IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 124/2003

BETWEEN **MOHAMMED NASIR KHAN & MOHAMMED NAZIM KHAN** both sons of Mohamed Yakub Khan formerly trading as **MOHAMMED YAKUB KHAN & COMPANY** a firm of Lautoka but now trading as **MOHAMMED YAKUB KHAN & COMPANY LIMITED** a limited liability company having its registered office at Lautoka

Plaintiff

AND **TROPIC WOOD INDUSTRIES LIMITED** a limited liability company having its registered office at Lautoka.

Defendant

APPEARANCES:
Mr Tunidau for the Plaintiff
Mr Haniff for the Defendant

DATE OF HEARING: 30 June 2020

DATE OF JUDGMENT: 6th July 2020

DECISION

Background

1. This proceeding was commenced by the plaintiff in 2003. The last amended statement of claim dated 3 May 2007 included seven causes of action arising from a contract between the parties dated 1 July 1997 (which I understand redocuments an arrangement that has been in place since 1987, and is still in effect and being performed by the parties). Pursuant to this contract the plaintiff is responsible for carting woodchip from the defendant's sawmill at Drasa to the defendant's woodchip storage and loading facility at Lautoka Port, and for managing and maintaining the storage. For this work the plaintiff is entitled to payment at an agreed - stipulated in the contract - rate of $3.28 (including VAT) per tonne of woodchip moved by the plaintiff.

2. Of the seven causes of action that were extant in 2007, all but one have been settled, resolved or abandoned. It is not necessary here to explain how. The single remaining cause of action, the Fourth, relates to the review of the per tonne payment amount. In 2007 this issue was referred for mediation, but it seems that the parties could not resolve the matter. Nothing then happened for 10 years, until in 2017 new solicitors for the plaintiff sought to resurrect the matter, and sought a

hearing date. The defendant filed, but later abandoned an application to strike out the plaintiff's claim, and the matter came before me in December 2019 for trial.

3. At trial, the plaintiff's first witness was Mr Zarin Khan, a chartered accountant who sought to prove the amount claimed. It quickly became apparent that Mr Khan was applying a formula that had not been pleaded to accounting information that had not been disclosed by the plaintiff to arrive at the amount he suggested was due. The defendant complained that it was taken by surprise by this evidence, and sought an adjournment, which I granted, to enable the plaintiff to provide further particulars of its claim, and further and better discovery.

4. Because the parties were not able to agree on the details of the further particulars to be provided, or the extent of further discovery, the defendant eventually made a formal application for these. This decision relates to that application, filed in February, but heard only now because of the court's suspension, and my absence, as a result of the Covid 19 pandemic.

Plaintiff's claim & defendant's concerns

5. Clause 22 of the 1997 contract provides:

> 22. *TROPIK shall pay the CONTRACTOR for the satisfactory services performed as specified in this Agreement at a rate of $3.28 ... inclusive of VAT per tonne based on net weight of woodchips recorded over TROPIK's Drasa weighbridge.*
>
> ...
>
> *The rates specified above will be subject to review by the parties hereto every July and will be increased or decreased with retrospective effect from the first day of this month if the parties agree that the CONTRACTOR's costs (exclusive of depreciation), assessed on the basis of a standard formula acceptable to both parties, have changed to a significant degree over the course of the preceding year.*

6. The plaintiff's fourth cause of action referred to asserts (paragraph 27) that pursuant to the proper application of this clause of the parties' agreement the plaintiff is entitled, *in accordance with the accepted formula* to a further payment of $252,879.13. The statement of claim does not say what the accepted formula is, how this amount is calculated, or what period it covers, but after pleading clause 22 of the contract (reproduced in clause 5 above) goes on to say:

> 25. *The Plaintiff will adduce evidence on the hearing of this action on the standard formula applied in support of this claim.*
>
> 26. *That on numerous occasions the plaintiff requested the defendant to review the rates payable to the plaintiff in accordance with clause 22 of the written agreement but the defendant refused to agree to such reviews.*
>
> 27. *That in accordance with the accepted formula the sum of $252,879.13 ... is a reasonable sum payable to the plaintiff in the event that such review had taken place.*

7. The defendant complains that this is not a sufficient pleading to fully and fairly inform the defendant of the claim that it faces. The defendant's summons of 28

February 2020 seeking further and better particulars and discovery of documents asks for orders as to particulars as follows:

> 1. *That the Plaintiffs do serve on the Defendants within 7 days of the Court making such orders for further and better particulars of the Statement of Claim issued on 11 June 2007 as follows:*
>   *(a) Paragraph 25: Particularize:*
>   *(i) the specific formula the Plaintiffs intend to rely on at the continuation of the trial of this action*
>   *(b) Paragraph 26: Particularize:*
>   *(i) the details provided to the Defendant to review the rates in accordance with Clause 22 of the written agreement between the parties.*
>   *(c) Paragraph 27: Particularize:*
>   *(i) the formula accepted by the Plaintiff*
>   *(ii) the details of how the sum of $252,879.13 was calculated.*

