

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 418 of 2007

BETWEEN : **ARTELIA INTERNATIONAL** having its registered office at 2
Avenue Francois Mitterrand 93200 La Plaine Saint Denis, France.

PEAINTIFF

AND : **NATADOLA BAY RESORT LIMITED** a limited liability company
having its registered office at c/- Deloitte Touche Tohmatsu, Level 10
FNPF Place, 343 Victoria Parade, Suva Fiji

DEFENDANT

Counsel : Plaintiff: Mr. Clark. W and Ms. Low. P
: Defendant: Mr. Sharma. D and Ms. Choo. N
Date of Judgment : 02.08.2023

JUDGMENT

INTRODUCTION

1. Plaintiff (Coteba International) entered in to an agreement with Defendant and Asia Pacific Resort Development Limited (APRIL) 18.11.2005 (the Agreement). Artelia International is the substituted Plaintiff but for convenience the Plaintiff is used to denote (Coteba International) in the judgment.
2. In terms of the Agreement Plaintiff was the Construction Manager (CM) of Defendant's construction project where a third party APRIL was the Development Manager (DM). The object of the construction project was to build a hotel by the 'General Contractor' and Fiji branch of APRIL was its DM and the Agreement was between CM and Defendant to 'carry out the construction management' of the said project in terms of the Agreement.

3. Plaintiff is foreign company (Coteba International), who had entered in to the Agreement of 18.11.2005 as CM and according to clause 18 party to the Agreement could not assign obligations under it, without prior consent obtained in writing by other parties.
4. Plaintiff had established a fully owned subsidiary in the name of Coteba (Fiji) Limited and Foreign Investment Registration Certificate was issued prior to the entering of the Agreement.
5. Coteba (Fiji) could accordingly engaged in project management and construction management services in terms of Section 4(1) of Foreign Investment Act 1999. Despite having established fully owned subsidiary, Plaintiff, entered in to the Agreement with Defendant that prohibit assignment of benefits and obligations 'without prior written consent'.
6. Plaintiff had engaged its local subsidiary Coteba (Fiji) Limited, without prior written consent from all parties to the Agreement to be its CM and also invoiced Defendant accordingly.
7. Statement of Claim is based on the invoiced sum in terms of the Agreement's payment schedule which stipulate time for submission of the said payment, subjected to obligations being fulfilled by it, in terms of the Agreement.
8. All monthly progress reports in terms of the Agreement were by Coteba (Fiji) Ltd and there was no prior written consent, obtained for assignment of obligations under the Agreement. So Plaintiff cannot claim for works done by its fully owned subsidiary.
9. Apart from that, Plaintiff had failed to prove that it had fulfilled its obligations in terms of the Agreement for full settlement of, payment under the Agreement.
10. Choice of law under the Agreement is governed by the laws of Fiji. Accordingly Plaintiff being a foreign entity required to fulfill the requirements under local legislation in order to provide services as CM. Admittedly, this was the reason for setting up of Coteba (Fiji)Ltd and obtaining approval in terms of Foreign Investment Act 1999, but no assignment of duties were done or it being made a party to the Agreement.
11. Plaintiff being a foreign entity had neither obtained required approval in terms of Section 4(1) of Foreign Investment Act 1999 nor assigned the obligations under the Agreement in terms of Clause 18 of the Agreement. Plaintiff had failed to prove that it had fulfilled its obligations in terms of the Agreement. Accordingly Plaintiff's claim under the Agreement

is struck off. Defendant abandoned its counterclaim against Plaintiff, accordingly it is struck off.

FACTS

12. At the hearing Plaintiff called one witness and marked documents and Defendants also marked their documents from the same witness and did not call any witnesses for the Defendant.
13. Both parties filed written submissions and Defendant filed a reply to the Plaintiff's submission as directed.
14. The witness for the Plaintiff at all time material to this action worked for Coteba International (Plaintiff). There was a change of Plaintiff's structure and shareholding with mergers and acquisitions.
15. Plaintiff is a foreign company having its registered office overseas, entered in to the Agreement on 18.11.2005 as the CM of the Defendant's hotel construction project where APRIL was the DM.
16. Prior to the Agreement being entered . Plaintiff's full owned subsidiary Coteba (Fiji) Ltd was incorporated and it obtained certificate of incorporation and also Foreign Investment Registration Certificate for providing services of project management and construction management services.
17. Plaintiff called Mr. Gabriel Elias who was a supervisor of work of CM. The Agreement as P2 and twelve monthly reports as P3. He also marked invoices issued to Defendant marked from P4 to P18 and P25 and P26. The claim is based on the said invoices in terms of the payment schedule annexed to the Agreement.
18. Defendant also marked D1 to D4 from the same witness. D1 and D2 are regarding approval obtained by Plaintiff's fully owned subsidiary Coteba (Fiji) Ltd.

