IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 64 of 2012
(High Court HBC 285 of 2005L)

BETWEEN	:	**THE MINISTRY OF WORKS AND ENERGY**
		First Appellant
AND	:	**ATTORNEY-GENERAL OF FIJI**
		Second Appellant
AND	:	**CHASE CORPORATION LIMITED**
		Respondent
Coram	:	**Calanchini P** **Basnayake JA** **Corea JA**
Counsel	:	**Ms M Lee with Ms K Naidu for the Appellants** **Mr V Mishra for the Respondent**
Date of Hearing	:	**26 November 2013**
Date of Judgment	:	**5 March 2014**

JUDGMENT

Calanchini P

[1]. This is an appeal from a judgment of the High Court at Lautoka delivered on 7 September 2012. The High Court awarded the sum of $151,647.92 (including interest) together with costs fixed summarily in the amount of $10,000.00 to the

Respondent. The Court also ordered that the sum of $8,500.00 held in the trust account of the Respondent's legal practitioner be released to the Respondent.

[2] The Respondent had commenced these proceedings by writ issued out of the Lautoka High Court registry on 20 September 2005 claiming the sum of $757,360.00 together with interest and costs against the Appellants. In its Statement of Claim the Respondent pleaded that the parties had entered into an agreement on or about 31 August 1998 whereby the Respondent provided a large excavator to the Appellants at the rate of $60.00 per hour. The Respondent's excavator was required by the First Appellant for excavating and drainage works on Naviti Island in the Yasawa group of Islands. The Respondent claimed that the works commenced as agreed on 1 October 1998 and that the excavator was returned to the Respondent on 12 June 2000. The Respondent claimed the sum of $192,780.00 as the amount owing for unpaid hours minus $28,560.00 already paid by the Appellants. The Respondent also claimed the sum of $17,500.00 being the cost of repairing the excavator due to the negligence of the Appellants. A further sum of $575,640.00 was claimed as loss of income from the machine for the period 13 June 2000 to 23 December 2003. The claims amounted to $757,360.00.

[3] The Minutes of the Pre-trial Conference dated 28 March 2010 set out the agreed facts. The Respondent carried on the business of excavation, building, demolition and other works. The First Appellant in August 1998 asked the Respondent for a quotation for large excavators to carry out excavating and drainage works on Naviti in the Yasawa Islands. The Respondent gave a quotation of $60.00 per hour for one large excavator.

[4] The quotation was accepted by the Appellants. The Appellants loaded the Respondent's excavator from the Respondent's premises and took the same to the Fisheries Jetty at Lautoka in September 1998 and loaded it onto a Government vessel which took it to Morou, Naviti, Yasawas. Excavation work commenced at Morou on 1 October 1998. The excavator was only returned to the Respondent on 12 June 2000. The Respondent demanded payment of the sum of $192,780.00 but the Appellants refused to pay. The Appellants paid to the Respondent the sum of $28,560.00 for 476 hours at $60.00 per hour for the project at Morou, Naviti from 1 October 1998 to 12 June 2000. It was agreed that there had been discussions on how much is to be paid as a category of lost hours but the issue had not been *"amicably resolved."*

[5] At the trial the Respondent called two witnesses. The first witness was the driver of the excavator and the second witness was the Company Secretary of the Respondent who was the wife of the Respondent's Managing Director, Mr Mukesh Kumar. He had died some time before the trial. The Appellants called two witnesses. The first was the then Deputy Secretary for the Public Works Department Mr Veitokiyaki and a Divisional Engineer, Mr Vosaki. The trial lasted over five days and 65 documents were tendered and admitted into evidence.

[6] The Minutes of the Pre-trial Conference had listed what were described as agreed issues of which there were a total of 13. The judgment of the High Court consisted of an examination in turn of each of those 13 agreed issues. Before commencing his analysis of the agreed issues, the learned trial Judge noted that the dispute concerned (1) the payment due for idle hours and (2) the payment for damage to the large excavator. The learned Judge noted that there was no fixed date for the return of the excavator. He also noted the Respondent's contention that since the excavator had been taken from the Respondent's yard in Lautoka to the island of Naviti by the Appellants it was for the Appellants to return the excavator to the Respondent's yard at Lautoka.

