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

CIVIL ACTION NO. HBC 127 OF 2015

BETWEEN : **VISION INVESTMENTS LIMITED** trading as **VISION MOTORS** having its registered office at 123 Ratu Mara Road, Samabula, Suva.

PLAINTIFF

A N D : **HANS RAJ & COMPANY LIMITED** a limited liability company duly incorporated under the Companies Ordinance having its registered office in Tabua Place, Varoka, Ba.

DEFENDANT

Appearances	: Mr S. Nandan with Mr R. Prakash for the plaintiff Mr V Sharma with for the defendant
Date of Trial	: 14-16 August 2019
Date of Closing Sub.	: 1 November 2019 (defendant), 21 February 2020 (plaintiff)
Date of Judgment	: 25 September 2020

JUDGMENT

Introduction

[01] This action was commenced by the plaintiff on 10 August 2015, seeking judgment against the defendant for breach of contract. The plaintiff amended its claim twice. The last amendment was on 23 March 2018.

[02] The defendant filed a defence to the second amended statement of claim and also counterclaimed against the plaintiff seeking damages arising out of misrepresentation and breach of the agreement.

[03] The trial commenced on 14 August 2019 and concluded on 16 August 2019. The defendant filed its closing submission on 1 November, 2019 and the plaintiff on 21 February, 2020.

[04] A tremendous amount of work has been put in by both counsel in filing submissions to aid the Court's task. I express sincere gratitude to each of them.

Factual background

[05] The factual background is essentially gathered from the second amended claim.

[06] Vision Investment Ltd, the plaintiff ("*the plaintiff*") is a limited liability company engaged in the business of *inter alia* wholesaling, retailing, financing and general trading.

[07] Hans Raj & Company Ltd, the defendant ("*the defendant*") is also a limited liability company.

[08] In 2013, the defendant and the plaintiff entered into an agreement whereby the plaintiff at the defendant's request agreed to supply, install and commission an escalator for the defendant at the defendant's premises and the defendant agreed to pay the plaintiff the sum of $142,000.00 ("the *agreement*").

[09] The agreement is partly is to be evinced by the following documents:

(a) Quotation from the plaintiff to the defendant dated 3 July 2013;
(b) Revised Quotation from the plaintiff to the defendant dated 5 September 2014;
(c) Quotation from the plaintiff to the defendant dated 25 March 2014;
(d) Revised Quotation from the plaintiff to the defendant dated 14 April 2014;
(e) Order from the defendant to the plaintiff dated 30 April 2014;
(f) Amended order from the defendant to the plaintiff dated 30 April 2014.

[10] In performance of its obligations under the agreement the plaintiff attempted to supply and install the escalator.

[11] It was an express and/or implied term of the agreement that the plaintiff shall not be responsible and that the defendant shall be responsible for the following:

(a) Any on-site modifications/alterations, drawings attached for builders;
(b) Constructional & structural works;
(c) Obtaining relevant permits and building certificates including labour, inspection and certification;
(d) Electrical upgrade if any.

[12] The defendant, the plaintiff alleges, in breach of the agreement and/or has been unwilling to take delivery of the escalator and prepare the defendant's site for installation of the escalator.

[13] By a letter dated 30 June 2015, the plaintiff's solicitors gave notice to the defendants to remedy its breach ("the *Notice*"). However, the defendant has failed to and/or been unwilling to remedy the breach.

[14] As a result, the plaintiff has launched these proceedings against the defendant seeking damages for breach of the agreement.

Defendant's case

[15] The defendant denied the plaintiff's claim and counterclaimed pleading that structural works were not part of its responsibility; and the plaintiff failed to provide escalator of the correct size and thereby breached the representations the plaintiff made in the agreement.

[16] The plaintiff in its reply to the counterclaim denied the allegations made by the defendant and stated that doing measurements for site preparation was not part of the contract between the parties and at the request of the defendant, the plaintiff had released one of its technicians to assist the builders.

Agreed facts

[17] At the pre-trial conference (*"PTC"*), the parties agreed to the following factual backgrounds:

1) The plaintiff is a limited liability company having its registered offices at 123 Ratu Mara Road, Samabula, Suva and *inter alia* wholesaling, retailing, financing and general trading.