ANALYSIS

Jurisdiction

19. Defendant states that jurisdiction of this action is ousted by Section 9(1)(h) of Natadola Development Bay Act 2010 which reads:

"9.-(1) No court, Tribunal, Commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any challenges by any person or body, or to entertain or grant any remedy to any person or body, which seeks or purports to challenge or question:

- (a) the validity, legality or propriety of this Decree;
- (b) any decision of any Minister or any State official or body, made under this Decree;
- (c) any decision, action or omission made under or arising out of the provisions of this Decree;
- (d) the validity of the process, grant or issue of any leases, licences or other instruments of title by the Native Land Trust Board or the Director of Lands prior to the commencement date hereof to Hotel Property Pacific Limited, Natadola Land Holdings Limited or Natadola Bay Resort Limited for any land within the boundaries depicted in the Schedule;
- (e) any transfer or assignment or any agreement for the transfer or assignment of any land within the boundaries depicted in the Schedule to Hotel Property Pacific Limited, Natadola Land Holdings Limited or Natadola Bay Resort Limited which was effected or to be effected or pending prior to the commencement of this Decree;
- (f) the grant, issue or any agreement to grant or issue any lease or licence to Natadola Bay Resort Limited after the commencement of this Decree for any land within the boundaries depicted in the Schedule, against the Native Land Trust Board or the Director of Lands;
- (g) any damage caused or anything done or omitted to be done by virtue of breach of any duty or obligation imposed under any statute, common law, equity, agreement, deed, document or any interest in land prior to the commencement date hereof arising out of the use of any land, lease, licence or other interest in any land within the boundaries depicted in the Schedule hereto by Natadola Land Holdings Limited, Natadola Bay Resort Limited, FNPF Investments Limited or the Fiji National Provident Fund whether owned by the said bodies or not.
- (h) the failure to honour any duty or obligation imposed on Natadola Land Holdings Limited, **Natadola Bay Resort Limited**, FNPF Investments Limited or the Fiji National Provident Fund under **any Development Management Agreement or any related agreement which was made between any party which was prior to the commencement date hereof associated at anytime in any way whatsoever with the foreign shareholder** whether by way of a joint venture arrangement, partnership, shareholding or by way of having common directorships, officers, managers, employees, agents, contractors, consultants or otherwise entered into for the management of the Natadola Bay Development and any associated infrastructure on any land within the boundaries depicted in the Schedule hereto.”(emphasis added)

20. According to Section 9(1)(h) of Natadola Bay Development Act, the obligations of Defendant relating to Development Management Agreement or any related agreement between any party, prior to the commencement of said Act, associated at any time in any way whatsoever with **foreign shareholder** as stated therein is ousted.
21. This action is not 'associated at anything in any way whatsoever with the foreign shareholder', but a direct contract between Plaintiff and Defendant and APRIL regarding services of CM by Plaintiff.
22. The term '**foreign shareholder**' is interpreted exclusively in the following manner
"Foreign Shareholder" **means** Hotel Property Pacific Limited.
23. There was no evidence of **Hotel Property Pacific Limited** associated with the Plaintiff and or, the Agreement in any manner stated therein in the Act.
24. The object of the said Natadola Bay Development Act 2010, are stated in Section 3 which reads
"3.-(1) The object of this Decree is to protect the members funds invested in the Natadola Bay Development at Natadola by the Fiji National Provident Fund through its subsidiaries.
(2) The Decree achieves this object by--
(a) providing for the forfeiture of shares held in Natadola Land Holdings Limited following the cancellation of the Foreign Investment Certificate issued to Hotel Property Pacific Limited, being a foreign shareholder in Natadola Land Holdings Limited, which cancellation was caused by deliberate non-disclosure of bankruptcy and related information of past activities of a director of Hotel Property Pacific Limited;
(b) providing for the forfeited shares held in Natadola Land Holdings Limited to be vested in FNPF Investments Limited, for the benefit and protection of the members of the Fiji National Provident Fund and of the investments made by its subsidiaries;
(c) providing for the transfer of all real and personal property within the boundaries depicted in the Schedule in the ownership of Natadola Land Holdings Limited, Hotel Property Pacific Limited and FNPF Investments Limited to Natadola Bay Resort Limited."
25. Accordingly there is no effect on the obligation of Defendant arising from the Agreement between Plaintiff and APRIL affected by Natadola Bay Development Act 2010. So the preliminary issue raised by Defendant is overruled.