[7] The first issue considered by the learned trial Judge was the formation and terms of the contract between the parties. It would appear that it was not disputed that there was a written agreement signed by the parties. The learned Judge accepted the evidence given at the trial by Mr Vosaki that the standard Annual Suppliers contract and the terms contained therein did not apply to works carried out on islands in the Yasawa group. For works on those islands a special contract was required. However the Appellants were not able to produce the contract in question or a copy. The witness admitted that he had not made a search for the contract. No explanation was provided as to why the signed agreement or a copy could not be produced. The Appellants claimed that under those circumstances the *"Roads Manual"* under the standard contract should apply. The learned Judge rejected this submission. As there was a written offer (in the form of the written quotation) and a written acceptance, the learned Judge concluded that there was a written contract the terms of which were

constituted by the quotation, the correspondence passing between the parties and implied by the conduct of the parties, necessity and practice.

[8] The implied terms included an implied term that since the Appellants agreed to take the excavator from the Respondent's yard and transport it by land and sea they agreed to return the excavator in the same manner and condition to the Respondent's yard in Lautoka. It was a further implied term that the excavator had to be available with a driver and in working condition for the Respondent to be entitled to claim the hourly rate of $60.00 per hour. It was also an implied term that the Respondent was entitled to claim for *"idle hours"* (or stand by hours or lost hours) provided that the excavator was available with a driver and in working condition. It was an implied term that the Respondent could not rehire the excavator to another person before it was returned to the Respondent's yard at Lautoka. The learned Judge also found as a fact that the duration of the contract was from the date that the Appellants loaded the excavator on to the truck until the date of its return to the Respondent's yard, being 12 June 2000.

[9] The learned Judge concluded that since the quotation included a request that the Appellants transport the excavator from the Respondent's yard and since it was in fact the Appellants who had loaded the excavator on to the vessel at the Lautoka wharf for onward movement to Naviti, it was the responsibility of the Appellants to load the excavator on to the vessel for the return journey to Lautoka from Naviti.

[10] The learned trial Judge concluded that there was sufficient evidence for him to find that the parties had agreed that the amount that should be paid for standby hours was $70,200.00. The learned Judge also found that there was evidence of an agreement between the parties that the costs of repairs to be paid by the Appellants to the Respondent was $17,500.00.

[11] The learned trial Judge awarded interest to the Respondent on the amount of $87,700.00 at the rate of 6% per annum from 12 June 2000 till the date of judgment being 7 September 2012. Costs in the sum of $10,000 were awarded on the basis that the trial lasted over 5 days with reference to many documents (65 of which were admitted into evidence). The total amount awarded to the Respondent was $151,647.92 together with $10,000.00 costs.

[12] It is against this judgment that the Appellants appeal and seek an order from this Court that the judgment be set aside on the following grounds:

> *"1. That the learned judge erred in fact and law in relying on the evidence of Ms Vijayanti Mala and Mr Karan. Both of these witnesses were not involved in the negotiations of this contract.*
>
> *2. That the learned judge erred in fact and law in holding that this contract was not governed by the terms and conditions of the Road Manual. In failing to hold that this contract was governed by the Road Manual, the learned judge further erred in holding the following, that:-*
>
> *a. It is the obligation of the first appellant to transport the excavator from the respondent's yard to the work site. This is contrary to clause 14[b] [ii] of the Road Manual;*
>
> *b. It can be implied that the hourly rate is $60 per hour when there are standard government rates;*
>
> *c. The first appellant was responsible for the hours in which the excavator was not in use since it was in the possession of the first appellant;*
>
> *d. The first appellant was responsible for the security of the excavator;*
>
> *e. The first appellant has admitted negligence in this matter;*
>
> *f. The duration of the contract from the time the excavator was loaded on to the appellants truck to the time it was loaded to the respondents yard in Lautoka; and*
>
> *g. That the appellant has the responsibility of proving the existence of the written contract. If the respondent pleaded that there was a written contract with clauses that differs from clauses of the Roads Manual, the onus is on the respondent to produce the contract.*
>
> *3. That the judge erred in fact and law in holding that the respondent is entitled to $87000.00 for standby hours. The respondent did not provide any evidence indicating that the appellants have given instructions that the excavator was to be on standby for the above period.*
>
> *4. That the learned judge erred in fact and law in awarding an interest rate of 6% in this matter. An appropriate rate would be 3%.*