2) The defendant is a limited liability company having its registered offices at Tabua Place, Varoka, Ba.

3) The plaintiff and the defendant entered into an agreement on 23 June 2014 for the plaintiff to supply install and commission an escalator at the defendant's premises in Nadi for the sum of $142,000.00 VIP.

4) The plaintiff made written representations to the defendant prior to and at the time of contracting to supply and install the escalator and which representations became terms of the contract and relied on by the defendant being:

   a) The plaintiff had the expertise and knowledge of the most suitable escalators, the sourcing, supply, installation, suitability and fitness for purpose and accommodation of existing structure.

   b) The plaintiff had a team of skilled technicians and trained installers to provide a complete turnkey solution.

   c) The escalator would be custom designed to suit the defendant's requirement and the appearance of the defendant's premises.

   d) The plaintiff's pricing was for a complete package for supply, installation and commissioning.

5) At the request of the defendant, the plaintiff provided a quotation for supply, installation and commissioning of an escalator and the defendant accepted the said quotation by sending a purchase order.

6) The defendant received from the plaintiff:

   (a) Quotation from the plaintiff to the defendant dated the 3 July 2013;

   (b) Revised Quotation from the plaintiff to the defendant dated the 5 of September 2013;

   (c) Quotation from the plaintiff to the defendant dated the 25 March 2014;

   (d) Revised Quotation from the plaintiff to the defendant dated the 14 April 2014.

7) The plaintiff received from the defendant :

   (a) Order dated 30 April 2014;

   (b) Amended order dated 30 April 2014.

8) Pursuant to the agreement (in part evidenced by the documents in items (6) and (7) hereof) the plaintiff ordered the escalator from its supplier.

9) The plaintiff visited the site on the arrival of the escalator.

10) The defendant has not taken delivery of the escalator.

11) The defendant received a notice dated 30 June 2015 from the plaintiff's solicitors to which the defendant responded through its solicitors on 31 July 2015.

12) The plaintiff instituted these proceedings.

13) The defendant repudiated the agreement alleging a breach of it by the plaintiff.

The evidence

[18] The plaintiff called 3 witnesses: Dinesh Pal (PW1), Vijay Krishnan (PW2) and Sharnit Chand (PW3).

[19] The defendant called 5 witnesses: Moneel Kumar (DW1), Sanjay Patel (DW2), Kamlesh Kumar (DW3), Vishal Krishna (DW4) and Dhakshay Parmar (DW5).

The issue

[20] The central issue at the trial was whether or not the defendant breached the agreement and if so is the plaintiff entitled to any of the reliefs it is seeking in its statement of claim.

Discussion

[21] On 23 June 2014, the parties entered into an agreement for the plaintiff to supply, install and commission an escalator at the defendant's premises in Nadi for the sum of $142,000.00 VIP.

[22] It will be noted that there was no specific written agreement for supply of the escalator incorporating the terms and conditions. The terms and conditions were to be gathered from email correspondences exchanged between the parties.

[23] During the course of correspondences, the plaintiff made the following representations respecting the supply and installations of the escalator:

a) The plaintiff had the expertise and knowledge of the most suitable escalators, the sourcing, supply, installation, suitability and fitness for purpose and accommodation of existing structures.

b) The plaintiff had a team of skilled technicians and trained installers to provide a complete turnkey solution.

c) The escalator would be custom designed to suit the defendant's requirement and to enhance the appearance of the defendant's premises.

d) The plaintiff's pricing was for a complete package for supply, installation and commissioning.

[24] Thereafter, the plaintiff provided a final quotation for supply installation and commissioning of an escalator and the defendant accepted it by sending a purchase order.

[25] The defendant provided Design Hut's drawings/plans for an escalator on the defendant's premises to the plaintiff. The plaintiff sent it to its supplier and ordered the escalator to be supplied by its supplier. Design Hut were the defendant's architects.

[26] When the escalator arrived, the plaintiff visited the site. The defendant has not taken delivery of the escalator. There were a few correspondences between the parties' solicitors. Thereafter, the defendant repudiated the agreement alleging a breach on the part of the plaintiff.

[27] It was not in dispute that the site preparation for the installation of the escalator was the defendant's responsibility not that of the plaintiff.

