

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 207 of 2004

BETWEEN : **MOUNT CARMEL TIMBER CORPORATION LIMITED**, a limited liability company having its registered office at Suite 20, First Floor, Nadi Town Council Arcade, Nadi.

PLAINTIFF

AND : **TIMBER FIJI LIMITED** a limited liability company having its registered office at Cromptons Suite 10, Queensland Insurance, Victoria Parade, Suva.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Sione Fa** for the Plaintiff

No appearance for the Defendant

Date of Hearing : **30th November, 2011**

Date of Judgment : **26th September, 2013**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted present action after the Defendant had served Winding Up notice in terms of Section 221 of the Companies Act. The Default judgment entered due the failure of the Defendant to file a statement of defence. But this was set aside and the Defendant was granted an opportunity to file a statement of defence which also contained a counter claim for the alleged sum claimed in the Section 221 of Companies Act, but the Defendant failed to proceed with the action thereafter and no appearance on behalf of the Defendant when the

matter came up for hearing before the judge and the judge made orders for formal proof.

2. The Plaintiff proceeded to formal proof of the action in pursuant to the order made on 23rd September, 2010. The counsel for the Plaintiff obtained several adjournments due to the non-availability of the material witness who allegedly worked abroad. Finally, an accountant who was also a Director of the Plaintiff Company gave evidence and produced the documents marked in this case. The action is based on the breach of contract for inter alia timber felling, roading and hauling, with the Defendant. The Defendant had requested the Plaintiff to 'stand down' its operations in terms of the contract in December 2002, but according to the statement of claim the operations continued till 2004. The Plaintiff in the statement of claim seeking general damages for mobilization, a sum of \$99,750, but this sum was an estimate, and based on alleged letter to the Defendant when they were requested to 'stand down' of their operation and this was never an actual loss, but only an estimate and in terms of contract between parties the cost of such temporary 'stand down' has to be calculated in terms of Clause 13.3 of the Contract, but the Plaintiff failed to do so. The statement of claim also claims for breach of agreement a sum of \$2.415 million again there is no proof of breach of agreement, the Plaintiff was unable to prove breach of contract. The claim for aggravated damages for defamation a sum of \$200,000 was claimed and General Damages for balance of payment of the contracted price a sum of \$93,315.12 and a sum of \$26,600.66 were also claimed but failed to prove them. The evidence produce did not support the claims in the statement of claim.

B. FACTS AND ANALYSIS

3. The Plaintiff called only one witness and he and his wife were the initial Directors of the Plaintiff Company and the certificate of incorporation as well as the particulars of the Directors of the Plaintiff produced to the court, marked as Exhibit 1 proves that fact. The Plaintiff had entered in to a contract with the Defendant for 'Timber Felling, Roading and Hauling' in a forest area under the

said Contract and this Contract is marked as Exhibit 3. The Exhibit 2 is the Contract between the Defendant and a statutory body (NLTB at that time) where the Defendant obtained the authority to fell trees in an area defined in the said contract, according to the terms of the said contract between the parties to the said contract. In this proceeding there are no issues of any breach of condition by any of the parties and for the assessment of damages this Exhibit 2 is not material. The claim is based on 'Timber Felling, Roding and Hauling' contract (hereinafter referred only as the Contract) between the Plaintiff and the Defendant

4. The witness gave evidence to the effect that there were no problems between the parties during the first year of logging operation, but due to change of shareholding of major shareholders the work in terms of the Contract, between the Plaintiff and Defendant could not proceed. The reason given by the witness for the temporary 'stand down' of operations by the Plaintiff is not supported by any evidence other than the oral evidence, but contrary to this there were documentary evidence marked Exhibit 5 and Exhibit 6 which were the initial communications between Plaintiff and Defendant regarding the request to terminate the operations of the Plaintiff. The Exhibit 6 was a letter written by General Manager of Fenning Pacific (Fiji) Ltd (the majority shareholder of Defendant) requesting 'stand down' of the operation of the operation of 'sawmill and bush' from 16th December, 2002. The said communication is reproduced in full below.

