 targeted two things.
31. Firstly, that clause 2(d) of the 2010 Agreement does not entitle CFL to deduct 3% from any payment.
32. Secondly, that the figure of \$95,085.03 (i.e. the 7% unpaid rebate) can only be established by CFL if (a) CFL were to prove that it had made payments promptly in terms of the 2010 Agreement such as to entitle it to the 10% rebate and (b) that the total volume of sales to CFL in 2010 exceeded \$1 million such as to entitle CFL to a 10% rebate.

***Does Clause 2(d) of the 2010 Agreement Entitle CFL To Deduct 3% In Rebate?***

33. PW1 said that CFL rarely settled any monthly Statement within the time stipulated to attract rebate. On the few occasions when CFL paid on time, CFL has paid the rebate by MCFL. I have no reason to doubt this.
34. The arrangement is that CFL is supposed to pay MCFL the un-rebated full amount on every monthly statement. If, for example, the money was being paid within the stipulated rebate time, MCFL would then rebate CFL the discount applicable.

35. PW1 emphasized that it is MCFL that refunds CFL any rebate due rather than CFL deducting that amount in its payment.
36. In examination in chief, DW1 had tried to justify the 3% deduction in terms of clause 2(d) of the 2010 agreement.
37. However, when put to him in cross-examination that clause 2(d) does not say that, DW1 then tried to justify the 3% deduction in terms of clause 7(a) of the 2010 Agreement.
38. Clause 7(a) merely states as follows:
7. *The rebate and gondola space income will be payable to CFL the following terms and conditions (sic)*
- a. *Month deducted from payment*
39. And when put to him in cross examination that clause 7(d) says nothing about the 3% deduction, DW1 tries to justify it in terms of "our business practice".
40. DW1 was further cross-examined as follows:
- Q. *But there was no evidence from you to show the Court that the defendant company advised the plaintiff company that "we are deducting this 3% as rebate. Is it correct? You do not have any such evidence before this Court?*
- A. *At the moment.*
41. I find DW1 evasive and misleading. I do not accept his evidence. Clause 2(d) does not entitle CFL to make any deduction, let alone a 3% deduction.

### ***Did CFL Pay Promptly in 2010?***

42. In chief, PW1 had referred to the prompt payment discounts in the 2010 and 2011 Agreements (see paragraph 13 above). He also explained in chief (see page 15 of court transcripts) why, because they were suppliers in a low margin competitive business environment, the prompt payment clause was very important for their survival and in order to stay competitive.
43. In chief, DW1 said that there was a prompt payment arrangement in the 2011 Agreement but not in the 2010 Agreement (see page 115 of the Court transcripts).



44. In cross-examination, the following questions were put to DW1:

Q. ....You also admitted witness that at a certain point in time in 2011 agreement, you did not pay on time. Is it correct?

A. Yes

Q. So if the payments were not made on time, on what basis did the defendant company deduct?

A. In 2011, we did not minus it.

Q. And in the 2010 Agreement?

A. There was no agreement in 2010 that the rebate will be based on prompt payment terms.

.....  
Q. But...you have admitted that, as per the first agreement (2010), you were given time to pay 20 days but the company did not meet the obligation. Is it correct?

A. No, that is the second one

Q. I am talking about the 20 days one – that is in the 2010 Agreement. Have a look at it.

A. 2010.. we have paid, not specifically on the 20<sup>th</sup> of every month but obviously from 20<sup>th</sup> to the 30<sup>th</sup>.

Q. So the payments were not made on time?

A. Obviously.

45. I find that the 2010 Agreement included a provision in clause 1 for prompt payment and that this was what the parties understood. I also find that there is no clear evidence that CFL was prompt in its payments.

### ***What Was The Total Volume of Sales in 2010?***

46. DW1 was cross-examined as follows:

Q. You say that in the 2010 Agreement, the record of your purchases with MCFL was worth \$1.35 million. Is it correct? You have any evidence to show to this Court confirming the same?

A. I do not have but it should be in some file.

Q. How did you calculate the 7% balance? You said something about \$95,000. You said 7% was rebate?

A. Rebate balance. We had deducted \$40,000 from this payment. Total was \$135,000.

Q. And did you notify the Plaintiff company that tis \$40,000 has been deducted?

A. Correct. We are entitled.

Q. Did you notify the plaintiff company that "we are deducting \$40,000 from this

*payment.*

A. *To my knowledge*

47. There was no evidence adduced by DW1 to satisfy me that the total sales to CFL in 2010 was \$1.35 million. Accordingly, I refuse to accept this as true. Why DW1 did not simply extract the relevant commercial documents from CFL's files, is a mystery to me. Since I am not accepting this as proved, MCFL also cannot justifiably ask to be refunded the sum of \$40,750 which was retained by CFL based on the estimated but unproven \$1.35 million total sales volume for 2010.

#### DID CFL SUFFER ANY LOSS WHEN MCFL CLOSED BUSINESS?

48. In examination in chief, DW1 (see pages 115 to 117) said that after MCFL ceased providing supplies to CFL in April 2011, CFL began dealing with another supplier called Jet Set Supplies. I observe that DW1 was rather evasive at first in answering cross-examination questions on this. DW1 conceded also in cross-examination that he did not have any supportive documentation to prove that CFL had lost \$108,358 after MCFL ceased supplies to CFL (see page 131 of Court transcripts).

#### OBSERVATIONS

49. The defendant's case rests on the theory that the 2010 Agreement did not provide for any prompt payment rebate but only a gross volume rebate which is calculated at the end of the year.
50. How then the defendant is able to justify the 3% deductions it was making for the monthly sales, is hard to understand in terms of that theory. It does not make sense. If accepted, it would mean that the defendant would be entitled to a 10% (or 6%) rebate if the total sales to the defendant exceeded \$1 million (or less than \$1 million) at the end of 2010, regardless of whether the monthly payments were settled within the 20 day period or even two or three months after statement. It would also mean that the defendant would be entitled to make deductions every month even if it were to settle every monthly bill within 20 days or outside the 20 days.
51. Of course, apart from the above, as I have said above, the simple fact is that the 2010 Agreement does not say anywhere that the defendant is entitled to deduct 3% for every monthly account.



52. A great deal of objection was raised during trial when PW1 tried to tender some statements without the supporting invoices. Mr. Narayan objected that, without the supporting invoices, the statements cannot go in as evidence of debt.
53. Later however<sup>1</sup>, Mr. Narayan said his client does not dispute that goods were delivered by MCFL to CFL. Rather, the issue is whether or not CFL did pay on time. He said the invoices are relevant to this. The statements on their own, cannot be relied upon.
54. Mr. Narayan's objections seemed valid at first. However, as he later conceded<sup>2</sup>, the only dispute is his client's entitlement to rebate.

### ORDERS

55. I find in favour of the plaintiff and order as follows:
- (i) Judgement in favour of the plaintiff in the sum of \$85,067.57 of goods in the month of March and April 2011.
  - (ii) 6% interest p.a on the above sum.
  - (iii) Costs in favour of the plaintiff which I summarily assess at \$2,500 (two thousand five hundred dollars only).



Anare Tuilevuka  
**Judge**  
Lautoka

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<sup>1</sup> See page 51 of transcripts.

<sup>2</sup> Ibid page 51 of transcripts.