IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0062 OF 2007
(High Court Civil Action HBC 124 of 2003L)

BETWEEN : MOHAMMED NASIR KHAN and MOHAMMED NAZIM KHAN formerly trading as MOHAMMED YAKUB KHAN AND COMPANY a firm and now trading as MOHAMMED YAKUB KHAN AND COMPANY LIMITED

Appellants

A N D: TROPIK WOOD INDUSTRIES LIMITED

Respondent

Coram: Byrne, AP
Calanchini, JA
Wati, JA

Date of Hearing : 3 March 2010

Counsel : Mr R Singh for Appellants
Mr Q Bale for Respondent

Date of Judgment: 23 September 2010

JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Connors J) handed down on 19 July 2007. The Court dismissed the two claims that were before it and ordered the Plaintiff to pay costs as agreed or taxed. The remaining

six claims pleaded in the amended statement of claim had been settled between the parties.

[2] The relevant facts may be stated briefly. Since 1987 the Appellants had carted woodchips from the Respondent's mill at Drasa to the Respondent's stockpile at the Lautoka wharf and had been responsible for the management of the woodchip stockpile at the Lautoka wharf. The relevant agreement between the parties was dated 1 July 1997 (the agreement) and was for a period of three years from that date. It would appear that the arrangement between the parties ended in about June 2000.

[3] Clause 7 of the agreement stated:

> ***"The contractor shall be fully responsible for any loss of Tropik's woodchip due to accident or spillage during transit or resulting from stockpile operations and shall be fully responsible for any damage to Tropik's property caused by the operations of the contractor and his employees. The contractor will be fully responsible for any costs incurred in clearing up any spill of woodchip to be loaded or carted under this Agreement, and will be charged by Tropik for full sales values applicable at the time of any spillage for any woodchips which become unavailable for sale to Tropik's customers as the result of such spillage."***

[4] Clause 11 of the agreement stated:

> ***"The contractor shall be responsible for meeting all costs of his equipment used under this Agreement including but not limited to fuel, maintenance, registration and licensing fees and insurance."***

[5] The Appellants' claims that were dealt with at the trial relied upon these two clauses. The first of the claims was pleaded in paragraphs 36–38 of the amended statement of claim. Pursuant to paragraph 36

the Appellants claimed the sum of $22,829.72. The basis of that claim was set out in paragraphs 37 and 38 which stated:

> *"37 That the Plaintiffs were put in an impossible situation through the lack of foresight of the defendant in not anticipating the intensity of the operation of the cartage from Drasa mill and storage at the wharf of woodchips by the Plaintiffs. The Plaintiffs were obliged to collect the spillage or be penalized by the defendant company. The Plaintiffs pointed out to the defendant that the spillage was caused by the defendant in not ensuring that the woodchips were either regularly loaded as shipments or, once having been loaded, not anticipating that the intensity of the carting and storing of woodchips as just described would create spillage through no fault of the Plaintiffs."*
>
> *38 By reason of the matters aforesaid, the Plaintiffs have incurred expenses which otherwise are the responsibility of the defendant and therefore the plaintiffs have suffered loss and damage.*
>
> ***Particulars***
>
> *The Plaintiffs were required to collect woodchips from storage bins at Drasa mill and convey them to Lautoka wharf where, as has already been stated, storage had reached its full capacity causing the Plaintiffs, through no fault of its own, a slowing of its cartage. As a result, this caused a spillage of woodchips at both the mill and wharf sites. This amount of $22,829.72 is due and owing for the defendant's hire of other contractors to remove woodchip spillage for which the Plaintiff was deducted the said sum of $22,829.72."*

[6] Clearly whoever drafted paragraphs 37, 38 and 39 of the amended Statement of Claim was confused as to how he should refer to the Plaintiff. A firm is a legal entity and as such should sue or be sued in its firm name, not as stated in these paragraphs. Order 81 Rule 1 of the High Court Rules

makes provision for a firm to sue in its firm name without stating the names of all the partners.