5. *That costs awarded in this action is far too excessive and disproportionate to the costs awarded in similar matters."*

[13] Ground 1 of the Appellants' grounds claims that the judge erred in relying on the evidence of two witnesses called by the Respondent. It is claimed that the error arose because they were not involved in the negotiations for this contract. The wording is ambiguous. It would appear that the Appellants are claiming that the learned trial Judge relied on the evidence of the two named witnesses when he determined the terms of the agreement and that he was wrong to do so.

[14] It is apparent from the pleadings, the agreed facts and the documentary evidence that the learned trial Judge has not relied on the evidence of the witnesses called by the Respondent in order to determine the terms of the contract. In the pleadings the Appellants have admitted that the Respondent submitted a quotation to carry out works in the Yasawa. It is also admitted by the Appellants that the Respondent quoted in writing the price of $60.00 per hour for a large excavator on 31 August 1998 which was accepted by the Appellants. The learned Judge found that the document referred to as the quotation constituted the contract and that the remaining terms could be implied from the correspondence passing between the parties. Apart from offering to supply a large excavator for deployment to the Yasawa Islands, the Respondent requested the Appellants to arrange transportation of the excavator from its yard in Lautoka to the Yasawa Islands. Both the offer and the request were agreed to by the Appellants. There is no material in the judgment of the learned Judge to indicate that he had relied on the oral testimony of either witness to determine the terms of the contract. This ground of appeal fails.

[15] Ground 2 is essentially concerned with the finding of the learned trial Judge that what is referred to as the *"Roads Manual"* did not form part of the contract between the parties. It would appear that the "*Roads Manual*" was a component of the standard Government Annual Supplies and Services Contract.

[16] In considering this ground of appeal it is appropriate to start with the pleadings. In paragraphs 4 to 12 of its Statement of Claim the Respondent has pleaded a number of facts in the claim for breach of contract. In paragraph 3 to 8 of their Defence, the

Appellants admitted a substantial number of the facts pleaded by the Respondent but denied liability for the amounts claimed. However there is no reference in the Defence to the *"Roads Manual"* nor were any facts pleaded in paragraphs 3 to 8 that would give use to the inference that the Appellants relied on the *"Roads Manual".*

[17] The next matter that needs to be considered is the basis upon which the learned trial judge is alleged to have erred in holding that the Road Manual was not part of the contract. To establish the existence of the agreement and its terms and conditions the Respondent relied on the quotation which was accepted by the Appellants and terms implied by the contents of correspondence and conduct. If the Appellants contended that the terms of the agreement were otherwise, the evidential burden was on them to adduce evidence to show what those terms were. It was claimed by the Appellants that there was a written contract signed by the parties. The evidence established that the Appellants retained a copy of the agreement. At page 294 of the Record the witness Temo Vosaki, called by the Appellants, stated that he was present when the contract was signed by the parties. He stated that a copy was filed in the office of the First Appellant in 1998. He informed the Court at page 295 that he had not brought the contract to Court. He said it could be in the office but that he had not personally searched for it. There was no reasonable or satisfactory explanation provided for the failure of the Appellants to produce a copy of the agreement in Court.