And as to the further discovery, the defendant seeks the following orders:

> 2. *That the Plaintiffs provide the following documents within 7 days of the court making such order:*
>   *(a) The Plaintiff's tender document referred to in the Plaintiff's tender submission letter dated 24 April 1997*
>   *(b) The complete set of documents relating to the tender bid of $3.28 VIP per tonne.*
>   *(c) The complete set of documents of the amount of $3.28 was arrived at and agreed between the parties.*
>   *(d) All correspondence relating to the formula rate agreed for the tender bid of $3.28 VIP.*
>   *(e) The rates adjustment computation for 1998 and 1999.*

8. Prior to the defendant making its application of 28 February, the plaintiff on 22 January filed and served a further list of documents (with a verifying affidavit). Unusually, but helpfully on this occasion, the list of documents annexes copies of the additional documents discovered. This material suggests that at least in 2007/8 the defendant understood how the formula was supposed to work, and what figures applied to it, but I accept that given that this matter has now come back for the court to decide the issue, the defendant – and the Court - are entitled to know much more precisely than the statement of claim currently conveys what the plaintiff says is the formula that the parties agreement provides for, and how does that formula, once populated with figures for the various elements of the formula, translate into the amount claimed.

The Law

9. Order 18 Rule 6(1) of High Court Rules 1988 (**"HCR"**) provides:-

> 6(1) *Subject to the provisions of this rule, and rules 9, 10 and 11, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.*

10. The importance of pleadings in the civil procedure that is practised in UK and most commonwealth countries, including Fiji, is explained by Bisson J in the New Zealand

Court of Appeal in **Hopper Group Ltd v Parker** (1987) 1 PRNZ 363 @ 366 in the following passage:

> *One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial and questions such as payment into Court or offers of settlement can hardly be considered. Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly, suddenly emerges.*

11. The rule referred to above, and the many cases that deal with it, make the distinction between facts and evidence, but this dichotomy is often not well understood. After all, evidence usually contains facts, and evidence is usually essential to prove the case. What Rule 6 requires is the assertion of the facts upon which the plaintiff's cause of action depends, together with sufficient particulars to make those assertions intelligible to the court and to the defendant. Hence, in a personal injury claim, although the assertion:

> *The plaintiff was injured in an incident caused by the defendant in circumstances where the defendant owed a duty of care to the plaintiff.*

may be a sufficient pleading of the essential facts to found a claim, but clearly it does not meet the requirement explained by Singh J in **Gavidi v Native Land Trust Board** [2008] FJHC 24:

> *A certain amount of details is necessary to make a claim intelligible and to be expressed with clarity so the opposing party knows the case he/she has to answer. The Rules themselves do not specify the degree of particularity required so they do admit some measures of flexibility and individuality.*

In that case the court was dealing with prolix, rather than insufficient pleadings, but it is obvious that a personal injury pleading must at least include sufficient additional facts for the Court and the defendant to know when, where and how the 'incident' happened, and how the defendant was said to be involved in circumstances that give rise to a duty of care.

12. Applied to the present case those principles mean that the pleadings must include allegations of those elements of the plaintiffs' cause of action proof of which is essential for the plaintiffs' claim to succeed, together with sufficient particulars to make that claim intelligible to the defendant.

13. On the issue of discovery the obligations of a party are clear. Order 24, Rule 2 states:

> *(1) Subject to the provisions of this rule ...the parties to an action between whom the pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, ... make and serve on that other party a list of documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.*

Subrule (7) allows a party to insist that the list of documents is verified by affidavit.

14. O.24, r.5 stipulates that the list of documents must comply with Form 13 in Appendix 1 of the High Court Rules, which requires the party whose list of documents it is to set out all the documents that the party has or has had in its *possession custody or power relating to the matters in question in this action.*

15. In a system that is highly dependent on trust, the obligations on discovery of parties and their solicitors are high, and the sanctions for both where there is a breach of those obligations can be severe. The omission of relevant documents from a list can amount to perjury by the person verifying the list. The filing by a solicitor of a list of documents amounts to an assurance by the solicitor to the Court that he/she has explained to the client the obligations on discovery, and is satisfied that the list complies with those obligations. If the solicitor is not so satisfied, the list should not have been filed.

16. Even where there is an inadvertent failure to provide discovery, the consequences for the party at fault can be fatal to its claim. As Order 24, Rule 16 makes clear, the Court in such a case can refuse leave to use the document, strike out the defaulting party's claim or defence, and commit a person to prison for contempt.