[7] In the Pre-Trial Conference Minutes dated 28 June 2007 it was agreed between the parties that woodchips at the Respondent's woodchips stockpile at the wharf had overflowed and that the Respondent had arranged to have these collected by a private contractor. It was also agreed that the Respondent had paid $22,829.72 to the private contractor for the services rendered and that the Respondent had then deducted that sum from its payments to the Appellants.

[8] The learned trial judge said that under clause 7 of the agreement the Appellants were responsible for the cost of recovering any spillage and also for the value of those woodchips. He stated that the clause did not seem to impose any burden upon the Respondent to advise the Appellants that there had been a spillage and that they were required to clean it up. Having considered the evidence given on behalf of the Appellants the Judge concluded that the Appellants had failed on the balance of probabilities to establish their claim.

[9] The second claim was pleaded in paragraph 39 of the amended statement of claim. In that paragraph the Appellants claimed the sum of $272,587.00. Particulars of that amount were provided. Some of the claim was subsequently abandoned and only the sum of $168,367.00 in respect of fuel surcharge remained to be determined, particulars of which were as follows:

> ***"The Plaintiffs had been working with the defendant since 1987. From 1997 till their contract and operation ceased with the Defendant they were charged an unjustified and exorbitant fuel markup or surcharge which was unavoidable for the Plaintiffs to pay. Despite***

the fuel being the Plaintiffs' responsibility under the contract, the circumstances dictated that the Plaintiffs had no other recourse but to use the Defendant's supply of fuel. This was because the limitations placed on the route of the Plaintiffs' operation prevented them from obtaining fuel from a regular service station. The Plaintiff was therefore forced into a situation where they had to rely on the Defendant supplying them fuel which was supplied at a mark up of 20% which was unconscionable conduct on the part of the defendant and illegal under the Prices and Incomes Board (PIB) regulations. Fuel surcharge $168,367.00."

[10] In respect of this claim, the following matters were agreed between the parties in the Minutes of the Pre-Trial Conference:

> ***"1. The Defendant issued invoices to the Plaintiff demanding payments totaling $168,367.00.***
>
> ***2. The Plaintiff paid the invoices in the total sum of $168,367.00.***
>
> ***3. The prices of fuel during the relevant period were controlled by orders issued by the Prices and Incomes Board.***
>
> ***4. Any mark-up over the PIB prices of fuel supplied by the Defendant to the Plaintiff contravened the relevant PIB orders and was therefore illegally collected.***
>
> ***5. The deduction of the sum of $168,367.00 by the Defendant was within the contract and justified."***

[11] The trial judge considered the evidence given on behalf of both parties. He also perused a number of invoices from the Respondent tendered by the Appellants. He noted that there was no item identified as a mark-up on any of the printed invoices. There was an item on the invoices titled "Profit Sale on SP". This was explained in the evidence as being the Respondent's profit margin on the sale of spare parts.

[12] His Lordship also noted that the invoices related not only to diesel fuel but to other items such as spare parts, oil and the like including protective clothing. The Respondent's evidence was that the Respondent charged a mark-up of up to 20% on the items sold from its store from time to time which amount was the cost of supplying those items. More importantly, the Respondent's evidence was to the effect that the invoices verified that the Respondent charged the Appellants the Prices and Incomes Board price of diesel fuel from time to time. The Judge also noted that it appeared that the Appellants had not at any stage during the life of the contract sent a letter to the Respondent alleging overcharging by the Respondent.

[13] The Judge noted that the Appellants had not placed before the Court any evidence to establish the quantum of the markup or alleged fuel surcharge. The amount claimed was completely unsubstantiated apart from the assertion that that was the amount charged over the period of the contract. As a result the learned trial judge concluded that the Appellants on the balance of probabilities had not established the claim as pleaded nor was there any evidence placed before the Court to establish the quantum.

[14] The Appellants appealed to this Court on the following grounds:

> ***"1. That the Learned Judge erred in law and in fact in dismissing the Appellants' claim and deciding that the Appellant has failed on the balance of probabilities to establish its claim for the amount claimed in Cause of Action Nos. 7 and 8(a).***
>
> ***2. That the Learned Judge erred in law and in fact in exercising his discretion and failed to properly consider the relevant principles.***
>
> ***3. That the Learned Judge erred in law and in fact in failing to take into consideration of the agreed issues in mediation.***

4. ***That the Learned Judge erred in law and in fact in failing to take into full consideration of the facts of the case.***

5. ***That the Appellants reserve the rights to add further grounds of Appeal to its present grounds upon receipt of the full record of the Court."***

[15] Before considering the substantive issues raised by the Notice of Appeal, it is appropriate at this stage to consider the Notice itself. Rule 15 (3) of the Court of Appeal Rules states:

> ***"... every notice of appeal shall specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make."***

The Appellants' Notice asks for an order that:

> ***"... the decision of the Honourable Justice John Connors delivered at Lautoka on 19 July 2007 in the High Court ... be set aside and the Appellants' action be re-instated."***

[16] The effect of this application is that the Appellants are seeking a new trial since re-instatement of the action means that the matter goes back to the High Court for re-hearing. The power of this Court to order a new trial is dealt with in Rule 23 of the Rules. Rule 23 (1) provides that on the hearing of any appeal the Court may make any order as could be made in pursuance of an application for a new trial. However Rule 23 (2) provides:

> ***"A new trial shall not be ordered on the ground of the improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned."***

[17] So far as the Appellants' grounds provide any assistance, it would appear that this appeal is not concerned with the improper admission or rejection of evidence.

[18] We now turn to the grounds of appeal set out in the Appellants' Notice.

[19] On reading the grounds of appeal, the one common thread that runs through each ground is the lack of precision or particularity. This issue was raised by the Respondent in its written submissions in paragraph 2.4. The Respondent submitted that the grounds were too general and insufficiently particularised.

[20] In ground 1 the Appellants do not specify the error or errors in law and in fact that it is alleged was or were made by the Judge and upon which they are relying.

[21] In ground 2 the Appellants do not specify any of the relevant principles which they claim the Judge failed to properly consider.

[22] In ground 3 the Appellants have not identified the agreed issues in mediation that they claim the Judge failed to take into consideration.

[23] In ground 4 the Appellants do not say which facts they claim that the Judge failed to take into full consideration.

[24] It was only when the Appellants' submissions were filed and served that the Respondent was able to determine the basis upon which the Appellants sought to challenge the decision. The submissions dealt with each of the two claims separately.

[25] Dealing first with the issue concerning the deduction of $22,829.72 as the cost of clearing up the spill of woodchip at the Lautoka wharf, the Appellants submitted that the Trial Judge should have accepted the evidence called by the Appellants as there was no evidence on the matter from the Respondent.

[26] In his judgment the learned trial judge considered the evidence given on behalf of the Appellants at some length from paragraph 4 through to paragraph 13. His Lordship concluded that the evidence was quite unsatisfactory. That was a conclusion that was open to him having heard and observed the witness called by the Appellants. We find no reason for disturbing the Judge's view of the evidence nor the findings which he subsequently made as a result of that conclusion. We do not consider that his findings were inconsistent with the agreed facts that were set out in the Pre-Trial Conference Minutes.

[27] The submission on the second issue concerned the 20% mark-up on what was claimed by the Appellants as an unauthorised markup on fuel prices. The Appellants do not appear to challenge the trial Judge's finding that the 20% mark-up was on items other than fuel. The mark-up appeared to be confined to SP or spare parts which also included protective clothing. In the submission the Appellants claim that the agreement did not provide for a mark-up of 20% and that a margin for profit was already included. However the trial Judge appeared to accept the Defendant's evidence that the mark-up represented the cost of supplying the items.

[28] The Appellants also claim that the mark-up was harsh and unconscionable. As the trial Judge indicated the Appellants carried the burden of proof to establish that claim. The Judge was not satisfied that they had done so. We see no reason to disturb his conclusion.

[29] The Appeal is dismissed and the Appellants are ordered to pay the sum of $4,500.00 costs to the Respondent.

Byrne, AP

Calanchini, JA

Wati, JA

Solicitors:

Kohli and Singh for the Appellants

Q B Bale & Associates for the Respondent