[18] However the principal basis upon which the learned trial Judge found that the *"Roads Manual"* did not constitute a term of the agreement was the evidence given by Mr Vosaki under cross-examination. It must not be forgotten that Mr Vosaki was called by the Appellants to give evidence at the trial. His answers to questions from Counsel for the Respondent were to the effect that the contract between the parties in this case was not governed by the terms that apply to the *"Annual Supplies and Services Contract."* He confirmed that this standard contract did not apply to work in the Yasawa group of Islands because there were no roads in the Yasawa Islands. He stated that a supplementary contract needed to be entered into. He described it as a special contract. He also confirmed that it was part of the contract that the excavator was to be taken to the Yasawa Islands by the Government vessel as was also the obligation on the part of the Appellants to bring the machinery back to *"the main land."* (See pages 293 – 295 of the Record).

[19] I am satisfied that the finding concerning the exclusion of the *"Roads Manual"* was open to the learned Judge on the evidence before him and in view of the inability of the First Appellant to produce the signed contract. The issues raised in (a) to (g) of ground 2 are premised on the basis that the learned trial Judge had erred in holding that the contract was not governed by the terms and conditions of the "*Road Manual".* In view of the conclusion that has been reached on that issue there is no requirement to consider the points raised in (a) to (g). This ground of appeal fails.

[20] Ground 3 is concerned with the quantum of the damages awarded by the learned Judge with particular reference to the amount awarded in respect of the claim for standby hours. There was no reference in the quotation to an hourly rate for *"standby"* hours. The Respondent's claim for the amount of $192,780.00 was set out in paragraphs 10 and 11 of the Statement of Claim. The claim is ambiguous but it would appear that the Appellants did not seek further particulars. The Appellants' Defence appears to be pleading that a total sum of $45,210.00 has been paid in full settlement of the claim. Once again no further particulars were sought.

[21] There is reference on page 286 of the record to the effect that the document on Respondent's page 27 of the bundle of documents was admitted into evidence as exhibit P63. Page 27 is the first page of a five page report dated 21 October 2010 addressed to the Divisional Engineer Western from a Mr P.B. Galuvakadua, Inspector. Under cross examination the Deputy Secretary Public Works Department (Mr Veitokiyaki) admitted that there had been an investigation carried out on behalf of the Appellants and that findings and recommendations had been made. He was aware of the recommendations but did not agree with them. Under cross examination, Mr Vosaki, the Divisional Engineer Central, was shown the full report and stated that he did not know the author and had not seen the report. This particular report was admitted into evidence and its significance is that it contained admissions and recommendations concerning liability. The report pointed to poor planning and mismanagement by the Public Works Department. The report recommended that the Department calculate (a) hours not paid (still pending), (b) stand-by hours, (c) lost income and (d) value of damage to the machine in order to negotiate an out of court settlement.

[22] In determining both liability and quantum for this claim the learned trial Judge in paragraph 25 of his judgment relied on a document dated 3 November 2003 prepared by a Mr S.L. Tupou on behalf of PPO which was addressed to *"DSO".* More importantly a cc copy of this document was addressed to and received by the Respondent. This document appeared in the Record as document No.14 in the Appellants' bundle of documents on pages 91 – 93. In that document there was a recommendation that an offer should be made to pay $28,560.00 for unpaid hours, $17,820.00 for lost hours (March to June 2000), $52,380.00 for lost hours (December 1999 to February 2000) and $17,500.00 for damages to the excavator coming to a total of $116,260.00 to the Respondent to bring *"the case to a close."*

[23] In the Respondent's exhibits there were copies of correspondence passing between the parties concerning resolution of the Respondent's claim. By letter dated 8 September 2004 addressed to the Solicitor-General the Respondent enclosed a copy of and referred to the report dated 3 November 2003. Implied in that letter is its willingness to accept the internal recommendation in settlement of its claim. In the fifth paragraph the following appears:

> *"Please note the PPO's recommendation (Report) on the matter dated 3rd November 2003 confirmed that Divisional Engineer Western should pay our company the sum of $116,260.00 (copy attached) (emphasis added).*
>
> *From $116,260.00 only $28,560.00 has been paid as per your advice and the balance of $87,700.00 is still owing and outstanding."*

