

HARRY NODA (Trading as NODA Construction Co.) -v- S.I. NATIONAL PROVIDENT FUND

High Court of Solomon Islands
(Palmer PJ)
Civil Case No. 115 of 1992
Hearing: 25 and 26 August 1992
Judgment: 28 August 1992

A. Radclyffe for the Plaintiff
A. Rose for the Defendant

- PALMER PJ: This is a claim by the Plaintiff, Harry Noda, for -
- (i) damages for loss of use of 116 sets of scaffolding;
 - (ii) for a declaration that the scaffolding is the property of the Plaintiff;
 - (iii) for an injunction to restrain the Defendant (Solomon Islands National Provident Fund) from selling and disposing of or in any way dealing with the scaffolding without the consent of the Plaintiff;
 - (iv) an order for the delivery up by the Defendant to the Plaintiff of the scaffolding or pay \$15,822 its value;
 - (v) damages for detention and/or conversion.

The Defendant on the other hand has made a counter-claim for -

- (i) damages for the loss of use of 7 sets of scaffolding and seeks similar remedies to the Plaintiff in respect of the 7 sets of scaffolding removed by the Plaintiff.

The key issue as agreed by both parties is the question of ownership of the scaffolding.

There is no dispute that the Plaintiff was invited to apply for a tender to do re-painting of National Provident Fund's Five Storey Building (See Exhibit 1).

There is no dispute that the Plaintiff submitted a tender for \$64,701.00. (Exhibit 2).

The tender was subsequently accepted on behalf of NPF by Saunders O'Connor and Partners, a duly registered and Corporate Quantity Surveyor and Cost Planning Consultant firm, responsible for Supervision of the re-painting work, by letter dated 4 October 1990 (See Exhibit 3).

Under the tender agreement there is a clause which caters for the provision and erection of scaffolding or trestles staging. The amount submitted in the tender was for \$15,000.00.

It is clear that the Plaintiff did not have any scaffolding to do the work with. It is clear too that the Plaintiff made arrangements with another contractor, Mr Moses Fuata to hire his scaffolding. The amount for hire of scaffolding was for \$15,000.00 it seems.

In a letter to the Plaintiff by the Resident Manager of Sanders O'Connor and Partners and copied to NPF it referred to an advance payment to the scaffolding supplier of \$16,500.00.

The Plaintiff stated that this referred to the arrangement to purchase the scaffolding from Dongsan Construction Company Limited and that it confirmed his arrangement with NPF to purchase the scaffolding plus planking.

However, in a letter dated 18 March 1991 written by the Resident Manager (Exhibit 17) at paragraph 5 and I quote,

"On the 8th October 1990 we informed you to make available \$16,500.00 which was to be a progress payment being for the expenditure of scaffold hire charges, this payment was to be paid directly to Moses Fuata."

The figure of \$16,500.00 as far as Sanders O'Connor was aware was for hire charges payable to Mr Moses Fuata and this was made known as far back as 8 October 1990.

Paragraph 6 of that letter continued:-

"From the 15th January scaffolding had been delivered to site. I was of the belief that Mr Moses was the supplier for no instruction was given to the contrary, and scaffolding was now being erected. We were of the belief that NPF made the necessary payment for the hire of scaffolding, required for the job all as we expected to happen however not in

accordance with our letter dated 8th October 1990, that is not as a progress payment by NPF.

Under the contract this will be treated as a variation."

And on the second page, last paragraph, I quote again -

"As it happened yourself and H. Noda made arrangement to purchase the scaffolding, this was completely outside the parameters of the contract I was not aware of or part of the dealings and in such are not able to assist you other than the facts outlined above."

It is crystal clear from the above quoted contents of the letter that the letter of Sanders O'Connor (Exhibit 5) referred to by the Plaintiff as confirming the arrangement with NPF to advance payment for the scaffolding was not true. The advance payment as understood by Sanders O'Connor of \$16,500.00 was to be made to Moses Fuata for hire charges.

So the Plaintiff cannot rely on the letter dated 4 January 1991 (Exhibit 5) as confirming his arrangement to advance payment to Dongsan Construction Company Limited. That letter must be put in its proper context.

There is no dispute that the Plaintiff went to see the Property Manager of NPF, Mr Eric Fono about his difficulty in finding scaffolding to be able to commence work on the buildings.

The Plaintiff could not remember the date when he went to see the Property Manager. Mr Fono stated that the Plaintiff saw him on the afternoon of the 7th of January 1991.

It is not disputed that the Plaintiff went and asked for an advance for the sum of \$15,922.00 to pay for 133 sets of scaffolding that were put on sale by Dongsan Construction Company Limited.

The Plaintiff stated that the Property Manager agreed to this. The Property Manager in his evidence under oath denied this.

This case turns really on which witness this Court views objectively to be speaking the truth. If this Court accepts the sworn evidence of the Plaintiff that there was an agreement with NPF to advance money to him to pay for the scaffolding and then to be recovered in his progressive payments then the matter really ends there and he is entitled to the remedies sought. However, the Plaintiff must establish on the balance of probabilities that he made such an agreement with NPF.

If on the other hand the Court accepts the evidence of the Defendant then again the matter ends there too and the defendant is entitled to the remedies claimed. Again this is a matter of proof on the balance of probabilities.

In assessing the credibility and reliability of the two key witnesses, namely Mr Fono and the Plaintiff, the events of the 7th January 1991 and what transpired subsequently are crucial.

I accept as fact that the meeting between the Property Manager and Plaintiff in which the advance payment was discussed occurred on the 7th January 1991.

I accept as fact that a memorandum from the Property Manager dated 7th January 1991 (although I point out here that the year was put as 1990 which could not have been correct and I accept it as a genuine mistake) was sent to the Financial Controller in which it was made quite clear that the scaffolding were to be purchased from Dongsan Company and hired out to the Plaintiff for \$15,000.00. The memorandum contained inter alia, the purchase price, and the justification for its purchase as an asset.

The comments of the Financial Controller were to have the sets bought and a check prepared by the next day 8 January 1991. This was confirmed by the Financial Controller in his evidence under oath.

It must be pointed out here too that both the Property Manager and Financial Controller made it clear that their financial instructions forbade the issue of advance payments and that they could not have issued a check as advance payment to the Plaintiff to purchase the scaffolding.

A check was subsequently raised for the sum of \$15,822.00. This is National Bank of Solomon Islands Limited Check No. C 063372 dated 8 January 1991, payable to Dongsan Construction, marked Not Negotiable and duly signed. (This is Exhibit 19).

I accept as fact that the check was collected on the 8 January 1991 and paid to Dongsan Construction Company on the same day and duly deposited at ANZ Banking Corporation Limited on the same day as well. The check bears the stamp of ANZ Banking Corporation Limited dated 8 January 1991, and this could only lead to the only logical conclusion that the check was received by Dongsan Company on the 8 January 1991.

The evidence of the NPF driver Allen Maeniua corresponds to the above facts perfectly.

The evidence of the Plaintiff however on the subsequent events of the 7 January 1991 is both vague and dubious. He could not remember the date he saw the Property Manager, however he stated that it was him who collected the check and then paid it to the company and in support of this produced the documents marked Exhibit 4 and 6.

Exhibit 4 is a copy of the purchase agreement made between the Plaintiff and the Company and dated 14 January 1991. It contained in Article 1, a description of the equipment and the purchase price.

In Article 2 headed "Payments", I quote paragraph 2.1 -

"The Purchaser shall pay the total price of SID15,822.00 indicated in Article 1. to the seller upon signing this AGREEMENT in cash or equivalent."

The agreement was signed on the 14 January 1991.

There is no evidence of any payment of \$15,822.00 being made on that date, after the signing of the agreement.

Exhibit 6 merely was an original certificate referring to the purchase under Exhibit 4 and is mere surplusage.

It is quite clear that the so-called payment for the scaffolding referred to in the agreement between the Plaintiff and Dongsan Company was made on the 8 January 1991 and not on the 14 January 1991.

The agreement was made close to one week after payment of the scaffolding and after the scaffolding had already been removed. It raises some serious questions on the commercial sense and prudence of such an agreement and casts a lot of doubts on the weight this Court would place on such document as supportive of the Plaintiff's assertion that he bought the scaffolding on his account.

I have seen the Plaintiff give evidence. It is clear he has a problem with remembering dates and events, and on that basis it is quite possible that he may not have been able to recall clearly what did actually transpire in the discussion between him and the Property Manager.

It is clear that he wanted and intended to buy the scaffolding but had no money. It is clear that it was explained to him by the Property Manager that money could not be advanced to him as it was

not permitted by the financial procedures governing NPF. The Financial Controller himself made it quite clear that had a request for advance had been made, it would have been turned down.

It seems clear to me that as a result of the inability of the Plaintiff to pay for the scaffolding, the Property Manager then must have decided there and then to purchase the scaffolding for NPF and then hire them out to the Plaintiff, to enable him to carry out the work with immediate effect.

I have seen the Defendant's witnesses give evidence. They all gave clear and detailed evidence of what occurred and not wishy washy. All their subsequent actions and letters corresponded to the original agreement made by the Property Manager with the Plaintiff.

I am specially impressed with the evidence given by the Property Manager. He stated that the Plaintiff and him agreed that NPF will purchase the scaffolding and hire them out to him for \$15,000.00. He stated that he instructed accounts section not to give the check to the Plaintiff. The check was collected by the NPF driver and taken to Dongsan Company. He denied being asked to take the scaffolding and to charge the labour and transport charges to the Plaintiff.

He stated that the Plaintiff only started to claim the scaffolding towards the end of February. He denied emphatically ever entering into any agreement with the Plaintiff to advance payment to him.

I find the evidence of the Defendant's witnesses on the whole to be consistent and specific in detail.

The supervising firm, Sanders O'Connor was not even aware too of the arrangements to advance payment for purchase of the scaffolding. They were only aware of the hire charges to be paid to Moses Fuata for \$16,500. They did make a request to NPF to advance this sum but the Property Manager in his evidence in chief stated that this was turned down as it was not in accordance with their financial procedures.

Another piece of documentary evidence which goes to support the claim of the Defendants is contained in the first certificate of payment.

A sum of \$15,000.00 was deducted for hire charges in that certificate of payment.

The Plaintiff has sought to explain that he limited the amount to \$15,000.00 because he needed the remainder for paying labour and other charges. This may well be so, but the details on the certificate of payment stated that the payment was for hire charges and he attested his signature to this. If it was for payment of scaffolding then he should have said so and raised it with Sander O'Connor or NPF. He did not.

The suggestion therefore made that the document containing his final claim which was accepted by NPF could be seen as an acknowledgment of the payment of \$15,000.00 towards the scaffolding does not have as much persuasive effect especially when the document was written out at, a time when the issue of ownership was clearly being disputed. The document referred to is Exhibit 10 and was dated 5 March 1991.

The Plaintiff may have felt aggrieved by the fact that it was him who arranged for NPF to purchase the items. He may have felt aggrieved that his high hopes of obtaining ownership and title to the scaffolding did not work out.

The fact still remains that at no time did ownership to the goods ever went to him.

The scaffolding were bought by NPF money and collected by NPF personnel on the 8 January 1991. There is very clear and undisputed evidence on this given by the NPF driver, Allen Maeniua. He specially stated that he gave the check to the boss of Dongsan Company, a person whom he described as a Taiwanese, but in fact is a Korean) and then a forklift then loaded the pile of scaffolding into his truck. He commenced loading from 10 - 12 and continued at 1.00 p.m. and completed it that afternoon. The scaffolding were taken to NPF warehouse at Point Cruz, and later to the work site.

The check was deposited at ANZ Banking Corporation on the 8 January 1991 which clearly supported the version given by the driver that it was paid in the morning.

The Plaintiff could not remember the dates clearly, at first he thought it was the 12th or the 13th, but it is obvious that part of the reason for the difficulty in remembering is due to the fact that his version of events were not correct and not true.

Much has been said about the absence of a receipt. A receipt is merely proof of payment. There has never been any dispute that any payment was ever made to Dongsan Construction Company. The Company

has never raised an issue on this. Delivery was effected on the same time. I am satisfied that evidence has been adduced to show that payment was duly made to the company on the morning of the 8 January 1991 and not on the 14 January 1991 as the Plaintiff would have this Court to believe in his very questionable documents submitted as Exhibits 4 and 6.

The check was stamped with the ANZ Banking Corporation stamp for the 8 January 1991 and confirms the evidence of the NPF driver that the check was not only paid but was duly received and therefore banked on that same day.

The scaffolding were collected on the same day and kept at the NPF premises at Point Cruz and later brought down to the work site. Payment of the check was made by NPF staff and items collected by NPF staff. All these were acting for and on behalf of NPF. Title passed immediately on payment of the check. And there is no doubt in my mind as to whom it passed to.

Subsequent actions of the NPF in arranging to refund the sum of \$822.00 as soon as the Property Manager became aware of the payment by the Plaintiff lends support to their claim. On the 22nd of February a letter was written by the Manager (Employers Services) to the Plaintiff and advising him to return whatever scaffolding he had removed. This is all consistent with the stand that the Defendant has taken right from the start.

There is little doubt in my mind as to the accuracy, the correctness, the truth and the reliability of the evidence of Mr Fono. On the balance of probabilities, Mr Fono's evidence is more credible than that of the Plaintiff. There is supportive evidence from the colleagues and superiors of the Property Manager, of the verbal arrangement made with the Plaintiff, and this evidence is clear and undisputed. The subsequent transactions all point in favour of the NPF as the rightful and legal owner of the scaffolding.

The subsequent documents relied on by the Plaintiff in reality are meaningless as the transactions for the payment and delivery had already been effected and title already transferred. Any person can make any agreement they wish with the company but in reality, title had already passed on the 8 January 1991 to NPF and the company no longer has any rights whatsoever over those scaffolding to enter into any agreement with anyone else.

If the Plaintiff feels aggrieved by the purchase agreement then it is a matter he can take up with the company.

He never paid for the scaffolding on the 14 January 1991. NPF did on the 8 January 1991.

He may have played a major part in the bargaining of the prices, however, he never acquired title. NPF did. Subsequently, the claim of the Plaintiff is dismissed.

Judgment is given to the Defendant for its counter-claim.

The Defendant is claiming damages for loss of use of the 7 sets of scaffolding wrongfully removed by the Plaintiff. It is obvious that the Defendant has lost out in not hiring out the other scaffolding that have been in its possession. It has purposely and respectfully not rented out those scaffolding and in that sense has lost out on opportunities that may have arisen to do so and hence lost out on revenue.

However, it is only seeking damages for the loss of 7 sets. The Plaintiff on the other hand has had the benefit of hiring out those sets for use by others.

The rates used for calculation of the damages is not in dispute. It is the same rates used in the calculation of the Plaintiff's claim for damages.

I am satisfied that the claim for damages is justifiable. However, I do take into account too that the Defendant is in a far better position to shoulder any losses than the Plaintiff, who is but a sole contractor struggling in the harsh environment of the business world to make ends meet and to make a success in his business.

From March 1991 to July 1992 is 16 months - converted to weeks it is 64 weeks (i.e. 16 x 4).

At the rate of \$5.25/set/day for 5 days in a week for the 7 sets the total amount due/week is \$183.75

The amount of damages due therefore for 64 weeks is \$11,760.00. I limit the claim for damages to \$11,500.00 and payable in 4 instalments of \$2,875/month effective from the 30th of September 1992.

I make a DECLARATION for sake of completeness that all of the scaffolding including the 7 sets (comprising scaffolding (vertical) 81 Units, (comprising scaffolding (horizontal) 26 Units, (comprising scaffolding (bracing) 68 Units) are the property of the Defendant (NPF).

I also impose an injunction effective forthwith against the Plaintiff not to sell, dispose of or in any way deal with the scaffolding without the consent of the Defendant.

I also make an Order for the delivery of the 7 sets of scaffolding to the Defendant forthwith.

No damages is given for detention and/or conversion.

Costs of the Defendant to be paid by the Plaintiff.

(A. R. Palmer)
PUISNE JUDGE