"16 December 2002

Mount Carmel Timber Corporation Ltd
P. O. Box 213
Deuba
Fiji

Attn: Alex Ong

Dear Sir

RE: STAND DOWN OF LOGGING OPERATIONS

We wish to confirm that the management would stand down operations for the sawmill and the bush with effect from 16

December 2002. The reason for the decision was discussed during the operational meeting on 10 December 2002.

We have duly informed OGL of the above decision. **We also enclosed a memo dated 4 December 2002 from Mr. Leong for your perusal.**

Thank you.

Yours faithfully

FENNING PACIFIC (FIJI) LTD
ONGW.H
General Manger

cc. Mr. Leong Kian Ming
Mr. Rey

(emphasis is added)

5. The said letter had an annexed letter from Mr. Leong, but this was not produced to the court at the formal proof. Whether this was accidental slip or deliberate, it would have been material for the action and would have explained the reasons for the request for 'stand down'.The above communication was marked Exhibit 6 and on the following day on 17th December, 2002 the Plaintiff had written a detailed reply to said request for 'stand down' of operation, and this reply was marked as Exhibit 5. This lengthy reply explains the reasons for such request to some extent, as well as the relationship between the parties at that time. The said letter is reproduced in full below.

"December 17, 2002

Fenning Pacific (Fiji) Ltd
P O Box 2668, Lautoka
Fiji

Attn: CK Yap

Dear Sir

Re: STAND DOWN OF LOGGING OPERATIONS

I refer to your letter dated 16 December 2002.

We did discuss at length about the stand down during a meeting on the 10th December 2002 and I have given my

reasons why it should not be carried out. I am very disappointed with your letter date 16 December which required me to stop operation on the same date. **You did not specify how long I should stand down in your letter but you did mention verbally one month from the 16 December. Please clarify.**

I am saddened by your action as it would not only affect me now but will also affect my performance in the months ahead. Moreover, your action did not indicate a consistent pattern which you have been driving this far but a 360 degree about turn in your approach. I am more appalled and confused by your action as I would expect consistency in your decision, which you have said came from your head office board of directors in Kuala Lumpur to boost logging operation volume at all cost even to the extend of invoking clause 8.1 (b) **(the right for you to bring in other contractors without informing us)**. There are several operation meetings which followed which **discuss about the low volume production and to assist MCT in achieving the volume**. I would understand if we have already achieved what we both have set out to achieve (production volume) but the directive to increase logging operation volume only came to me as late as 20 August 2002. **I am again reminded in writing of our dismal performance and the consequences in a letter from Fenning dated 22 October 2002.** Apparently when we were instructed to perform and the fear of losing the contract, we set out to do our best to achieve our target at whatever cost. Your pointed out clearly to me at a meeting in the sawmill office that I have to achieve it at whatever cost even if we have to pay F\$70 per m3 to subcontractors. We did exactly that. We increased our wages to our operators. We took in semi-skilled operators already with Tropic Pine and Mahogany and not willing to camp in the bush), they wrecked our machines which increased our repair cost and now after some 'training' they are good operators. We had to beg and pay top money for logging trucks to cart for us (Tropik Pine is paying \$F21 PER m3). We arranged for subcontractors to come and do the logging for us. We have to pay in advance for the repairs of their machineries, wire ropes, wages and diesel just to provide better incentive for them to log for us. As you know, there are not many good, trustworthy and financially sound contractors around in Fiji now. Bringing in our subcontractors means more problems as we have to watch over their shoulders. We brought them in despite the many disadvantages because your board requested them. I talked to my subcontractors yesterday about the stand down and hey wanted me to compensate them because they have just joined us and cannot afford to stop now. Moreover, I have promised them to log as much as they can because you told me to and trusted you.