[28] Interestingly, the agreement excluded the following:

a) Any on-site modifications/alterations, drawings attached for builders;
b) Contractions and structural works;
c) Obtaining relevant permits and building certificates including labour inspection and certification.

[29] The plaintiff gave the escalator layout plan (which the supplier sent to the plaintiff) to the defendant so that the defendant's builder can prepare the ground site.

[30] It appears that the defendant's builder (DW4) had difficulty understanding or reading and/or interpreting the drawings. The defendant then sought assistance of the plaintiff. They sent one of its technicians (PW 3) to assist the defendant's

builder. The defendant's builder (DW4), during cross examination, admitted that he is not a qualified builder.

[31] In the course of the site preparation, the plaintiff dug a pit in the floor where the escalator had to sit and a concrete beam was discovered underneath the floor. The concrete beam prevented the installation of the escalator.

[32] The defendant was adamant and refused to make structural modifications and alterations affecting the beam. It was the defendant's responsibility to prepare the site for installation of the escalator. The site preparation would require structural modifications and alternations because the installation of the escalator was on the existing building. The reason for the defendant's refusal was that the structural modifications and alterations would comprise the structural integrity of the building.

[33] In an attempt to resolve the issue that had arisen at that point, although it was not within the scope of work of the plaintiff under the agreement, engaged an engineer to provide a solution to the concrete beam.

[34] The engineer (PW2) gave evidence in court. He said he visited the site (Nadi Shop) and inspected the escalator pit and he noted the extent of the pit encroaching on the tie beam was by 200mm. He further said he provided a brief report that the beam did not have to be removed but could be modified with no risk to the structural integrity of the building. PW2 confirmed that such modifications would not have posed any risk to the structural integrity of the building.

[35] The defendant was not satisfied with the opinion of the engineer. It demanded that the plaintiff pay the costs of the modifications and alterations and give an assurance of the structural integrity of the building to it (defendant).

[36] The defendant did not lead any expert evidence to counter the PW2's evidence.

[37] PW2 (the engineer), had obtained Bachelor of Engineering and Master of Engineering Degree from University of Canterbury, New Zealand He is a corporate member of the Fiji Institution of Engineers, the Australian Engineers and Engineering New Zealand. He has been the principal of Engineered Designs, which is his firm formed in 2000. Prior to that he was employed by another

consulting engineering firm, E Morgan & Co where he ended up being the director of the company.

[38] I find PW2 to be an expert in civil engineering and engineering designs. He has got a Master degree in the field and has wealth of experience. He was firm in his evidence that the tie beam did have to be removed but could be modified with no risk to the integrity of the building. I have no reason to disregard his evidence. I would accept his evidence.

[39] Despite the well qualified engineer's suggestion, the defendant was adamant; and insisted that the plaintiff pay the costs of structural modifications and alterations and give an assurance of the structural integrity of the building. To my mind, the conditions imposed by the defendant for structural modifications and alterations were unreasonable. On the evidence (having been satisfied on the balance of probabilities), I find that the defendant had attempted to repudiate the agreement by imposing unreasonable conditions especially the costs of the modifications and alterations to be borne by the plaintiff when it was in fact the obligation of the defendant under the agreement.

[40] It is true that the plaintiff had made certain representations pertaining to the expertise and skill in sourcing, supply, installation, suitability and fitness for purpose and accommodation to existing structure. The defendant did not allege that these representations were untrue. Rather, they claim that they relied on the representations given by the plaintiff. I find no evidence demonstrating that the plaintiff had breached any of the representations.

[41] Precisely, the plaintiff's case was that the defendant refused to fulfil its obligations under the agreement by failing to prepare the site for installation of the escalator, thereafter repudiated the contract.

[42] The escalator was not incorrect size. The engineer (PW2) told the court that the escalator was of standard correct size. I accept PW2's evidence in this regard.

[43] The defendant did not engage an architect or engineer to supervise the site preparation. They had used their own employee who had no work experience in such work. The defendant's builder himself admitted that he was not a qualified

professional builder. As I said, the site preparation for the installation of the escalator was the responsibility of the defendant under the agreement.

[44] On the evidence, and having been satisfied on the balance of probabilities, I find that the defendant had breached the agreement by failing to prepare the site for installation of the escalator. This translates that the defendant had refused to perform the obligation under the agreement.

