

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CIVIL APPEAL HBA 21 OF 2010
(Magistrates Court Civil 23 of 2009)

BETWEEN : **KIMS FURNITURE FIJI**
Appellant

AND : **SHABUSHABU RESTAURANT CO. LTD**
Respondent

Mr R P Singh for the Appellant
Ms S Narayan for the Respondent

JUDGMENT

This is an appeal from a decision of the Resident Magistrate sitting in the civil jurisdiction of the Magistrates Court at Suva. In a decision delivered on 9 September 2010 the learned Magistrate dismissed the Appellant's claim and awarded costs to the Respondent. The Appellants subsequently filed, apparently within time, notice and grounds of appeal. The appeal was first called before me

on 18 February 2011. On that day directions were given for the parties to file and serve written submissions and the appeal was relisted for mention on 15 April 2011. The parties had not complied with the Court's directions as at 15 April 2011. Between 15 April 2011 and 16 September 2011 the appeal was listed for mention on a number of occasions by consent of the parties. On 16 September 2011 fresh directions were given for the filing of written submissions. On 2 November 2011 the Appellant filed its written submissions. The Respondent did not file answering submissions and as a result the appeal was listed for one further mention on 12 June 2012. On that day further directions were given whereby the Respondent was ordered to file written submissions within 14 days. To date the Respondent has failed to file written submissions and, in the interest of justice to the parties, the Court can wait no longer for the Respondent to comply with the orders of the Court.

The Appellant's claim was for the balance of money owing for work and labour done and materials supplied pursuant to a contract. The amount claimed was \$20,640.00. The proceedings were initially commenced in the High Court by writ. A Statement of Claim and Defence were filed in the High Court as pleadings under the High Court Rules. Following an increase in the civil jurisdiction of the Magistrates Court, the proceedings were transferred to the Magistrates Court on 2 February 2009. Prior to that date, discovery and inspection of documents had been completed and pre-trial conference minutes had been filed. The hearing of the claim took place on 11 December 2009. Mr Kim Young Chang gave evidence for the Appellant. Two witnesses were called for the Respondent.

Although described on the writ as a company, the Appellant's correct description was set out in the agreed facts as a furniture and journey business. It would appear that Mr Kim Young Chang was the proprietor of that business. The Respondent was a body corporate with its restaurant business located in Gordon Street Suva.

The Appellant claimed that he entered into a contract with a Mr Oem Chang Soo, as a representative of the Defendant company whereby the Appellant would carry out joinery and finishing work at the Respondent's restaurant for the price

of \$36,000.00. The Appellant claimed that the contract was entered into on 19 March 2004 pursuant to an offer dated 5 March 2004 made by the Appellant to the Respondent which offer was accepted by the Respondent on 19 March 2004. The Appellant claimed that later agreed variations brought the total cost of the works carried out pursuant to the agreement to a total of \$45,840.00. The Appellant claimed that he had completed the contract but had only been paid the amount \$25,100.00 by the Respondent. The Respondent has refused to pay the balance of \$20,640.00.

In its Defence dated 21 November 2007 the Respondent pleaded in paragraph 2, amongst other things, that the agreement was made between the Appellant and the previous director of the Respondent, a Mr Oem Chang Soo. In paragraph 3 of the Defence the Respondent alleges that the Appellant failed to carry out extra work as requested. In paragraph 4 of the Defence the Respondent acknowledges that the first payment of \$18,000.00 was made to the Appellant on 8 March 2004 being 50% of the initial contract price. The Respondent then pleaded in the same paragraph that it made a second payment of \$7,200.00 when the works had not been completed. In paragraph 5 the Respondent denied that any debt is owed to the Appellant by the Respondent. It claims that when it purchased the business from Mr Oem Chang Soo there were no debts in the name of the company. In paragraph 7 the Respondent pleaded that the Appellant failed to complete the work and that as a result Mr Soo had to engage other contractors to complete the work. In paragraph 8 the Respondent pleads that there is no cause of action against the Respondent since Mr Soo had entered into a personal dealing with the Appellant and not on behalf of the Respondent.

After considering the documentary evidence and the evidence given at the hearing the learned Magistrate concluded that the contract between the parties was entered into on 5 March 2004. The learned Magistrate also concluded that the contract was made by Mr Kim with Mr Oem Chang Soo in his personal capacity since the company was incorporated on 17 March 2004 and was as a result not in existence as at 5 March 2004. The learned Magistrate concluded that there was no agreement between the Appellant and the Respondent.

Consequently the Respondent was not indebted to the Appellant in the sum of \$20,640.00.

It is against this decision that the Appellant appeals seeking an order that the judgment of the Resident Magistrate delivered on 9 September 2010 be wholly set aside on the following grounds:

- "1. *The learned trial Magistrate erred in law and in fact when he did not consider section 36 of the Companies Act Cap 247 which was vital to the outcome of the case.*
2. *The learned trial Magistrate erred in law and in fact when he failed to consider section 40 of the Companies Act Cap 247. The Act states that the documents may be executed on behalf of the company by its directors and there is no need for the common seal of a company to be endorsed on the documents executed by it.*
3. *The learned Magistrate erred in law and in fact when he failed to take into account the Agreement of 19 March 2004 as it meets all the requirements of the Companies Act Cap 247.*
4. *The learned trial Magistrate erred in law and in fact when he failed to take into consideration exhibit 11 which was a letter dated 21 July 2004 which had explicitly confirmed that there was a contractual agreement between the Plaintiff and the Defendant for works at the Defendants' restaurant and that Mr Oem Chang Soo is not personally a party to the contract.*
5. *The learned trial Magistrate erred in law and in fact when he failed to take in to consideration that when the Defendant's company became a duly incorporated company on 17 March 2004 the exhibit No.11 dated 21 July 2004 confirmed that there was a contractual agreement between the Plaintiff and the Defendant for works at the Defendant's restaurant and the execution of the said agreement was done on 19 March 2004 after 2 days when the company was incorporated by Mr Oem Chang Soo as the director of the (Respondent).*