26. Apart from the above Defendant had raised another objection as to the substituted Plaintiff (Artelia International), which is the successor to the claim due to mergers and acquisitions in overseas. According Defendant it is an assignment in terms of clause 18 of the Agreement.
27. Clause 18 of the Agreement states, "no party may or may purport to assign or novate the benefits and obligations of this contract without prior written consent of the other parties". The acquisitions and mergers in Coteba International, had happened after both parties had in writing suspended services of CM in 2007. So there were no pending obligation pending on either party in terms of the Agreement, except any disputed payments under it.
28. Plaintiff had suspended "all services under "the Agreement on 6.3.2007, for the alleged non payment of their invoices.
29. On the same day Defendant had informed that the payments for invoices were suspended due to performance of its obligations in terms of the Agreement as CM. The issue of performance was not resolved between the parties for payment.
30. Defendant had requested a response to issues raised and had by its letter dated 14.3.2007 had taken over the work of CM. So the contract of engagement had stopped by this time. So from 14.3.2007 clause 18 of the Agreement cannot be applied. Artelia International (who is the substituted Plaintiff) is the substituted Plaintiff in this action but for convenience the term Plaintiff is used to denote Coteba International.
31. So the objection raised for substituted Plaintiff (Artelia International) as it was not assigned in terms of the Agreement for this action, is without merit.
32. Plaintiff was a foreign company and it had entered in to the Agreement with Defendant and APRIL to provide Development Manager (DM) services subject to said Agreement. The choice of law in terms of the Agreement is contained in Clause 16 and accordingly it is the laws of Fiji that govern the contract.
33. The Agreement set out the obligations and duties of each party to the contract.
34. Plaintiff was a Foreign Service provider in terms of the said Agreement, hence it was required to obtain necessary approvals for providing services locally for its business. The payment and also repatriation of the payments made to it also needed to comply with local legislation.

35. Plaintiff had failed to provide it had obtained necessary approvals in terms of Foreign Investment Act 1999 to provide services of CM and or payments under the Agreements in terms of the Payment Schedule.
36. As the choice of law clause contain in clause 16 indicated the contract was governed by laws of Fiji. Accordingly Plaintiff was required to comply with local laws for payment as well as to perform its obligations as CM to provide a service.
37. It is not in dispute that fully owned subsidiary of Plaintiff , Coteba (Fiji)Limited , had obtained Foreign Investment Registration Certificate for FSIC code 74141(for Project Management services for resort, hotel development and other development for Natadola InterContinental Hotel Resort and Construction Management Services for the abovementioned under FSIC Code 74141 and for other ancillary undertakings and services. The said certificate is attached with a letter dated 20.10.2005 which stipulated the additional requirements to commence the business under said certificate.
38. So there is no issue that the entity that provided the services as CM was Coteba (Fiji) Limited which was a fully owned subsidiary of the contracted party (Plaintiff), but there was no assignment of obligations under the Agreement in terms of Clause 18 which needed prior written approval by Defendant and third party which was DM.
39. Hence Plaintiff could not seek payments in terms of the Agreement for following reasons
 - a. Plaintiff had not violated Clause 18 of the Agreement by not obtaining written approval from other parties to the Agreement.
 - b. Plaintiff being a foreign company could not engage in the services of project management and or construction management without seeking approval for the same.
40. Without prejudice to above, Plaintiff had suspended its services by its letter of 6.3.2007 (P21), and the same date they were informed of unsatisfactory performance of its services and the reason for suspension of payments due to that.
41. Defendant on 14.3.2007 taken over the work of CM and by doing this parties mutually accepted that the Agreement had come to an end, but there was an issue as to payments. Defendant had stated that it had suspended the payments due to Plaintiff's performance having issues, of performance.