Damages

[45] I now turn to the relief the plaintiff is entitled to.

[46] Damages are available as of right on proof of breach of contract. Contractual damages are compensatory and not punitive, i.e., they aim to compensate the claimant for losses suffered, as opposed to seeking to punish the defendant.

[47] The basic rule of recovery of compensation in the case of breach of contract is that the non-breaching party is to be put into the position it would have been in had the contract been performed as agreed (***Robinson v Harman*** (1848) 1 Ex 850; and see ***Surrey County Council v Bredero Homes Ltd*** [1993] 1 WLR 961). This principle was also confirmed as fundamental in ***Golden Strait Corporation v Nippon Yusen Kubushika Kaisha, The Golden Victory*** [2007] 2 WLR 691.

[48] In the matter at hand, the defendant as the contract breaker is obliged to pay damages to the plaintiff.

[49] At the trial, the plaintiff, with the leave of the court, amended its claims. Accordingly, the plaintiff claims against the defendant: a) judgment in the sum of $6,818.00 for loss of profits, b) judgment in the sum of $15,600.00 for detention costs; c) judgment in the sum of $35,820.00 for storage costs and d) costs and interests.

Loss of profit

[50] The plaintiff claims a sum of $6,818.36 for loss of profits. It was the plaintiff's evidence that it expected to make a profit around 10% had the contract been performed as agreed.

[51] In an attempt to mitigate its damages, the plaintiff sold the escalator to Courts, another division of the plaintiff for $135,181.64. The contract amount was $142,000.00. Under loss of profit, the plaintiff claims the difference between the contract amount of $142,000.00 and $135,181.64 which amounts to $6818.36. This claim appears to be reasonable. Therefore, I allow this claim.

Detention costs

[52] A sum of $15,600.00 is claimed as detention costs. There was no satisfactory evidence adduced by the plaintiff to prove that it actually paid for container detention. The plaintiff could not produce any receipt or invoice in proof of such payment. This claim was not sufficiently proved. Therefore, I disallow this claim.

Storage costs

[53] The plaintiff claims a sum of $35,820.00 on storage costs. According to the plaintiff, the escalator was stored in its yard from 3 March 2015 to 29 December 2016. The storage costs had been calculated at a rate of $70.00 per day which comes to $35,820.00. It was the plaintiff's evidence that it was the best market rate ($70.00 per day) at the time. This claim, in my opinion, appears to be exaggerated and unreasonable. The plaintiff did not call any independent witness to establish the best market rate for storage at the time. I accept that the escalator was stored in the plaintiff's yard from 3 March 2015 to 29 December 2016. Taking all into my consideration, I allow a sum of $15,000.00 for storage costs.

Interest

[54] Under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, Section 3, the Court has the discretion to grant interest on the whole or any part the debt or damages at such rate as it thinks fit. The plaintiff seeks interest. Therefore, I would allow interest on the judgment sum to be calculated at the rate of 5% per annum from the date of writ of summons (10 August 2015) to the date of the judgment.

Costs

[55] As a winning party, the plaintiff is entitled to the costs of these proceedings. The plaintiff submits that: the costs should be at the higher end of the scale given the large amount of evidence produced in this matter; and the trigger to litigation in this matter was unilateral termination of the contract by the defendant. Taking all into consideration, I summarily assess costs at $3,500.00.

Counterclaim

[56] The counterclaim necessarily fails given the fact that the defendant had breached the contract. The plaintiff is not liable to compensate the defendant. Accordingly, I would dismiss the defendant's counter claim.

Result

1. There shall be judgment in favour of the plaintiff in the sum of $21,818.36.
2. The defendant shall also pay interest on the judgment sum to be calculated at the rate of 5% per annum from the date of the writ of summons (10 August 2015) to the date of this judgment.
3. The defendant shall also pay summarily assessed costs of $3,500.00.
4. Counterclaim is dismissed.

Hon Ajmeer
25/9/20
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M.H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI
LAUTOKA

At Lautoka

25 September 2020

Solicitors:
Reddy & Nandan Lawyers, Barristers & Solicitors for the plaintiff
AK Lawyers, Barristers & Solicitors for the defendant