I am encouraged by the various ways of assistance you have come up with in our operational meetings to help us increase the volume. I go all out to get the volume leaving very little margin

from the rate of \$F70 for myself. I do it because I believe once I get the volume the pressure will be off me and you. Having sacrificed for the last 3 months financially or so I am beaming with confidence as I believe the bleak days are over. We are on the up swing momentum and the momentum will bring us higher in terms of production volume later. The weather is getting better and we thought finally everything has come together for you and I. we are doing very well this month of December. Up to 14 December we have managed to come out with about 1930m³ of logs despite minor hiccups over scaling issue. We aim to achieve at least 2800m³ this month before 24 December 23002. I thought the time has come for me to be able to save some fund for the coming wet season starting February to June. The morale is high in the camp, I have cancelled all leave for my workers during the Christmas & New Year break. They will go on holiday on December 25, 26 and January 1 only.

The about turn that you have handed to me has left me disillusioned. I will lose my operators if I ask them to go on leave for a month. A lot of other companies are waiting to employ them. It will take me some time (at least 3 months) to get new operators and 'train' them to achieve the level of optimum volume with minimal breakdown like what my operators are doing now. If my truck contractors have nothing to cart for the next one month, they will leave us. Tropik Pine is offering way too much and we cannot compete with them. My subcontractors will create a big fuss, apart from having to compensate them, they will spread rumours which may affect MCT and Fenning's position in the timber industry in Fiji.

At the moment, I have run out of cash. I have no money to pay for the subcontractors, trucking and diesel which I have expensed up to today 17 December 2002. (1930m³ to the mill). I have no one to turn for fund except advances from you or may own internal generated fund from the contract fees. MCT has been looking forward to the day where we can independent financially which means we need to achieve a certain volume a month. We will continue to face financial problem for sometime because of this stand down. I need time to 'restart' the operation again after one month. A computer can be shutdown and restart the next moment and still work perfectly but a logging operations can't. I estimate that with this stand down, my operations will be set backward for at least 2 - 3 months. I have to reiterate here that you have penalized me in the year 2003 because of my dismal production

figures in Year 2002 (without examining the cause of the shortfall). My year 2003's rate is chopped down by F\$5 PER m3 to F\$70 and my Year 2004's rate reduced by F\$5.40 to F\$75. As you have mentioned, the rate for Year 2004 will be re-examined depending on the production of Year 2003. I truly believe this stand down will definitely hamper our effort and damaged what we have built up so far. I therefore sincerely hope you will take this stand down and its negative effect on my production into account should I failed to achieve the Year 2003 figures.

I can't afford to be penalized again. I understand the penalty clause is provided for in the contract agreement signed between us but I believe any action must be taken withcaution and restrain. There is a 'master' and 'servant' relationship here. The principal company should 'take care' of the contractor and not penalized it unnecessarily. If the contractor is made to suffer, the principal company will be affected too, sooner or later.

Due to the reasons above and the financial losses which we will suffer because of the stand down, I would like to request for some compensation to tie us over for the next few months. We will lost all the revenue for the duration of the one month you closed us down. We estimated the losses at F\$175,000 (2,500m3 @ F\$70). From our record we are now averaging more than 200m3 per one fine day. Apart from the revenue loss, we will have to incur additional cost on recruiting and retraining new operators, compensating our contractors for the stand and looking for new trucking. We will also have to maintain other fixed overhead cost. Additional and overhead cost are estimated at F\$50,000. We sacrifice our rates by paying higher rate to the subcontractors in the past. We will also suffer lost of production volume in the following months after the stand down because we have to restart from zero again. We will be set back at least 500m3 a month for at least 2 – 3 months. In financial terms we will be looking at a loss of F\$105,000.

The compensation figure s expensed as follows:

35% @ F\$175,000	=	61,250
35% @ F\$ 50,000	=	17,500
20% @ F\$105,000	=	<u>21,000</u>
Total compensation		<u>99,750</u>

According to the calculation of quantum above, I thing it is justify and fir to claim the amount of **F\$99,750** as compensation.