42. So in order to claim payments under the Agreement Plaintiff must establish fulfillment of its obligations as Plaintiff was informed failure to perform its professional obligations under the Agreement, as suspension of payments.
43. Accordingly as CM Plaintiff is obliged fulfil the obligations stated in the clause 2, which are exhaustive and in order to seek payment Plaintiff needs to prove fulfilment of these obligations
44. Accordingly Clause 2 reads;

“SCOPE OF SERVICES

The Construction Managers services will cover all successive Project phases, **from design review and negotiation of the Construction Contract to delivery of the Hotel (including, final accounts and close out). The scope of these services is as follows:**

1. **General**

- From the beginning (based on the contractual) time schedule agreed with the General Contractor, updated as necessary) the time schedules showing key Project milestone.
- **Manage all contracts** (listed in Appendix B) of all parties involved in the Project having a contractual relationship with the Principal and manages changes, variations and claims in the best interests of the Principal.
- Ensure **all due communication and co-ordination between all parties** involved in the Project.
- **Advise the DM on all aspects of management of the Project, as a regards decisions to be made, whenever necessary.**
- **Report to the DM as indicated in section 3.**

2. **Design Management**

The design of the Project was completed and approved by the Principle prior to the appointment of the CM. However, it is planned to review such design during negotiation of the Construction Contract. During the phase the CM will assist the DM, cooperate with the Architect and the Operator, and make such recommendations as may be appropriate to achieve targeted budgets. In addition, if during the construction stage changes as required, the CM shall manage and co-ordinate all parties involved in such changes (whether the Architect and his contractual consultants, the General Contractor, the DM, of other parties) so as to give effect to and validate the design modifications with a view to

ensuring that all design work changes are delivered in time, and in accordance with the overall Project brief.

All necessary actions will be taken by the relevant parties to obtain all required Project permits and authorisations, including building permits, environmental impact approvals, connections to roads *and utilities*, availability of required services (water, power, telecommunications, etc). The CM will be informed of all actions taken and of the relevant results of the actions. The CM will ensure that actions concerning these matters are positively conducted and that the Project will not suffer from a lack of co-ordination between the relevant parties

3. **Tender Evaluation and Design review phase**

The principal has decided to use a General Contractor to carry out the Works..

As at the date of this Contract General Contractor tender evaluation has been conducted by the DM and the Quantity Surveyor as mandated by the Principal for this purpose. Based on the evaluation report and all the designs and technical specifications, the CM will participate in the design review by:

- Checking administrative responsiveness and total price of tenders and corrections in case of omissions, incomplete pricing or errors in tender price calculations.
- Evaluating technical quality of the offer, in co-ordination with the Architect, his contractual consultants and the DM.
- Reviewing alternatives proposed by the Architect and his contractual consultants, the General Contractor, the Hotel Operator and the DM.
- Querying wherever clarifications are required.
- Producing whenever necessary detailed evaluation reports comparing prices at tender opening, prices after correction of errors and omissions, prices adjusted after technical evaluation, prices of alternative proposals found appropriate and of interest.
- Giving a technical evaluation, and recommendations on a final revised tender..

4. **Contract Finalisation**

Negotiations for contract details and contract finalisation Construction Contract are performed by the DM with the assistance of the CM.

Upon final acceptance of the General Contractor's tender and its approval by the Principal, the CM will participate in preparation of the Construction Contract, containing all relevant documents which will include:

- drawings signed by the Architect, his consultants and the Operator;
- revised Technical Specifications reflecting the agreement;
- overall time schedules;
- general conditions of contract and conditions of particular application;
- list of unit prices, bill of quantities and total price

The DM will then arrange to have the final Construction Contract signed by the General Contractor and the Principal, and the CM will issue the notice to proceed with the Work.

The CM must obtain and verify all ancillary documents to be submitted by the Contractor, such as insurance policies and proof of payment of premiums, bank guarantee/performance bond, etc all within the time stipulated in the Construction Contract.

