IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL No. ABU0021 of 2011
(Lautoka High Court Civil Action No. 64 of 2008

BETWEEN : **J K BUILDERS LIMITED**

Appellant

AND : **JOPE DAKAI**

First Respondent

AND : **MAISURIA DESIGN LIMITED**

Second Respondent

CORAM : **Calanchini, P**
Basnayake, JA
Wati, JA

COUNSEL : **Mr. R. Singh for the Appellant**
Mr. K. Vuataki for the 1st Respondent
Mr. E. Maopa for the 2nd Respondent

DATE OF HEARING: 17 September 2013

DATE OF JUDGMENT: 3 October 2013

JUDGMENT

Calanchini P9

[1] I have read the draft judgment prepared by Basnayake JA and agree that the appeal should be dismissed.

Basnayake JA

[2] This is an appeal against the judgment dated 4 May 2011 of the learned High Court Judge at Lautoka. By this judgment the learned Judge had dismissed the plaintiff's (appellant) case and allowed the defendant's (1st respondent) counterclaim in a sum of $ 134,429.86. The plaintiff was ordered to deliver the keys and handover possession of the buildings to the defendant forthwith together with costs amounting to $5000 to be paid within 28 days.

The plaintiff's case

[3] The plaintiff filed this action against the defendant with a writ of summons dated 24 April 2008 to claim a sum of $160,987.45 together with interest and costs. The plaintiff had entered in to a contract with the defendant on 18 January 2006 to construct a four flat residential building for the defendant. The plaintiff claimed that he completed the building with variations. Payment was to be made on 10 certificates of payments. These certificates were issued by the architect who was in employment under the third party-2nd respondent. In all, ten such certificates were issued and payments made in respect of eight of them. The plaintiff pleaded that the defendant failed and neglected to pay part of the 9th certificate amounting to $52,784.81 and total payment in respect of certificate No. 10 amounting to $81,721.72. The contract also provided for retention monies to be released after 6 months from the date of the issue of the certificate of practical completion which the plaintiff claimed was on 30 July 2007. Although a period of six months had elapsed after the date of the practical completion the defendant had failed to release the retention fees amounting to $26,480.92. The total amount of the claim was $160,987.45. The plaintiff also claimed interest at 10% and costs.

The defence

[4] The defendant denied the plaintiff's claim and moved for a dismissal of the plaint. In an amended statement of claim the defendant claimed that the work was unsatisfactory and incomplete and made a counter claim of $83, 910.38 and liquidated damages at $4000 per month for failing to complete the building on the agreed practical completion date, namely, 13 January 2007 or alternatively for the loss of

rental from April 2007 till the date of judgment and interest. The defendant claimed that payments were not made due to unsatisfactory workmanship and made a claim for remedial works.

Defendant locked out

[5] When the defendant refused to pay the full amount on the two certificates (9th and 10th) the plaintiff refused to let the defendant take possession and locked him out of the apartments. This was in July 2007.

The Judgment

[6] The learned Judge had found 3 July 2006 as the starting date of the construction. This was the date the plans were approved by the Nadi Town Council. The learned Judge also found that the contract was for a period of 12 months. On the above finding the learned Judge fixed the date as 4 July 2007 for the practical completion. Considering the grace period of 5 days granted as an extension for inclement weather by the architect the extended practical completion date was fixed for 9 July 2007.

[7] The learned Judge found that the plaintiff had not built the flats to a stage of completion. Substantial defects and outstanding work was observed by the architect at the site meeting No. 7 on 21 March 2007. The learned Judge had observed a revelation in the report of the Quantity Surveyor dated 31 August 2009 that those defects remained un-rectified. However the certificate No. 10 dated 19 September 2007 issued by the architect claiming a sum of $81,721.72 was on the basis that the building was complete. This certificate was issued by the architect without further inspection since 21 March 2007. The learned Judge had observed that the architect was favouring the plaintiff. The learned Judge had also observed that the architect was not well aware of the contract work as he had not given sufficient supervision.