We hope you would consider our request and we look forward to your favourable reply.

Thank you

Yours faithfully
A Ong

CC: Yap Hon Seeng”
(emphasis is added)

6. The said letter is self-explanatory, and quite contrary to the oral evidence, the reason behind the request for ‘stand down’ of the operation, was more linked to performance of the Plaintiff, other than any issue with shareholding of the Defendant and or change of ownership as alleged by the witness. The Plaintiff in that letter had admitted their performance below the expectations in terms of the Contract and had even admitted that Defendant could engage another contractor to do the same work which the Plaintiff was doing without their consent. The Plaintiff’s claim is based on the contract between the Plaintiff and Defendant marked as Exhibit 3 and the contract period was 3 years from April 2002. The witness stated that there were no issues between the parties during the first year, but documentary evidence is contrary to that statement, and even their claim for \$99,750 was based on a letter during the first year. The witness relied on the evidence of request for ‘stand down’ of operation in December 2002, for the termination of the Contract, which is again contrary to the statement of claim which indicated, operations of the Plaintiff in terms of the Contract as late as 2004. There is no clear indication as to when the alleged termination of the Contract happened.
7. From the evidence produced before me it is clear that even before the request for ‘stand down’ the Plaintiff was given opportunity to improve its performance and discussions were held as late as 10th December, 2002, before the decision for temporary ‘stand down’ request was made. The letter of 17th December, 2002 which was produced marked Exhibit 5 starts with **‘We did discuss at length about the stand down during a meeting on the 10th December, 2002 and I have given my reasons why it should not be carried out.’** This amply

demonstrates that there was no unilateral decision to 'stand down' as alleged in the statement of claim, and the performance of the Plaintiff was below the expectation and the Defendant had granted opportunity to the Plaintiff to improve it. It is also not clear how long this temporary 'stand down' prevailed.

8. So, from the evidence it is clear that the stand down of the operation was communicated by the letter dated 16th December, 2002 after the said meeting between the parties regarding the 'stand down'. It is also clear that the parties were not in agreement over the issue of 'stand down'. But the statement of claim clearly indicate operation of work in terms of the contract beyond 2002 and this communication cannot be relied to prove any breach as parties have resumed work in terms of the Contract. In terms of the Contract there was an agreed method of calculation of costs during the temporary 'stand down' and this was stipulated in clause 13.3 of the Contract. Despite this the Plaintiff was relying on an estimate in a letter (exhibit 5) to prove the cost and this was clearly contrary to the Contract between the parties which is produced to the court marked Exhibit 3.
9. This action was instituted only after the Defendant's solicitors instituted winding up action against the Plaintiff. Obviously, Winding Up notice resulted this action hence the claim of the Defendant for winding up stalled. Plaintiff produced the Contract between the parties and the action is based on the breach of the Contract marked as Exhibit 3. If so which part or clause was breached and when it was breached, is not clear. There is no evidence produced except these two communications between the parties in 2002 relating to any dispute between the parties. It is clear that the Contract between the parties was not terminated in 2002, as the parties continued to work under the said contract till 2004.
10. The Plaintiff relied on the letter dated 17th December, 2002 for the assessment of damages, but in contrary to this the statement of claim indicate operations of the Plaintiff beyond 2002 'stand down'. The Plaintiff cannot rely on this documents to assess any damages, as the work had progressed even upto 2004

and the figures indicated in the said letter was only an estimate and not in compliance with the Clause 13.3 of the Contract, which deals with demolition costs during a temporary 'stand down'.