5. Works supervision

- **General**

The CM will be assisted whenever necessary by the Architects and his consultants to monitor the works carried out by the General Contractor.

The CM must supervise the Work on a continuous basis, to ensure that construction is carried out in compliance with the Construction Contract. In doing so, the CM must consult with the Architect, his consultants and any other relevant consultants, on issues relating to design, as and when appropriate.

When requested by the CM the Architect and his consultants will supervise the site works relating to their specialities and report to the CM team, as detailed under clause 6 below. The Architect and his consultants are responsible for technical issues on such works, and at commissioning stage, snag lists and closing out of the established snag lists. Daily supervision work will be carried out by the CM team. Architect and his consultants and such other consultants as may exist shall give the CM full back up support when requested in order to respond to queries issued by the General Contractor which involve engineering elements.

Generally speaking, the CM:

1. is to be responsible for co-ordination between all parties to the Project and with the DM, including keeping on site all necessary contract documentation, amendments, orders, instructions, minutes of meetings, reports, etc, and ensuring that filing is done in such a way that the Project history can be traced at any time and that documents in use are always the latest updates.

2. will ensure that he is provided with all necessary documents submitted by the General Contractor upon starting construction, such as jobsite organisation plan, method statements, quality and safety plans, etc.
3. must organise and chair weekly site meetings, and any other meeting of a general or specific nature he considers necessary for the smooth running of the Project. The CM must prepare and circulate minutes of these meetings.
4. must organise and chair monthly meetings with the DM ("Steering Committee Meetings"), and prepare and circulate reports and other materials for such meetings, and minutes of such meetings.
5. must set up ad hoc site meetings to ensure that any specific action or remedial action agreed is undertaken, and more generally ensure that the site organisation, access and traffic management is in accordance with the General Contractor's method statement, that the site is kept clean and safe, and more generally that works are carried out in compliance with local safety laws, rules and standards.
6. must supervise the Work in general, and materials used in the Works through review of material specification forms submitted by the General Contractor, and random checks on materials (quality control forms). He may accept or reject works and materials found to be defective or not in accordance with the contract specifications, and check that rejected works/materials are removed from the site and replaced.
7. must ensure that due controls are implemented by relevant bodies and appointed companies in due time and as required by their contracts.
8. must obtain the DM's and when necessary Hotel Operator's approvals whenever decisions are needed on major issues, in particular those in relation to significant architectural or technical changes, those affecting the delivery time, and/or those entailing additional costs beyond the normal contingency allowance agreed. In order to obtain such approval, the CM must provide the DM with due information and recommendations.

For the sake of efficiency and proper construction management, the DM will refrain from issuing instructions or orders directly to the Architects, his consultants and the General Contractor. All such instructions or orders will be systematically passed through the CM.

Instructions to the General Contractor can be given by the CM by:

- written instructions, or
- through minutes of meetings, or

- verbally during site visits, provided such verbal instructions are confirmed either by a written confirmation or by a minute of meeting afterwards

The CM may give written instructions by letter, fax or email.

- **Progress**

Upon beginning of the Work, the CM must obtain from the General Contractor, and check, the General Contractor's time schedule in accordance with the Construction Contract requirements. This time schedule must detail all trades and show all necessary Project milestones, and be supported by the General Contractor's resource plan.

The CM will, monitor work progress versus plan, promptly inform the General Contractor of discrepancies, take steps necessary in case of any deviation/delay against plan, and inform the DM in case of non performance of the General Contractor or whenever CM's decisions may impact completion time.

The CM will ensure that the time schedule is revised at intervals as necessary by the General Contractor under close supervision of the CM, and ensure that sufficient means and resources have been provided for by the General Contractor to achieve the revised plan.

- **Payment Statements**

The CM will check the General Contractor's interim and final payment statements, their compliance with the Construction Contract, that the work actually completed is in conformity with the same, and establish payment proposals. Payment proposals must be submitted to the DM with all relevant supporting documentation and details of the contractual payment deadline. Payment statements must include cost variations resulting from change orders, deductions, retentions, penalties, etc in accordance with the Construction Contract.

The DM will inform the Principal in writing of all payments made to the General Contractor. This will assist the CM in dealing (if necessary) with the General Contractor's requests or claims for late payment.

