

In the High Court of Fiji at Suva  
Civil Appeal No.18 of 2016  
Between  
Sohan Singh Construction Ltd  
Appellant  
Zainab Holdings Ltd  
Respondent

COUNSEL: Ms L. Lagilevu with Mr Vinit Singh for the appellant  
Ms S. Devan for the respondent

Date of hearing: 10<sup>th</sup> February,2017

Date of Judgment: 6<sup>th</sup> April, 2017

**Judgment**

1. This is an appeal from a judgment of the Magistrates Court.
2. The appellant appeals on the following grounds of appeal:
  - I. *That the Learned Magistrate erred in law and in fact in not finding that the Appellant had completed all the works required of it under the building Contract with the Respondent.*
  - II. *That the Learned Magistrate erred in law and in fact in finding that there was no evidence to show that the Appellant was not in a position to apply for completion certificate from the local council.*
  - III. *That the Learned Magistrate erred in law and in fact in finding that the Appellant was responsible in obtaining and submitting the certificate of completion to the Respondent when the works required for such certificate to be granted were beyond the contract building works required of the Applicant.*
  - IV. *That the Learned Magistrate erred in law and in fact in failing to find that the certificate of completion could not be obtained due to other parties failing in their part to complete the requirements for such certificate to be obtained.*
  - V. *That the Learned Magistrate erred in law and in fact in finding that the Respondent is not liable to release the final payments until the Applicant submits the completion certificate from the local council when the Applicant had completed all building works required of it and the same had been certified by the Respondent's Architect.*
3. The appellant and the respondent were parties to a construction contract dated 16<sup>th</sup> March,2009. The appellant, as contractor was required to construct duplex residential apartments "*as shown in the Drawings and described in the Specification*".

4. The appellant, in its statement of claim filed in the lower court claimed that the respondent failed to pay a sum of \$33,853.55 to the appellant. The respondent acknowledged satisfaction with the works.
5. The respondent, in its statement of defence stated that the appellant failed to satisfactorily complete the building. Shortly after entering into possession, the respondent discovered serious defects in the waste water and sewerage drainage works carried out by the appellant and an aluminum door installed by the appellant's subcontractor. The sewerage and waste seeped onto the neighbouring property. As a "*direct result*", the SCC did not issue a completion certificate. The respondent counterclaimed for damages for defective work.
6. The Learned Magistrate held that the respondent was not liable to release the final payment, until the appellant submitted the completion certificate. The counterclaim was dismissed.
7. Ms Devan, counsel for the respondent in her written submissions filed before me points out that the parties were bound by the drawings and specifications prepared by the respondent's architect Denis Biggs and Co. The drawings schedule provided inter alia details of the plan for the septic tank and absorption trench.
8. The respondent appointed Orton Architects after the passing on of Denis Biggs.

*The first ground of appeal*

9. The first ground of appeal contends that the Learned Magistrate erred in not finding that the appellant had completed all the works.
10. The Learned Magistrate has held that the architect has certified that the building was completed. This ground of appeal fails.

*The second to fourth grounds of appeal*

11. The central issue raised in this appeal is whether that the appellant was not entitled to the final payment, as it did not submit the completion certificate from the SCC.
12. Clause 14 of the specifications titled "*FINAL PAYMENT*" provides that on the expiration of the defects liability period and certification by the Architect that the appellant completed the works, the appellant was required to hand over "*all certificates of authorities appertaining to the work*", in order to recover the final payment.
13. The appellant had accepted in the lower court that clause 14 contemplates a completion certificate.
14. The second to fourth grounds of appeal urge that the Learned Magistrate erred in finding that there was no evidence to show that the appellant was not in a position to apply for the completion certificate when works beyond the contract works of the appellant had to be done by other parties, in order to obtain that certificate.
15. The respondent contented that the SCC did not issue a completion certificate, as there were defects in the waste water and sewerage drainage system, which the appellant failed to rectify. Nine months after completion of the works, the SCC issued notices to the respondent to abate the nuisance caused by the seepage of water and sewerage to the adjoining property.
16. I turn to the evidence led in the lower court.
17. PW1,(Salend Singh, a director of the appellant company),PW2, (*John Orton, Architects*) and the sole witness for the defence DW1,(*Abdul Farheem, Managing Director of the respondent company*) testified that the joinery, kitchen fittings, tiling, fence and gates, gate motor, doors and electrical works were not within the scope of the appellant's works.

18. The evidence of PW1 and PW2 was that the appellant carried out the works according to the drawing and specifications given to them. It was not responsible for the defects in the drainage and sewerage system arising from the septic tank being placed in soft stone soil. The appellant did not have civil engineering knowledge. The plan should have been amended by the Engineers relocating the sewerage tank and soakage pit.
19. PW2 stated that the respondent complained of defects after the defects liability period.
20. DW1 said that the appellant did not do anything about the water seepage to his neighbour's house. It transpired in his cross-examination that the respondent had not submitted an application to the SCC for a "Permit" to carry out any rectification works, as was stipulated in the Notice requiring abatement of nuisance issued to the respondent.
21. I would reproduce an excerpt of the concluding part of the re-examination of DW1:

*Q. Now in so far as the construction of the septic tank is concern(ed) soakage pit and everything else my learned friend had put to you that the difficulty or the problem with the septic tank or the soakage pit was because there was soap stone around that area that was causing the problem; right; now did you at any time receive any sort of advice from Denis Biggs or from John Orton or from you(r) builder saying you should not put the septic tank there because (of the) soap stone ?.*

*A. They didn't.*

*Q. And when these drawings were prepared what input did your company have in those drawings?*

*A. Everything was done by Denis Biggs.*

*Q. Including where the septic tank should be located and how it was supposed to be build ?*

*A. Yes. (emphasis added)*

22. A review of the evidence as a whole reveals that the appellant had carried out the construction in accordance with the specifications and drawings of the defendant's architects. The respondent's architect had inappropriately specified the location of the septic tank in his specifications and drawings. That led to the seepage to the adjoining property.

23. It is evident that in order to obtain the completion certificate, the appellant would have had to carry “new works” to use the phraseology in *Emson Eastern Ltd v E M E Developments Ltd*, (1991) 55 BLR 114 referred to in the written submissions of the appellant.
24. The architect had issued a payments certificate, which as Mr Singh, counsel for the appellant submitted reflected that the appellant had completed all its works. The architect gave “final clearance” as held by the lower court. The respondent was satisfied with the works as stated in its letter of 18<sup>th</sup> July, 2012, to the architect.
25. In my view, the obligation of a contractor is to carry out and complete the work to the satisfaction of the architect.
26. *Robert Smellie, Building Contracts and Practice in New Zealand*, (1979) at page 125 to 126 as cited in the written submissions filed before me by the appellant, states:
- ....if the two persons, employer and Architect, have once exercised their power of approval and such approval has been acted upon and subsequently defects are discovered, the employer cannot, in ordinary circumstances, retract his expression of approval and bring action against the contractor for bad workmanship or defective materials.*
27. Vol 1, *Hudson’s, Building and Engineering Contracts*, (11<sup>th</sup> Ed, 1995) at para 5-012 under the title “*Defects where Work is Done to the Approval of the Owner*” cites the following illustration:

*Work was agreed to be done using the best materials and also to the satisfaction of the Architect and of the owner, and the Architect was to certify,;but it was provided that, notwithstanding the certificate of the Architect, the owner might recover for defects discovered within 12 months. The Architect certified, and the owner expressed satisfaction by paying under the certificate; defects were discovered after 12 months; no fraud by the Architect was alleged. The owner brought an action against the builder for damages for inferior materials. Held, that the owner could not, after certificate given, and expression of satisfaction by himself, sue for defective work after the expiry of the 12 months: Bateman (Lord) v. Thompson (1875).*

28. The Learned Magistrate quite correctly declined the respondent's counterclaim on the basis that the appellant "*should not be liable for work done by him according to the plan. Even though the defendant alleged that the plaintiff did not properly do plumbing there were no complaints to architect about that during the defect liability period. In fact the defendant wrote to the architect on 18<sup>th</sup> July 2012(P9) stating that he was satisfied with the work of the plaintiff*".
29. In determining the appellant's claim, the Learned Magistrate however, came to the erroneous conclusion that the appellant "*failed to produce any evidence to show that (it was).. not in a position to apply(for the) certificate from the local council*".
30. In my judgment, the Learned Magistrate failed to draw the proper inference from facts specifically found, that the appellant was not in a position to obtain the completion certificate.
31. The second to fourth grounds of appeal succeed.
32. It follows that the Learned Magistrate erred in not finding that the appellant was entitled to the final payment as certified by the respondent's architect, as contended in the fifth ground of appeal.
33. The appeal succeeds.
34. **Orders**  
(a) The appeal is allowed.  
(b) The respondent shall pay the appellant costs summarily assessed in a sum of \$ 1500.



*A.L.B. Brito-Mutunayagam*

**A.L.B. Brito-Mutunayagam**

**Judge**

**6<sup>th</sup> April, 2017**