11. The Plaintiff had instituted the present action after the Winding Up, proceedings of the Plaintiff was initiated by the Defendant's solicitors Yong and Associates, claiming a sum of \$583,120.73. Presumably, that Winding Up action did not proceed and the said claim became counter claim in this action. In the statement of defence, the Defendant is counter claiming for the said amount, but the Defendant did not appear at the hearing and the judge ordered formal proof of the Plaintiff's claim, but the Plaintiff is not absolved from proving their claim in order to obtain judgment.
12. Though the Defendant did not appear at the hearing the evidence produced by the Plaintiff at the formal proof does not prove the general and special damages claimed in the statement of claim. The letter written on 17th December, 2002 regarding the temporary 'stand down' request cannot be relied to assess damages for the Plaintiff as the parties had continued to work in terms of the contract after this till 2004. Quite contrary to the evidence produced by the Plaintiff, the Contract between the parties never terminated in 2002, if so there cannot be resumption of work in terms of the same Contract. If the resumption was under a different contract that needs to be pleaded and also proved, but there were no such evidence and in terms of the statement of claim the work under the Contract continued till 2004 and the Plaintiff instituted this action only after the Defendant's solicitors served them with Winding Up notice in terms of Section 221 of Companies Act. When I asked the witness how long the 'stand down' in 2002 the witness was unable to answer, but after some time gave a vague answer that 'may be 2-3 months'. These are vital facts in assessing the damages if there was a breach from the Defendant and without that no assessment of damage is possible.
13. The letter of 17th December, 2002 cannot be considered as proof of damages to the Plaintiff as the said letter was written after the request for temporary 'stand

down' of operation and without knowing the duration of stand down and actual loss there is no proof of damages to the Plaintiff. In a 'stand down' period the Plaintiff needs to prove the actual loss in terms of clause 13.3 of the Contract which states as follows

Demobilisation Costs

During the **period of suspension** of any obligation of the parties under clause 13.2, the Company shall compensate the Contractor (the Plaintiff) for

- (a) All demobilization costs the employees to their countries of origin;
- (b) All demobilization costs of the equipment and machinery to a place that is acceptable to both the Contractor and the Company; and
- (c) All fixed overhead costs of the Contractor's office in Fiji (including without limitation, the salaries of accounting staff approved by the Company, rent and costs of service utilities).' (emphasis added)

14. The Plaintiff's only witness was unable to state the period of time of suspension, hence there cannot be assessment of damages during the said period in terms of the Contract. In any event the Plaintiff had failed to produce evidence of damages stated in clause 13.2 (a), (b) or (c) of the Contract and on that basis the Plaintiff had failed to prove the vital facts in terms of the Contract. The Plaintiff in its letter dated 17th December, admitted engagement of other contractors without the consent of the Plaintiff in terms of the Contract was allowed. In the circumstances the payment to a third party is possible in terms of the Contract if they were engaged in the operation in the same area as Plaintiff was operating. The claim for \$26,600.86 was based on payment to a third party according to the paragraph 73 of the statement of claim. The said third party was allegedly a subcontractor of the Plaintiff and obviously it was engaged in the operation of felling timber, hauling etc in terms of the Contract between the Plaintiff and Defendant as a sub contractor of the Plaintiff. The Plaintiff admits

that engagement of another contractor without the concurrence of the Plaintiff was expressly permitted in terms of the Contract. If so the Defendant could employ another contractor irrespective of that person was earlier a sub contractor under the Plaintiff or not. In the circumstances any payment to such third party for the work it had done cannot be a basis for any claim for damages in terms of the Contract. The claim for general and special damages is struck off for want of proof of breach of contract and or for want of proof of assessment in terms of the Contract.

15. There are no evidence for any award of aggravated damages, for the reasons above and claim for aggravated damages needs to be struck off, too. Delay is regretted.

C. CONCLUSION

16. The Plaintiff has failed to prove termination of the contract by the Defendant and had also failed to prove the special and general damages in terms of the Contract between the parties. In the circumstance the Plaintiff's statement of claim is struck off and the action is dismissed. I will not award any costs considering the circumstances of the case.

D. FINAL ORDERS

- a. The statement of claim is struck off and action dismissed.
- b. No costs.

Dated at **Suva** this **26th day** of **September, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva