3/2

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 27 of 1980

Between:

MOHAMMED HANIF
s/o Mohammed Yasin — Appellant

and

ROBERT VIVIAN MEAD — Respondent

Mr. H.K. Nagin for the Appellant
Mr. P.I. Knight for the Respondent

Date of Hearing: 16 September 1980
Delivery of Judgment: 30-9-80

JUDGMENT OF THE COURT

Henry J.A.

This appeal concerns a dispute relating to an oral building contract. Respondent was the owner of a section of land in Matu Road, Pacific Harbour, Deuba. He commenced the construction of a residence employing appellant as a supervisor on an hourly basis assisted by other labour. In or about January 1979 the parties entered into an oral contract for the completion of the work which had reached a stage about which there is some conflict of evidence.

Appellant alleged that the price for completion according to an approved plan was $24,500 payable in progress payment of $5,000 "every two months the first of such payments to be made forthwith". He claimed that payments had

been made as follows:

"8.2.1979	-	$3,000.00
2.3.1979	-	2,000.00
22.3.1979	-	2,000.00
24.3.1979	-	1,000.00
2.4.1979	-	2,000.00
25.6.1979	-	1,500.00
TOTAL		$11,500.00 "

Appellant alleged in his original statement of claim, filed on August 20, 1979, that respondent in breach of contract refused to make any further payments. A sum of $15,000 was claimed for breach of contract and a further sum of $1,500 for extras.

Respondent in his statement of defence claimed that the price was $12,000 and that progress payments were to be made as requested by appellant. The payments which appellant set out in the statement of claim were admitted but respondent claimed that credit should be given for a further sum $550 for a concrete mixer sold to appellant thus making the total credits $12,500. Respondent denied any breach of contract and alleged that appellant was in breach of contract in failing to complete construction of the said residence and counterclaimed for the sum of $5,000 for the cost of completion. It was alleged that work ceased on August 10, 1979 - ten days before the writ of summons was filed. In his reply to the defence appellant said:

" (i) That Defendant's house is a four bedroom house measuring 60 feet by 33feet 8 inches.

(ii) That a house of this size cannot be built at a cost of $12,000.00 as claimed by the Defendant.

(iii) That the Defendant did agree with the Plaintiff to have the said house built for the contract price of $24,5000.00 (TWENTY FOUR THOUSAND AND FIVE HUNDRED DOLLARS)."

Appellant also claimed that, when the contract commenced, construction had reached the height of only four ordinary cement blocks and not up to roof height as respondent claimed. Appellant also said the contract price and progress payments set up by respondent "were totally false and fabricated". In view of the course of the paragraph 4 of appellant's reply. It reads:

"4. .....AND the Plaintiff further says that he ceased work on the site without fully completing the said house because the Defendant had stopped making any payments and was continuously threatening the Plaintiff that he the Defendant would return to Australia without making any further payments to the Plaintiff and that the Plaintiff would not be able to do anything about it."

The hearing commenced on January 30, 1980. At the end of the first day leave was sought to file an amended statement of claim. At this stage appellant had almost completed his evidence in chief. An amended statement of claim was filed next morning. The breach of contract previously alleged was repeated but in addition appellant claimed that on August 10, 1979 respondent had engaged another contractor (unnamed) and that respondent had said that he would return to Australia without making any further payments. Appellant said he was forced to stop work and to treat the contract as repudiated. The claim for $15,000 was dropped and it was now replaced by a claim for unspecified damages. The claim for extras remained as before. In the result respondent's counsel did not find it necessary to

file a defence to the amendment and so the hearing continued on its second day and appellant's evidence was concluded. He called one further witness - a workman who had worked on the job since construction first begun and who was present and taken off the job by appellant on the crucial date, namely, August 10, 1970.