Analysis

17. In the present case the only facts pleaded in the plaintiffs' fourth cause of action in the Amended Statement of Claim of June 2007 are the terms of the agreement in paragraph 24 referring to review and application of a 'standard formula', and the assertion in paragraph 27 that application of the formula results in a certain sum being payable by the defendant to the plaintiff. The pleadings in paragraphs 25 and 26 of the claim are not assertions of fact that explain the claim in any way. A promise to provide evidence in future about the standard formula does not assist the defendant to understand the basis of the claim, and the fact that the defendant has on several occasions declined to review the payments is irrelevant. What matters is surely whether the defendant is contractually (or otherwise – although no alternative basis for an obligation to review is suggested) obliged to do so, whether he/she has breached that obligation, and that the breach has caused loss.

18. It is not the function of the court or the responsibility of the defendant to plead the plaintiffs' case for them, but at the very least I would expect to see, in addition to the assertion as to the terms of the contract,
    - an explanation of what the acceptable standard formula is that the plaintiff says is applicable to any review of the payment rates,
    - information as to how the contractor's costs have changed to a 'significant degree' over the course of the preceding year(s) (whatever that is said to be)
    - an assertion that the proper application of the formula results in the plaintiff being entitled to an increased payment rate under the agreement
    - how that formula produces the figure claimed by the plaintiffs in paragraph 27 of its claim.

19. In this case the formula is obviously a calculation based on financial information relating to the capital and consumable costs incurred by the plaintiffs in carrying out the carriage, storage and woodchip management services they have contracted to provide. Therefore a coherent and informative pleading must include (whether by way of primary pleading or particulars does not really matter) sufficient additional information as to how data is applied to populate the formula to arrive at the figure claimed, and how and from what that data is derived.

20. This in turn leads to the issue of discovery. I am not suggesting that either the plaintiff or their solicitors have deliberately failed to provide full discovery. But while the list of documents provided by the plaintiffs in January 2020 may be a genuine attempt to include all relevant information, it suggests that they have not applied their minds to what they need to do to prove their claim, if they can. This in turn, I suggest, arises from the fact that their pleadings do not address the facts that they need to establish to succeed in their claim. Had the claim been pleaded in the manner that I have suggested above is required, it would surely have occurred to the plaintiffs and their advisers, that in addition to correspondence and material that might assist in the interpretation of clause 22 of the agreement, they need to provide discovery of all the financial information (including possibly the source documents from which that information is derived) which they have used to populate the formula to reach the figure they are claiming they are owed by the defendant.

21. I do not intend to set out in detail exactly how this claim should be pleaded, or what any further discovery should consist of. Because the formula that the plaintiffs are relying on has not yet been pleaded, it is impossible to know what information is required to populate that formula, and therefore what documents need to be disclosed. Those are matters the plaintiffs and their advisers need to decide. What I can say is that if the plaintiffs at trial seek to rely, in proving their claim, on pleadings that are unclear, or documents that have not been disclosed, they are likely to encounter opposition from the defendants, and – given the history of this litigation – very little further indulgence from the Court. Nevertheless, I hope that the observations I have made in this decision are helpful to the plaintiffs in addressing the issues raised by the defendants. I note the sensible acknowledgement by counsel for the defendant that notwithstanding the fact that Mr Zarin Khan is under cross-examination it is unrealistic in the circumstances to prohibit him from discussing these issues with the plaintiff and the plaintiff's counsel. I suspect (although this is not intended to be a ruling) that as a result of the orders that I am making now Mr Khan will have to start his evidence again.

22. The defendant has sought costs on an indemnity basis. I do not agree that this situation warrants such an order. Although the situation should not have reached this point, the defendants have had 13 years to complain about the deficiencies in the pleading, and the adequacy of discovery. The fact that they did not do so until trial has led to the need to deal with the issues now.

23. I make the following orders:

i. The two day resumed trial set down for 13/14 July 2020 is vacated.

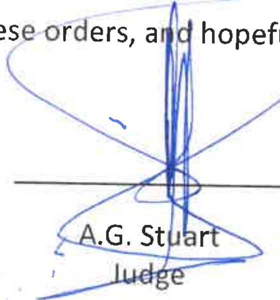
ii. Leave is given to the plaintiffs to file and serve on or before 21 July 2020:

(a) An amended statement of claim properly pleading what is currently the Fourth Cause of Action.

(b) A further list of documents complying with Order 24, Rules 2 & 5 relating to the matters still in issue.

iii. The plaintiff is to pay costs to the defendant in the sum of $1000.00 to be paid prior to the next mention date.

iv. The matter is listed for mention on 28 July 2020 at 10.30am to monitor compliance with these orders, and hopefully, fix another trial date.



A.G. Stuart
Judge

At Lautoka this 6th day of July 2020

SOLICITORS:
Kevueli Tunidau Lawyers, Lautoka for the plaintiffs
Hanif Tuitoga, Suva, for the defendant