6. *The learned trial Magistrate erred in law and in fact when it failed to take into account the conduct forms the Directors of the Company which tendered to show that they had rectified the agreement."*

Although not stated in as many words, the grounds of appeal challenge the finding of the learned Magistrate (1) as to the date of the contract and (2) as to the parties between whom the contract was made. The grounds of appeal also raise the application of certain sections of the Companies Act to the present case. For these two sections to be of any relevance to the appeal, it would be necessary for this Court to conclude that (1) the contract was made on a date later than the date of incorporation or (2) the Respondent was nevertheless bound by the contract even though it had been made prior to the date of incorporation.

The first issue to consider is the date of the contract. The Appellant's quotation and hence his offer is dated 5 March 2004. The crucial question is when was it accepted by Mr Oem Chang Soo. Having heard the evidence given by the Appellant in cross-examination and in re-examination, the learned Magistrate concluded that it was more probable that the contract was made on 5 March 2004. The Appellant admitted that he had added the handwritten notation under the signature of Mr Oem Chang Soo on about 19 March 2004. It was a fair inference, since Mr Oem's copy did not have the same handwritten notation that the notation was added after Mr Oem had signed the document and that Mr Oem had signed the document before 19 March 2004. It was open on the evidence for the learned Magistrate to conclude that the contract was made on about 5 March 2004. I see no reason for distributing that finding of fact.

From that finding of fact, it is clear that the contract was made between the Appellant Mr Kim and Mr Oem Chang Soo before the Respondent was incorporated. The Respondent was incorporated on 17 March 2004. It is also clear from the material before the learned Magistrate that Mr Oem Chang Soo was a director of the Respondent's company upon incorporation on 17 March 2004. It was not disputed that the contract was for the Appellant to perform joinery and finishing works on the restaurant.

The restaurant's name was the name of the company incorporated no more than 12 days after the contract was made between the Appellant and a person who subsequently was registered as one of two initial directors of the company. It was not for one moment suggested that the contract related to work to be performed on premises that belonged to Mr Oem Chang Soo personally or jointly with another person in a private capacity.

These facts raise the question whether the contract can be said to be what is sometimes referred to as a preliminary contract. A preliminary contract is a contract that is purported to be made on behalf of a company before its incorporation. In my judgment there was sufficient evidence before the learned Magistrate to conclude that Mr Oem Chang Soo purported to enter into a contract with Mr Kin on behalf of the Respondent before its incorporation.

That conclusion, of course, raises the question as to what is the extent of the Respondent's liability under such circumstances. The position was stated clearly in **7 (1) Halsburys 277** at para.454:

"A company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation. After incorporation it cannot ratify or adopt any such contract because in such cases there is no agency and the contract is that of the parties making it. The adoption and confirmation by a directors' resolution of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between it and the other party to the contract, or impose any obligation on it towards him."

Therefore, even if it is accepted that Mr Oem Chang Soo purported to contract with Mr Kim on behalf of the Respondent before its incorporation, the contract is not binding on the company although Mr Oem may be sued personally. This is because Mr Oem cannot be an agent for a non-existent principal.

However that is not necessarily the end of the matter. There is nothing to prevent the company, after its incorporation, from entering into a new contract to put into effect the terms of the pre-incorporation contract. This is the only way a company may be bound by an agreement entered into before its

incorporation. The new agreement, which must be to the effect of the previous agreement may be inferred from the company's acts after its incorporation. A new contract will not be inferred when the acts are done in the mistaken belief that the first agreement was binding on the company. In **Natal Land and Colonization Company Limited -v- Pauline Colliery and Development Syndicate, Limited** [1904] AC 120 the Privy Council observed at page 126 that:

"But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract."

For a court to conclude that a new contract was made, the circumstances relied on for that purpose must be necessarily referable to and must necessarily imply a new contract. There needs to be distinguished a situation where directors of the company act under a contract that purported to be made on its behalf prior to its incorporation and a situation where the acts of the directors can be inferred or implied as constituting the formation of a new contract on the same or similar terms.

In the present case, there are only two matters that may reasonably be considered in order to determine whether the company has made a new contract. The first matter was the payment of \$7,200.00 on 29 March 2004. This was a payment made by the Respondent after its incorporation pursuant to the agreement dated 5 March 2004. At best it can be said that the payment was made by the Respondent because it mistakenly considered itself bound by the agreement dated 5 March 2004 before its incorporation. The second matter was the letter dated 21 July 2004. The letter relates to issues arising under the agreement dated 5 March 2004. Neither matter can in any way be said to imply or infer that the Respondent had, after its incorporation, entered into a new contract with the Appellant. Furthermore there is insufficient evidence to conclude whether the discussions concerning variations to the agreement of 5 March 2004 occurred before or after the incorporation of the Respondent. Even if those discussions occurred after incorporation, I do not consider that they constituted acts capable of implying notation.

As a result I have concluded that there was no contract between the Appellant and the Respondent. The Appeal is dismissed and the Respondent is entitled to costs which I fix summarily in the sum of \$1,500.00.

W D CALANCHINI
JUDGE

9 August 2013
At Suva