- **Cost control**

The CM controls Project cost against budget. The budget, determined at the time of acceptance of agreements with the General Contractor, includes an agreed amount covering unforeseen events/changes (so-called "contingency cost").

Every month, the CM will determine and report to the DM, for all Project components:

- (i) the cost invoiced,
- (ii) the cost committed ("month" and "Project to date"), including cost of variations, and
- (iii) the cost projection at Project end, including the contingency cost gradually decreasing as the work progresses.

Comparison with the cost plan allows identifying deviations, making recommendations to the DM as appropriate, and taking necessary remedial steps.

- **Variations**

Variation or change orders may be issued from time to time due to:

- (i) DM change requests, or
- (ii) CM proposals, or
- (iii) General Contractor's proposals, or
- (iv) unforeseen event/design insufficiency.

For any such variation, the CM will determine the cost impact (addition or reduction), and when necessary obtain and check the General Contractor's quotation, after consultation of the Architect and his consultants for relevant issues

All variation cost estimates must be supported by all due technical documentation (materials, technical details and/or performance, method statement)

For minor modifications, within an agreed contingency amount, the CM may issue the change order directly to the General Contractor, and must inform the DM when this occurs.

For major modifications, prior DM approval is required, and the change request must be submitted to the Principal with all due supporting documentation and recommendations.

Final Inspections and acceptance

The CM is responsible for organising the final inspection and commissioning tests, in co-ordination with the Architect and the engineering consultants. The programme of technical tests included preliminary testing before completion to determine works yet to be completed. The list of such works and the list of snags, will be established between the DM, the engineering consultants, the Architect, the Operator, the General Contractor and the CM, and then recorded, and circulated by the CM.

The CM is also responsible for organising visits by the all relevant statutory, local government and other authorities (fire safety, etc) needed to obtain all clearance and operation certificates, and must ensure that all necessary actions are undertaken by the relevant General Contractor to obtain such clearance.

Project provisional acceptance must be signed off by the DM, the CM, and the General Contractor upon recommendation by the CM, in accordance with the Construction Contract stipulations

Snagging and Close-Out

The CM will supervise snagging and remedial works carried out by the General Contractor, check that all snags have been made good, and organise final certification and sign off of the Project

The CM will collect conformity certificates, equipment opening and maintenance manuals, test reports and as built drawings and documentation from the General Contractor, the Architect and the engineering consultants and hand over the same in complete "as- built" and indexed file to the DM."

45. There are limits of the scope of the work as stated in clause 6 of the Agreement which states the limits of the scope of the works and it reads

"Clause 6 Limits of Scope of Works

The Principal acknowledges that the appointment of the CM to supervise the works of the General Contractor, and the CM's investment with full authority6. Final Inspections and acceptance.

The CM is responsible for organizing the final inspection and commissioning tests, in co-ordination-with the Architect and the engineering consultants. The programme of technical tests included preliminary testing before completion to determine works yet to be completed. The list of such works and the list of snags, will be established between the DM, the engineering consultants, the Architect, the Operator, the General Contractor and the CM, and then recorded, and circulated by the CM.

The CM is also responsible for organizing visits by the all relevant statutory, local government and other authorities (fire safety, etc) needed to obtain all clearance and operation certificates, and must ensure that all necessary actions are undertaken by the relevant General Contractor to obtain such clearance.

Project provisional acceptance must be signed off by the DM, the CM, and the General Contractor upon recommendation by the CM, in accordance with the Construction Contract stipulations instruct and approve any queries issued by the General Contractor, does not relieve the Architect and his consultants of their direct professional responsibility to the Principal, and to the CM under this Contract.

The Architect and his consultants have entered into a contract with the Principal to assist the CM when requested. Their intervention will be requested by the CM from time to time if and when necessary. Such intervention will be provided either from the office of the Architect or by the Architect visiting the site if necessary.

The Principal has agreed with the Architect the terms and conditions of such interventions and will confirm the obligation to support the CM when requested.

The interventions are estimated to a maximum of

- for the Architect: three days per month, from the Architect's office or by visit on site from the beginning of the site works till delivery and the commissioning of the Hotel.
- Interior Designer: three day monthly visit commencing one month prior to the commencement of interior design works on site till delivery of the Hotel.
- The engineering team: three days every two months, from their office or by visit on site from the beginning of works till the commissioning, plus three weeks during the commissioning stage.