[24] However it must be recalled that the sum of $87,700.00 includes both the claim for lost or standby hours (being $70,200) and value of damage to the excavator (being $17,500.00). As a result in a letter dated 22 September 2004 addressed to the Respondent the Solicitor-General's Office (Attorney-General's Chambers) replied that the sum of $17,500.00 was offered as the total sum for damage to the machine. This offer was accepted by letter dated 29 September 2004. The Solicitor-General's letter also indicated that *"we are still in the process of calculating the category of lost hours."* The letter also confirmed that the sum of $28,560.00 had been paid for unpaid hours.

[25] As a result the amount that was awarded by the learned trial Judge was $70,200.00. In arriving at that amount he relied on the calculations set out in the Appellants' internal correspondence. He then added the agreed sum of $17,500.00 as the amount for repairs to the excavator, arriving at a total of $87,700.00 as the amount to be paid to the Respondent.

[26] However, there is one issue of concern arising from the report dated 3 November 2003. In relying upon that document the learned trial judge has apparently overlooked an inconsistency. In the report there was a recommendation to compensate for additional lost hours for the months of December 1999 and January – February 2000. This was for a period of 3 months or a total of 91 days. However in the report the calculation for this period appears to be stated as a total of 220 days.

[27] After the appeal hearing, the Court asked Counsel to appear so that this issue could be clarified. Counsel were directed to file written submissions. The Appellants filed written submissions on 13 December 2013 and the Respondent did so on 31 December 2013.

[28] The submission of the Appellants initially referred to material that was not before the learned trial Judge. In paragraph 2.7 the Appellants then refer to correspondence that was in evidence and submit that the stand by claim for the period December 1999 to February 2000 should be limited to 46 days. The submission does not assist the Court in relation to the reference to 220 days that is referred to in the report dated 3 November 2003.

[29] The submissions filed by the Respondent were somewhat confusing on the issue of how the Court should reconcile the 220 days with the period of the additional three months. However the thrust of the submission was that the Respondent's initial claim had been rejected by the Appellants. The Appellants had come up with a recommendation to pay $116,637.94 which had been accepted by the Respondents in a compromise settlement. The problem with that submission is that the Respondent did not plead the existence of a compromised settlement as the basis of its claim for stand by hours. There is a reference in the Statement of Claim to *"attempted*

settlement". It did plead the agreement between the parties in relation to $17,500.00 as the cost of repairs to the machinery. Furthermore, there was no formal offer in respect of stand by hours made by the Appellants to the Respondent.

[30] I can see no fault on the part of the learned judge in his reliance on the correspondence dated 3 November 2003 as the basis for assessing the quantum of the claim for stand by hours. However, if there is an inconsistency in the material then it was appropriate that the Judge should address and resolve that inconsistency. In my view the reference to *"totalling 220 days"* can only be taken as a reference to the total number of lost days for which compensation was recommended. That figure of 220 days can also only be taken to include all the days between December 1999 and June 2000 (inclusive) which being a total of 213 days. There is obviously included an additional seven days outside of that period. The effect of this is that the stand by days claimed for March – June 2000 have been counted twice in the report dated 3 November 2003. The claim for the stand by days should have been calculated on the basis of a total of 220 days which amounts to $52,380.00. This is the figure that has been calculated correctly in the report. Added to that amount is to be the yet unpaid but agreed costs of repairs to the machinery at $17,500.00 for a total award of $69,880.00.

[31] The next ground of appeal is concerned with the award of interest at the rate of 6%. The Appellants claim that the appropriate rate awarded should have been 3%. Under section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 in any proceedings tried in the High Court for the recovery of a debt or damages, the court may grant interest on the sum awarded at such rate on all or any part of the sum so awarded for the whole or any part of the period between the date when the cause of action arose and the date of judgment as it thinks fit.