[8] The learned Judge found that a practical completion certificate had never been issued in this case. The reason for not issuing it seems to be that the building was not completed. A list of such incomplete work had been given in the Quantity Surveyor's report (Vol. 3, pg 626 at 631 of the High Court Record) and assessed at $83,910.38.

After considering the work done and the work to be done, the Quantity Surveyor had estimated that a sum of $49570.14 was payable to the plaintiff by the defendant. This sum was arrived at as follows:-

The contracted sum:	$597,361.00
Total variations.....	$39,257.00
Total	$636,618.00
The cost after completion as per certificate No. 10	$503,137.48
Residual cost	$133,480.52
Deduct costs for real completion	$83,910.38
Amount payable	**$49,570.14**

Retention Money

[9] The learned Judge had found that as a consequence of non completion and non rectification of the defects the plaintiff is not entitled to the retention money.

Right to Lien in the event of default payment

[10] In addition to not completing and not rectifying the defects the plaintiff had prevented the defendant from entering in to the premises and thus prevented the defendant from renting the flats. Then, the next question to decide is whether the plaintiff had a right of lien? There is no mention in the contract of any such right that the plaintiff would acquire in the event of any default of payment by the defendant. "*In the absence of an express contract that the builder shall have a lien over a building in respect of work performed by him on the building, a building contractor has no lien over a building or the land on which it is situated in respect of such work, unless the building owner encouraged him to form such a belief or acquiesced in him forming that belief*" (Beach J in HG Nominees Pty Ltd v Caulson Ptd Ltd & Anor [2000] VSC 126).

[11] The learned Judge held (pg. 30 of the HCR) that the builders' rights under the contract are personal and not proprietary. The contract did not give him a lien over the building or the land and the builder's right to payment is personal only. Such right cannot defeat the proprietary rights of the owner for possession, occupation and enjoyment of his building and land (H G & R Nominees Pty. Ltd. v Caulson Pty. Ltd.

(supra) quoting Halsbury Laws of England Vol. 3 para 1002). "Once materials are fixed as part of the permanent works the maxim "*quiquid plantatur solo, solo cedit* (whatever is fixed to the soil belong to the soil) applies and the infixed materials pass to the owner of the land. A contractor has no lien on fixed materials and can only sue the employer for sums due under the contract. A contractor has no right to materials which although once fixed are subsequently severed" (Halsbury's Laws of England vol. 4 (2) 4th edition at para. 382).

Liquidated Damages

[12] The learned Judge held that the plaintiff should pay liquidated damages as per clause 22 of the contract under the heading Damages for non-compliance which fixed the amount at $4000 *per mensum* for the whole period that prevented the defendant from taking possession. This period was reckoned as 46 months commencing from 9 July 2007 (the date of the practical completion) to the date of judgment, namely, 4 May 2011 amounting to $184,000 (46x4000). From this amount, the sum of $49,570.14 (being the sum mentioned in the Quantity Surveyor's Report at page 631 of the HCR as payable to the plaintiff) had been deducted thereby entering judgment in a sum of $134,429.86 together with $5000 as costs in favour of the defendant.

The grounds of appeal

[13] 1. *That the learned trial Judge had erred in law and in fact in not considering that the 1st respondent was required at all material times to mitigate his loss.*

2. *That the learned trial Judge had erred in law and in fact in holding and finding that the appellant was liable to pay the 1st respondent the sum of $134,429.86 when the 1st respondent failed to wholly mitigate his loss.*

3. *That the learned trial Judge had erred in law and in fact in failing to consider that the 1st respondent was in breach of the contract agreement between the parties as the 1st respondent failed to pay under the payment certificate No. 10.*

4. *That the learned trial Judge had erred in law and in fact in finding that the appellant was not entitled to any monies under payment certificate No. 9 and issued by the 2nd respondent on the 15th March 2007 on the grounds as follows:-*

(i) The sum of $22,500.00 due to the International Shop Fitting under the certificate No. 9 as $22,000.00 had already been paid to ISF.
(ii) The sum of $8,855.00 was due to Mechanical Services Limited.
(iii) The sum of $26,429.81 was due and payable under payment certificate Number 9 to the appellant.