All reports, minutes of meetings, or notes issued by the above personnel will be submitted for the approval of the CM who will be responsible for the transmission of such reports, minutes of meetings or notes to the General Contractor and to any other concerned parties.

It is clearly stated that the CM team will not, and will not be required to, draw or issue any conceptual technical note which is the responsibility of the Architect, his consultants or any member of the engineering team."

46. Plaintiff had issued invoices in terms of said Payment Schedule but failed to prove that it had provided its professional duties as stipulated in the Agreement as stated above. The obligations of CM is extensive and it needed to prove that it had conducted its obligations. These obligations are exhaustive and needs to be supported with necessary documentation to support the payments. This is the very reason that the scope of work of CM was exhaustively described.

47. Plaintiff had produced in evidence, Monthly Progress Reports for 12 months but these reports were prepared by Coteba (Fiji)Limited. This was a requirement in terms of Clause 3 of the Agreement which states:

“Reports

The CM must issue monthly reports providing detailed status of the Project:

- Progress of work vs plan, including recommendations in case of deviation compared to plan.
- Cost status vs budget, including variations and change orders, cost projection at Project end, and recommendations in case of anticipated overrun.
- Change proposed and for claims by General Contractor and recommendations as to their treatment.
- Summary of quality issues, summary of quality control from filled out and controlled and remedies proposed if necessary.
- General indications on Project, including as reasonably required by the DM and the Principal, staff numbers on construction sites, administrative/authorization issues , incidents, etc
- Problem faced during past period , problems anticipated in next period solutions proposed

These reports must be presented at and commented on the monthly Steering Committee Meetings with the DM. The CM should issue such reports to the DM at least 3 business days prior to the relevant Steering Committee meeting.”

(emphasis mine)

48. Plaintiff had produced the monthly reports and there was no evidence to show they had complied with the mandatory requirements such as presentation to DM in timely manner to be discussed in Steering Committee Meetings.
49. So Plaintiff had failed to prove its obligations as stated in clause 2 which was quoted in full.
50. The 12 reports submitted by Plaintiff at the hearing had fulfilled the mandatory requirement in terms of Clause 3 which required comments from Steering Committee with DM. So the production of said reports, without evidence of they being presented timely manner and commented on that is falling short of the requirements contained in clause 3 of the Agreement.
51. Plaintiff was aware of the issues raised by Defendant as its failure to perform its obligations as CM as far back as 6.3.2007 and its reply on the same day marked by Defendant marked as D3. Defendant had taken over the work of CM manager after receipt of the said reply.

So Plaintiff needed to prove the court that it had fulfilled its obligations in order to seek payments in terms of the Payment Schedule. This was not done by production of invoices and also said monthly reports produced through evidence.

52. So even on merits Plaintiff had not proved its claim in terms of the Agreement. As such it is struck off. Plaintiff had produced invoices without the proof of services it provided in terms of the Agreement.

CONCLUSION

53. This action is based on the Agreement entered on 18.11.2005. It was between Plaintiff and Defendant as CM and APRIL as DM. Plaintiff had failed to obtain foreign investment certificate. It was obtained by Coteba (Fiji) Ltd which was fully owned subsidiary of Plaintiff. But the agreement was between Plaintiff and Defendant and APRIL and the claim is based on the Agreement. There was no written approval of assignment of obligation of CM by Plaintiff to its local subsidiary in terms of the Agreement. Accordingly claim based on the Agreement, fails and statement of claim is struck off. Even if I am wrong on that, Plaintiff had failed to prove that it had complied with its obligations as stated in Clause 2 of the Agreement in order to claim under the Agreement. Plaintiff produced monthly reports but they did not comply, with mandatory requirements contained on Clause 3 of the Agreement. Presentation of Reports were in addition to the detailed service obligations and duties contained in Clause 2 of the Agreement. Plaintiff had failed to prove its claims. Accordingly Plaintiff's claim is struck off. Parties to bear their costs considering the circumstances of the case. Delay is regretted.

FINAL ORDERS

- a. Statement of claim is struck off.
- b. No costs.

Dated at Suva this 2nd day of August, 2023.



Justice Deepthi Amaratunga
High Court, Suva