[32] In the present case the trial judge took the view that the cause of action for unpaid house arose on 12 June 2000 when the excavator was returned to the Respondent. He did not specify when the cause of action arose in respect of the agreed but unpaid claim for repairs to the excavator. As he has awarded 6% interest from 12 June 2000 in respect of the total award it may be assumed that interest runs for both claims from 12 June 2000. This was favourable to the Appellants and appears not to be challenged. It is only the rate of 6% that is challenged.

[33] Although the Appellants did not discuss this ground in their written submissions, Counsel did present a brief oral submission.

[34] The starting point for consideration of the question of interest is the decision of this Court in **Attorney-General –v- Charles Valentine** (unreported ABU 19 of 1998; 28 August 1998). In that decision this Court noted that section 3 gives an unfettered discretion to the Court which must be exercised rationally. The Court also noted that in normal circumstances the accepted approach for calculation of interest on damages (apart from future economic loss) was to take the average interest which could have been earned on the money in an appropriate low-risk or risk-free investment for the term the plaintiff has been without it, calculated from either the date on which the cause of action arose (special damages) or from the date the writ was issued (general damages). The Court in that case was determining a question relating to interest arising out of an award of damages for personal injury.

[35] In general interest is awarded on the basis that the successful party has been kept out of his money by the unsuccessful party who has had the use of the money himself. Therefore he ought to compensate the successful party accordingly. The rate of interest should reflect the earning capacity of money during the time the successful party has been deprived of the use of that money. Interest is awarded in respect of damages for loss already incurred. (See **12 Halsburys (4th Ed.) 490**).

[36] The learned trial judge has made no reference to any of the matters that I have mentioned above. The reference by the trial Judge to Order 13 Rule 1(2) and Order 44 Rule 10 do not necessarily assist the Court to determine the issue. I am of the view that given the extremely low rate of interest on cash deposits at banks (of which judicial notice can be taken) the interest rate that should be allowed in this case is 3%. I would allow this ground of appeal.

[37] In the written submissions filed on 13 December 2013 the Appellants submitted that section 4 (3) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 applied in this case and that as a result no interest should have been awarded. However it is clear from a reading of sections 3 and 4 of that Act that section 4 applies to post judgment interest for which the State is exempt. However section 3

applies to pre-judgment interest for which the State is liable. The interest awarded by the learned Judge in this case was for pre-judgment interest and as a result the State is liable to pay that interest. This argument is rejected.

[38] The final ground of appeal concerns the award of costs. The trial Judge awarded $10,000.00 costs for a five day trial. Costs are discretionary and in my judgment the amount awarded is within range although at the higher end. There is no error in the manner in which the trial judge has exercised his discretion.

[39] In summary I would dismiss grounds 1 and 2 of the Appellants grounds of appeal. I would allow ground 3 in part due to a mathematical error but not on the grounds relied upon by the Appellants. I would set aside the amount awarded by the trial judge and substitute the sum of $69,880.00. I would allow ground 4 and set aside the award of 6% and replace the rate with 3% to be paid on $69,880.00 for the period 12 June 2000 to the date of judgment. I would dismiss ground 5 and order that each side pay its own costs in this appeal.

Basnayake JA

[40] I agree with the reasons and conclusions of Calanchini P.

Corea JA

[41] I have considered the judgment of Calanchini P and agree with the findings, reasoning and conclusions.

Orders:

(1) *Appeal allowed in part.*

(2) Orders of the Court below are set aside.

(3) The Appellants are ordered to pay the total amount of $69,880.00 on the claim to the Respondent.

(4) Pre-judgment interest on that sum is to be calculated at 3%.

(5) *The Appellants are to pay the costs of the proceedings in the court below as ordered by the trial judge in the sum of $10,000.00.*

(6) *Each party is to pay its own costs in this appeal.*

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL

HON. MR JUSTICE BASNAYAKE
JUSTICE OF APPEAL

HON. MR JUSTICE COREA
JUSTICE OF APPEAL