5. *That the learned trial Judge had erred in law and in fact in finding that the construction of the building was not completed and by not considering that the Nadi Town Council had issued a completion certificate on the 30th July 2007. The learned trial Judge had also failed to consider that the 2nd respondent had issued payment of certificate Number 10 for payment of $81,721.72 evidencing completion of works.*
6. *That the learned Judge had erred in law and in fact when it found and held that the building was not completed as no practical completion certificate was issued when there was unchallenged evidence by the 2nd respondent that the practical completion certificate would be issued and had been issued at the latest on the 30th of July 2007 when the Nadi Town Council issued a completion certificate.*
7. *That the learned trial Judge had erred in law and in fact in finding and holding in not allowing for variation of works to the value of $34,737.00 when the variations were confirmed by defence witness number 1 in cross-examination to have been done and carried out on the instructions of the 2nd respondent, the 2nd respondent being appointed and employed by the 1st respondent.*
8. This ground is not reproduced as no submissions either written or oral were made in respect of this ground.

Submissions of the learned counsel for the plaintiff

[14] The learned counsel for the appellant (plaintiff) graciously admitted that the plaintiff was not entitled to a lien under Common law. He also admitted that the contract (vol. 3 pg 411 of HCR) did not contain a clause giving the plaintiff a right to a lien. On this admission the learned counsel could not maintain the 1st and 2nd grounds of appeal concerning mitigation. The plaintiff was holding on to the keys not allowing the defendant possession. Therefore the defendant did not have the opportunity to mitigate the loss.

[15] The 3rd ground is with regard to the failure to pay payment certificate No. 10. The defendant complained that the plaintiff has failed to rectify errors and to construct the building as per the contract. The Quantity Surveyor's evidence on this issue could not be refuted. The manner of issuing this certificate was also found to be questionable. This certificate was issued as the final certificate for payment. However with work still to be completed, the Quantity Surveyor had pointed out that it cannot be the final certificate.

[16] The Quantity Surveyor has taken in to account all the work done by the plaintiff in the preparation of her report and allowed a sum of $49, 570.14 (pg 631 of Vol. 3 HCR) as payable to the plaintiff by the defendant. The learned High Court Judge has given credit to this full amount in his final calculation. The plaintiff did not dispute the

Quantity Surveyor's Report (Ex 3 at pgs. 626-639 of the HCR). The appeal ground No. 4 relates to the certificate payment No. 9. Payments made under this certificate too have been considered together with the certificate of payment No. 10. Hence the plaintiff's complaint appears to be baseless.

[17] Ground No. 5 relates to the learned Judge's finding that the construction of the building was not completed. The plaintiff's argument is that Nadi Town Council would not have issued a Completion Certificate unless the building was fully constructed. It has become evident in this case that the construction of the building was incomplete. Although the certificate of completion was issued by the Town Council, the practical completion certificate, which was a requirement under the contract, was never issued. This has to be done by the Architect. Under these circumstances the learned counsel did not pursue the appeal on grounds other than grounds 6 and 7.

Ground No. 6

[18] This ground is based on the certificate of practical completion. The learned counsel submitted that the practical certificate was deemed to have been issued once the Nadi Town Council issued the certificate of completion. This was issued on 30 July 2007. The learned counsel submitted that in that event the liquidated damages could not be awarded beyond April 2007.

[19] The Architect said in evidence that he would have issued the practical certificate of completion once the Nadi Town Council issued the certificate of completion. This witness was found favouring the plaintiff by the learned Judge in his judgment. The learned Judge further observed that this witness was not conversant with the work of this building. He had been in and out of the country and not done much supervising.

[20] In terms of the contract it is the 2nd defendant who should issue the certificate of practical completion. Clause 15 (1) of the contract (Vol. 3 pg 411 at pg. 419) is as follows:-

> ***"15. When in the opinion of the Architect the Works are practically completed, he shall forthwith issue a certificate to that effect and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate". (emphasis added).***

[21] It was admitted that no such certificate of practical completion was issued by the 2nd respondent (Third Party). Therefore the submission of the learned counsel that the certificate of completion could be considered as the certificate of practical completion has to be rejected.

Ground 7

[22] Ground No 7 is with regard to not allowing $34,737.00 for variations. The learned counsel submitted that those variations were carried out on the instructions of the Architect who was employed by the defendant. The learned Judge in his judgment in paragraph 84 states thus:-

> ***"[84] I accept the quantity surveyor's findings and assessment that the sum of $49,570.14 should be paid to the builder by Jope Dakai. This amount was arrived at, based on the information provided in Certificate of Payment No. 10, by adding the Contract sum ($597,361) and variations ($39,257) then deducting the costs of the works as per the certificate ($503,137.48) giving the cost to complete ($133,480.52) then further deducting the cost of defective and incomplete works as assessed by her ($83,910.38) leaving the balance of $49,570.14".***

[23] The sum of $83,910.38 is made up of $34,737.00 and several other amounts involving other defective and incomplete work. $34,737.00 is the value claimed in the certificate of payment No. 10 as variations without the Architect's instructions. The sum of $34,737.00 is shown (at pg. 631 vol. 3 HCR) in item 5.3 of the Quantity Surveyor's report under Residual cost of the works as at 2006 and as deductions on defective and incomplete works. The payment certificate No 10 (pg. 650 at 651) gives 13 items of variations. Of this, seven variations were done with the written instructions of the Architect. Those items are shown under item No. 14 (14.1 to 14.7). Variations Nos. 14.8, 14.9, 15, 15.1, 15.2 & 15.3 amounting to $34, 737.00 were done without the written instructions of the Architect.

[24] The manner of obtaining the Architect's instructions are described under clause 2 of the contract at page 414 (Vol. 3). No. 2 (3) states that all instructions issued by the Architect shall be issued in writing. The learned counsel for the defendant submitted

that the Architect had a special form to issue those instructions. Some of these forms are filed of record at pages 602, 604, 606, 607, 609 and 611.

[25] The learned counsel for the plaintiff submitted that the Architect's approval had been obtained even in respect of the six items mentioned in the certificate No.10. He relied on clause 2 (3) (b) of the contract in support of his submission that the Architect had approved the variations. Clause 2 (3) (b) is as follows:-

> ***"2 (3) (b): That if neither the contractor nor the Architect shall confirm such an oral instruction in the manner and at the time aforesaid but the contractor shall nevertheless comply with the same, then the Architect may confirm the same in writing at any time prior to the issue of the Final Certificate, and the said instruction shall thereupon be deemed to have taken effect on the date on which it was issued."***

No evidence was adduced that written confirmation was at any time given. The Quantity Surveyor further said that although the architect had given his approval, the defendant's consent was not obtained. There is no doubt that the procedure set out under clause 2 (3) (a) & (b) had not been followed. Therefore the submission of the learned counsel is untenable.

[26] When this case was taken up for argument the learned counsel for the defendant moved to lead fresh evidence to prove that he had taken steps to mitigate the loss by leading evidence of rectification that he had done since the taking over of the building from the plaintiff. However as the defendant had already been given credit for such rectifications (by allowing a sum of $83,910.38) and as the defendant did not file a counter appeal to seek an enhancement, the learned counsel decided not to pursue the application with regard to leading fresh evidence.

[27] Considering all the submissions of both counsel I am of the view that there is no merit in this appeal. Hence this appeal is dismissed with costs fixed at $5000 to be payable to the 1st respondent by the appellant.

Wati JA

[28] I agree with the reasons and the conclusions of Basnayake JA.

Orders of Court

1. Appeal is dismissed.
2. Costs $5000 payable to the 1st respondent by the appellant.

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Hon. Mr. Justice William Calanchini
PRESIDENT

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Hon. Mr. Justice Eric Basnayake
JUSTICE OF APPEAL

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Hon. Madam Justice Anjala Wati
JUSTICE OF APPEAL