For the defence respondent was the only witness called. He had in attendance Mr. Jalil Khan who had drawn up the plans for the building. At the conclusion of the evidence counsel for appellant made an application for Mr. Khan to be called to rebut some portion of the evidence of respondent. The learned judge refused leave for appellant to do so and this refusal is one of the grounds of appeal. In due course judgment was given dismissing appellant's claim and awarding respondent $2,000 on the counter-claim. Appellant was ordered to pay costs. The appeal is from the whole of the judgment. Although Rule 12(1) of the Court of Appeal Rules require an appellant to state precisely the judgment sought this has not been complied with. So the only claim for breach of contract is now for unspecified damages. When questioned by the Court as to the form of judgment counsel did little to make the Court any better informed on the question of what was the basis for computation and what evidence was available for that purpose.

From what we have said it is clear that the case turned on credibility. The two versions of the oral contract are irreconcilable. We will refer only to the case of Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. Lord Reid at p. 375 said:

> " The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in Thomas v. Thomas, and particularly the passage which I now quote:
>
> 'I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.' "

The most striking finding by the learned trial judge was that appellant deliberately changed his story when the basis of his claim was amended. After referring to the differing versions, and they cannot be reconciled, the learned judge said:

> " I am quite satisfied that the plaintiff deliberately changed his story seeking to establish that the defendant was in breach of contract and that he the plaintiff had treated the alleged breach by the defendant as repudiation of the contract."

The learned judge also closely examined the evidence concerning the progress payments made and concluded that respondent was required to make payments when requested and not as to $5,000 forthwith and $5,000 every two months. Counsel for appellant pointed out that a total of $10,000 was paid in five payments within approximately two months but the learned judge had this factor before him as well as the diverse dates on which payments was made and the differing sums which were paid. He also took into account the payment of a sum of $1,500 on June 25, 1979. This aspect of the case was thoroughly considered by the learned judge. No complaint appears to have been made writing but appellant said:

> "Every payment I used to warn defendant verbally if he did not pay in time I would stop the work and we might end up in Court. Before I actually stopped work I did not warn him. I did not tell defendant I was stopping. I saw another contractor working there and he told me defendant had employed him. I then stopped working on the job. I did not go and see defendant. I went and engaged a lawyer. Last payment he made to me was $1,500 on 25.6.79. I stopped work about 2 weeks after the last payment."

Respondent denied that another contractor had been working on the job. This denial was corroborated by the workman called by appellant. The claim that appellant stopped work two weeks after the last payments is incorrect. It was over six weeks. Appellant was prompt with the issue of proceedings - a mere ten days after he left the job, and, it seems without making any written demand on respondent. It should be noted that if the crucial reason for treating the contract as being repudiated by reason of the presence of a new contractor this would be to the forefront of the statement of claim issued so close to the event.

3/4

The first ground of appeal is that the finding was against the weight of evidence. From what we have already said there is no merit in this ground and it requires no further comment.

Ground 2 reads:

"2. The learned trial judge erred in law and in fact by holding that the contract in question was for $12,000.00 (TWELVE THOUSAND DOLLARS) in view of the following:-

(a) The Respondent had already paid to the Appellant the sum of $12,500.00 (TWELVE THOUSAND AND FIVE HUNDRED DOLLARS).

(b) The size of the house was 60' x 30'8" and no reasonable builder would have agreed to build it for $12,000.00 (TWELVE THOUSAND DOLLARS), "

The figure should be $12,500 if the concrete mixer, about which there is a conflict of evidence, is included. The learned judge dealt adequately with this topic and we can see no reason to differ from his conclusion.

As to sub-paragraph (b) this relies solely on appellant's evidence. No witness was called to support him. It is incorrect to say that the residence was to be built for $12,000. It was partly constructed. The extent to which the building was completed was directly is issue as we have already stated. Appellant's own witness contradicted appellant and supported the evidence of respondent on this head. Respondent claimed he had purchased all the timber for completion, all roofing iron, cement concrete blocks and other material. It was not denied that respondent in the result got his residence built cheaply. The learned judge found as follows:

> " The plaintiff admits that between 8th February and 25th June, 1979 the defendant paid him $11,500 - the defendant contends he paid $11,950 and sold the plaintiff a concrete mixer for $550 making a total of $12,500. The plaintiff continued working from 25th June, 1979 until 10th August, 1979 without receiving any further payments when the house was then virtually completed. The total sum he says he received approximated the sum of $12,000. These facts strongly support the defendant's story that the agreed price was $12,000. I believe the plaintiff underestimated what it would cost to complete the building but on his own figures he was not that far out in his estimate. He admits he did not complete the building but says only $2,000 worth of work required to be done. "

Except for the question of calling evidence in rebuttal, the only other ground of appeal related to the conflict on the question of progress payments. We have already dealt with this.

The dominant feature of the trial was the finding, which was fully justified, that appellant deliberately changed his story in the circumstances already related. He did not hesitate in his pleading to accuse respondent of fabricating a false story - a matter which the learned judge, by his findings, shows to be a false accusation. Appellant was not content with a mere denial.

We are of the opinion that the learned judge carefully considered and weighed all relevant factors on the question of credibility and nothing put forward by appellant's counsel caused us to think that a different conclusion ought to have been reached. Even if we were of such an opinion, and we see no reason to be of that mind, then we are satisfied that the learned judge who saw and heard

the witnesses took proper advantage of this and correctly and very carefully considered and weighed all the evidence before coming to a conclusion. The matter, therefore, does not come even within Rule I of the rules laid down by Lord Thankerton (supra). Accordingly the first three grounds of appeal fail and it remains only to consider the question of the refusal to grant leave to call rebuttal evidence.

Appellant gave very sketchy evidence of the discussions concerning the making of the contract. He simply said: "I asked for $24,500. He agreed to that figure." In cross-examination he said:

> "He took me to Golf Club house and told me he could not control boys or obtain materials and asked me to give him a tender which I gave him the same say. We agreed on contract basis. No one else present....."

Appellant then gave details of how he arrived at his figure but there appears to be no discussion with respondent either on this or on the important topic of the value of work already done and the materials on hand. In evidence in chief respondent said:

> "Meeting with plaintiff at Atholl Place Pacific Harbour. Jalil Khan was present at time. We were discussing building of other buildings in Pacific Harbour in course of which I advised Jalil Khan I had verbal contract with plaintiff to complete my house for $12,00.
>
> (Court not put to plaintiff - Mr. Knight I agree but I did ask if anybody else there and he said no.)"

In cross-examination he said:

> " Jalil Khan was present when I mentioned about contract price. He

> has been subpoened. I do not know what he will say. It was in Atholl place - plaintiff was there - it was just about when I was leaving for Australia. "

At the close of respondent's case an application was made to call Mr. Khan in rebuttal. The ruling given was:

> "Court:
>
> Since alleged discussion with Jalil was not put to plaintiff in cross-examination I do not propose to place any weight on that part of the defendant's evidence alleging he mentioned contract price to Jalil.
>
> I see no reason now both parties have closed their cases to re-open it by permitting plaintiff to call Jalil in rebuttal evidence which I purpose to ignore. Application refused. "

The learned judge was not advised of the mature of the evidence which Mr. Khan might give. It appears that he was to be called merely because he was available and could give evidence of some sort in view of the fact that he was named by respondent in the manner set out earlier. Whether or not it would be rebutting evidence appears to have been unknown to counsel for appellant. It would similarly be unknown to the Court and its nature does not appear in the record. In those circumstances we are not prepared to interfere with the exercise by the learned judge of his discretion not to permit Mr. Khan to be called. We are told by counsel that he understood that Mr. Khan will say he was not present. Counsel invites us now to permit that evidence to be called. Even if it were given it does little to overcome the dominant factor found by the learned judge and clearly apparent in the record, that,

in the face of the Court, appellant on oath changed his story to fit in with his amended statement of claim. Counsel relied in particular on the case of Bigsby v. Dickinson 4 Ch. D. 24. The facts in that case were that plaintiff stood to be convicted of dishonest suppression of truth and his evidence discredited on a mere inference. With respect we accept the priniciples stated but the facts as we have shown are too dissimilar to be of any help. We cannot accede to counsel's request.

The appeal is dismissed with costs.

(sgd.) T. Gould
VICE PRESIDENT

(sgd.) T, Henry
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL