

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 172 of 2012

BETWEEN : **AUSMECH SERVICES (AUSTRALIA) LIMITED**, a limited liability company having its registered address at Vishnu & Associates, 82 Ratu Mara Road, Samabula, Suva.

PLAINTIFF

AND : **NEO (FIJI) LIMITED**, a limited liability company having its registered office at Tappoo Building, Main Street, PO Box 46, Sigatoka

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. Gavin O'Driscoll for the Plaintiff
Mr. Robert Newton with Mr. Roneil Prakash for the Defendant

JUDGMENT

- [1] The Plaintiff commenced this action by way of a Writ of Summons, issued on 21 June 2012.
- [2] On 30 October 2012, leave was granted to the Plaintiff to file Amended Statement of Claim.
- [3] In the Amended Statement of Claim the Plaintiff, inter alia, submits as follows:

- (1) The Plaintiff is a limited liability company duly incorporated in Fiji.
- (2) The Plaintiff is a building subcontractor providing services in respect of the installation and maintenance of mechanical, heating and air conditioning systems and other building works.
- (3) The Defendant is a limited liability company.
- (4) The Defendant is a builder and general contractor.
- (5) Ausmech Services (Australia) PTY Limited is a limited liability company incorporated in Australia and now de-registered [the AU Company"].
- (6) The Plaintiff and the AU Company were incorporated for the purpose of tendering for certain mechanical works and other subcontracts at Tappoo City.
- (7) During the tender process and various negotiations between the parties, it was discovered that, due to various legal requirements for local registration, local tax identification number, local bank account and FRCA tax exemption, it would be better to operate from the Plaintiff Company.
- (8) Hence, all contracts and operations were shifted to, allocated and/or assumed by the Plaintiff Company and all building works were performed by the Plaintiff Company.
- (9) All payments received from the Defendant were banked into the Plaintiff's local bank account.
- (10) There was no prejudice to the Defendant arising from same, as the AU Company and the Plaintiff had the same Directors and Secretary and both were newly formed companies.
- (11) However, in their dealings the Plaintiff and the Defendant have used the name of the AU Company and the name of the Plaintiff Company interchangeably as if one and the same.
- (12) The Defendant for its part regularly involved officers and employees of Tappoo Limited and the Tappoo Group of Companies in its dealings with the Plaintiff, despite the same not being officers or employees of the Defendant.

- (13) The Defendant, acting as general contractor, called for tenders for air conditioning works at Tappoo City, Suva, to be built on Certificate of Title No. 39184, of which the registered proprietor is Penina Limited, a limited liability company.
- (14) The Plaintiff tendered for the said mechanical works in respect of the Tappoo City based building. Thereafter, there were certain negotiations and adjustments between the parties, resulting in revised tenders being submitted by the Plaintiff to the Defendant.
- (15) Subsequently, on 20 November 2008, the Defendant accepted the Plaintiff's revised tender for mechanical services for six floors in the amount of \$2,353,018.00 VEP.
- (16) On or about 4 January 2009, the Plaintiff submitted an additional tender for the fit-out works on levels 1-3 of Tappoo City, and amended the tender on or about 15 January 2009. On or about 19 January 2009, this tender was accepted by the Defendant in the sum of \$789,000.00 VEP.
- (17) On or about 28 July 2009, the Plaintiff submitted a tender for the fit-out work on level 4 of Tappoo City. On 20 July 2009, the tender was accepted by the Defendant in the amount of \$374,000.00 VEP.
- (18) The Plaintiff installed and constructed air conditioning and mechanical works and fit-out works as agreed, including variations thereto and completed the work, despite numerous difficulties arising from the defects, problems or delays in other parts of the building works on the part of the Defendant and/or its servants and agents.
- (19) At all times the Plaintiff performed the said work under the belief that it had a contract with the Defendant per the terms and conditions of the tenders for the based building mechanical works and fit-out works.
- (20) From time to time, the Defendant remitted payments to the Plaintiff in respect of the work completed.
- (21) The Plaintiff submits that the Defendant is estopped from denying the Plaintiff's claims on the basis of its conduct in accepting services from and making payments to the Plaintiff.

- (22) The Plaintiff submitted its progress valuation certificates to the Defendant on a regular basis, but the Defendant unreasonably delayed payment thereof, causing the Plaintiff difficulties in paying its suppliers and meeting its tax obligations.
- (23) The Defendant then started paying some of the Plaintiff's suppliers directly while still withholding the Plaintiff's payment. This was done without the Plaintiff's consent.
- (24) There was a substantial delay by the Defendant in the completion of the building works, amounting to approximately 270 days, prolonging the period for completion of the Plaintiff's work. On account of this delay, the Plaintiff incurred additional expenses and/or losses.
- (25) During the construction, there was also devaluation of the Fiji Dollar, for which the Plaintiff claimed a devaluation adjustment from the Defendant.
- (26) Adjustment was also required to be made in respect of VAT, as the same increase from 12.5% to 15% during the term of the contract. The higher rate of VAT must now be paid by the Defendant in respect of all sums remaining unpaid to the Plaintiff.
- (27) The Plaintiff submitted its progress valuation certificates to the Defendant on a regular basis. However, the Defendant unreasonably delayed payment thereof, causing the Plaintiff difficulties in paying its suppliers and meeting its tax obligations.
- (28) On or about 11 January 2008, the Plaintiff submitted a tender to the Defendant in respect of mechanical services for the Duty Free Traders premises at the Nadi Airport in the amount of \$108,824.00 VEP.
- (29) The Defendant did not accept the Plaintiff's tender, but later contacted the Plaintiff requesting for relocation of the air conditioning units at Duty Free Traders.

- (30) As requested, the Plaintiff relocated the air conditioning units and submitted its claim to the Defendant for its services in the sum of \$40,075.69 VIP.
- (31) Up-to-date, the Defendant has not paid the Plaintiff for its work and services despite numerous requests for the payment.
- (32) Accordingly, the Plaintiff submits that the following causes of action has arisen against the Defendant:

First Cause of Action

Breach of Contract for Tappoo City Mechanical Services in the sum of \$333,670.44 VIP.

Second Cause of Action

Breach of Contract for Levels 1-3 Fit-Out works in the sum of \$55,042.38 VIP

Third Cause of Action

Breach of Contract for Level 4 Fit-Out works in the sum of \$31,529.17 VIP

Fourth Cause of Action

Breach of Contract for Duty Free Traders, Nadi Airport in the sum of \$40,075.69 VIP

Fifth Cause of Action (There is no fifth cause of action set out in the Statement of Claim)

Sixth Cause of Action

A claim for Quantum Meruit

Seventh Cause of Action

Breach of duty of care

- [4] Accordingly, the Plaintiff claims the following reliefs against the Defendant:
- (a) Judgment in the sum of \$460,567.68 (Four Hundred Sixty Thousand Five Hundred Sixty Seven Dollars and Sixty Eight Cents) against the Defendant in respect of the unpaid balances for the Plaintiff's mechanical services and building works;
 - (b) General Damages and/or Consequential Damages for breach of contract and breach of duty of care;
 - (c) Interest on unpaid balances to the date of this Writ;
 - (d) Interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act at a rate of ten percent per annum (10%);
 - (e) Post judgment interest;
 - (f) Solicitors costs on an indemnity basis and disbursements; and
 - (g) Such other and further relief as the Court may deem just.
- [5] It is said that the sum of \$460,567.68 is made up by the addition of the individual claims referred to above (including a sum of \$250.00 for Solicitor's cost for Notice of Demand).
- [6] In the Amended Statement of Defence, filed on 20 November 2012, the Defendant inter alia, states as follows:
- (1) Although the Defendant banked payments to the Plaintiff's account and had other dealings with the Plaintiff, the Defendant did not know that the AU Company and the Plaintiff were two completely different companies with separate entities. In fact, the Defendant was of the view that the AU Company was the same company that had the local bank account which the Defendant was paying monies into as the AU Company was the one which tendered for the works.

- (2) The Defendant states that the company that tendered for the mechanical works was an Australian Company, which is a different entity from the company stated herein as the Plaintiff.
 - (3) The Defendant states that the Plaintiff was not the company that agreed to a contract with the Defendant.
 - (4) The Defendant denies that there was a contract made between the Plaintiff and the Defendant for the construction of the base building mechanical and fit-out works at Tappoo City, as claimed by the Plaintiff.
 - (5) The Defendant denies that there was a contract entered into between the Plaintiff and the Defendant for the work at Duty Free Traders premises at Nadi Airport, as claimed by the Plaintiff.
 - (6) Further the Defendant categorically denies all the six causes of action submitted by the Plaintiff in the Amended Statement of Claim.
 - (7) Accordingly, the Defendant prays that the Plaintiff's Amended Statement of Claim be dismissed with costs.
- [7] On 3 December 2012, the Plaintiff filed a reply to the Amended Statement of Claim.
- [8] The Minutes of the Pre-Trial Conference record the following:

Agreed Facts

1. The Plaintiff is a limited liability company duly incorporated in Fiji and having its registered address at Vishnu & Associates, 82 Ratu Mara Road, Samabula, Suva.
2. The Plaintiff is a building subcontractor providing services in respect of the installation and maintenance of mechanical, heating and air conditioning systems and other building works.
3. The Defendant is a limited liability company having its registered office at Tappoo Building, Main Street, PO Box 46, Sigatoka.
4. The Defendant is a builder and general contractor

5. Ausmech Services Australia PTY Limited is a limited liability company incorporated in Australia and now de-registered [the AU Company"].
6. All payments received from the Defendant were banked into the Plaintiff's local bank account.
7. The Defendant for its part regularly involved officers and employees of Tappoo Limited and the Tappoo Group of Companies in its dealings with the Plaintiff, despite the same not being officers or employees of the Defendant.

Agreed Issues

1. Whether there was an enforceable contract or contracts between the Plaintiff and Defendant with respect to:
 - a) Air conditioning works at Tappoo City;
 - b) Fit out works at Tappoo City;
 - c) Mechanical services at the Duty Free Traders premises at Nadi Airport.
2. If the answer to 1(a), (b) or (c) is yes, what were the terms of relevant contract?
3. If there was a contract in respect of 1(a), (b) and (c) was that contract breached?
4. If the answer to 3 is yes, what are the damages?
5. If there was no contract with respect to 1(a), (b) or (c) is the Plaintiff entitled to receive a sum by way of quantum meruit or in respect of any unjust enrichment by the Defendant.
6. If the answer to 5 is yes, what is the amount thereof?
7. (a) Did the Defendant owe the Plaintiff a duty of care with respect of the Tappoo City Project?
 - (b) If the answer to 7(a) is yes, what was that duty of care?

(c) Was that duty of care was breached?

(d) If the answer to 7(c) is yes, what damages were caused by that breach?

8. If the Plaintiff succeeds on the basis of 3, 6, or 7(d) hereof, is it entitled to interest and if so at what rate and from what date?
9. Is either party entitled to costs in respect of the matter and if so on what basis?

THE PLAINTIFF'S CASE

- [9] The Hearing in this case commenced with Satish Padarath Narayan giving evidence on behalf of the Plaintiff. He testified that he migrated to Australia in 2005. He is working as a Mechanical Project Manager in Australia.
- [10] The witness stated that Ausmech Services (Australia) PTY Limited was a limited liability company incorporated in 2006 or 2007. It was a company incorporated in Australia. He was one of the Directors of the company.
- [11] Ausmech Services (Australia) Limited, a similarly named company, was incorporated in Fiji. As per document P1, the company was incorporated on 25 January 2007. This is the Plaintiff Company. The witness and Jagdish Prakash were the Directors of this company. They were both residing overseas.
- [12] The witness admitted that it was the Australian Company that tendered for mechanical works and other sub-contracts at Tappoo City. At this point in time the Fijian Company had not been incorporated. Both companies were incorporated for the purpose of tendering and carrying out mechanical works and other sub-contracts at Tappoo City. The Defendant was the building contractor, while the Australian Company and the Plaintiff Company were sub-contracting.

[13] The witness then went on to testify as to how the causes of action for breach of contract arose.

[14] During the course of the Plaintiffs' case the following exhibits were tendered to Court:

- P1** - Copy of the Certificate under the Companies Act incorporating Ausmech Services (Australia) Limited, dated 25 January 2007.
- P2** - Letter dated 6 February 2007, sent by Satish Padarath to Neo (Fiji) Limited, Re: Revised Mechanical Services Tender for 4 Levels Tappoo City Development, Suva, Fiji.
- P3** - Letter dated 1 March 2007, sent by Krishna Murti, Executive Director, Neo (Fiji) Limited, Re: Revised Mechanical Services Tender Tappoo City, Suva, Project for 4 Levels only.
- P4** - Email dated 3 August 2007 (fax copy), sent by Satish Padarath to Jagdish Chandra, Neo (Fiji) Limited, Re: Tappoo Suva City Project – Mechanical Services Contract.
- P5** - Copy of Certificate of Exemption from Fiji Revenue and Customs Authority (FIRCA), dated 27 September 2007.
- P6** - Letter dated 23 July 2008, sent by Satish Padarath, to Neo (Fiji) Limited, Re: Duty Free Traders Proposed Shop Extension Nadi Airport - Sub: Temporary Relocation of A/C Units.
- P7** - Email dated 6 November 2008, sent by Satish Padarath to James Camille (Jim).
- P8** - Letter dated 20 November 2008, sent by Jagdish Chandra to the attention of Satish Padarath, Re: Tappoo City Development – Mechanical Services.
- P9** - Letter dated 4 January 2009, sent by Satish Padarath to Neo (Fiji) Limited, Re: Tappoo Departmental Store, Suva, Fiji – Sub: Levels 1 to 3 Fit-out.
- P10** - Undated letter sent by Suresh Tappoo to Ausmech Services (Australia) PTY Limited, Re: Tappoo Development Store Suva, Fiji Fit Out Mechanical Level 1, 2 & 3.
- P11** - Email dated 19 February 2009, sent by Satish Padarath to James Camille (Jim).

- P12** - Letter dated 19 May 2009, sent by Mike Morriss, Services Engineer, Neo Fiji Limited, to Ausmech Services (Australia) PTY Limited.
- P13** - Letter dated 28 June 2009, sent by Satish Padarath to Neo (Fiji) Limited, Re: Tappoo Departmental Store, Suva, Fiji – Sub: Level 4 fit-out.
- P14** - Letter dated 30 July 2009, sent by Suresh Tappoo to Ausmech Services (Australia) PTY Limited.
- P15** - Email correspondence dated 21 July 2010.
- P16** - 22nd Progress Claim: Tappoo City Development, Suva – Mechanical Services Contract, dated 7 October 2010.
- P17** - Email correspondence dated 7 October 2010.
- P18** - Email correspondence dated 7 March 2011.
- P19** - Letter dated 17 March 2011 titled Sub Contractor Progress Valuation: Tappoo City Development Fit-out – L1, L2 & L3.
- P20** - Email correspondence dated 17 August 2011.
- P21** - Reconciliation of Progress Payment/Claim Tappoo City Development, Suva – Mechanical Services Contract, dated 5 March 2012.
- P22(a)** - Sub-Contractor Progress Valuation Certificate, dated 9 March 2011.
- P22(b)** - Sub-Contractor Progress Valuation Certificate, dated 29 March 2011.
- P22(c)** - Sub-Contractor Progress Valuation Certificate, dated 5 April 2011.
- P23** - Sub-Contractor Progress Valuation Certificate, dated 18 February 2011.
- P24** - Reconciliation of Claim/Payment, dated 8 March 2012. Tappoo City Development, Suva: Fit-out Mechanical Services Levels 1 to 3
- P25** - Reconciliation of Claim/Payment, dated 8 March 2012. Tappoo City Development, Suva: Food Court at Level 4 – Mechanical Services Fit-out.

- P26** - Copy of Bank Statement for the period 11 October 2007 to 30 November 2007.
- P27** - Copy of Bank Statement for the period 30 January 2009 to 27 February 2009.
- P28(a)-(e)** - Cheque payments in favour of Ausmech Services (Australia) Limited.
- P29** - Sub-Contractor Progress Valuation Certificate, dated 9 November 2010.
- P30-P47** - Tax Invoices sent by Ausmech Services (Australia) Limited.
- P48** - Copy of document sent by Mike Morriss in reply to the email dated 17 August 2011 (P20).

THE DEFENDANT'S CASE

- [15] The Defendant relied on the evidence of three witnesses, namely Krishna Murti, Jagdish Chandra and Mike George Morriss.
- [16] Krishna Murti was a former Executive Director of the Tappoo Group. He was also the Executive Director and the CEO of Neo (Fiji) Limited. He continued in that capacity until 2014.
- [17] He testified that Neo (Fiji) Limited was a construction company. Mr Suresh Tappoo, Vinod Tappoo and the witness were the Directors of the company. The company was established as a joint venture company between Tappoo Limited and the Fiji National Provident Fund (FNPF). The day to day activities of the Defendant Company was controlled by him.
- [18] Jagdish Chandra was the General Manager of the Defendant Company, while Mike Morriss was a Consultant. Both Jagdish Chandra and Mike Morriss reported to Krishna Murti.

[19] During the course of the evidence the following exhibits were tendered to Court by the Defendant:

- D1** - Letter dated 11 January 2008, sent by Satish Padarath, to Neo (Fiji) Limited, Re: Duty Free Traders Proposed Shop Extension Nadi Airport - Sub: Mechanical Services Tender.
- D2** - Letter dated 24 January 2008, sent by Satish Padarath, to Neo (Fiji) Limited (Attention: Mr Krishna Murti).
- D3** - Medical Certificate, dated 9 August 2016, relating to Suresh Tappoo.
- D4** - Letter dated 30 August 2006, sent by Jack Prakash to Neo (Fiji) Limited, Re: Mechanical Services Tender for Tappoo City Development, Suva, Fiji.
- D5** - Sub-Contractor Progress Valuation Certificate, dated 8 August 2007. [Corresponding to Tax Invoice D6].
- D6** - Tax Invoice dated 9 July 2007, sent by Ausmech Services (Australia) PTY Limited.
- D7** - Sub-Contractor Progress Valuation Certificate, dated 1 October 2007. [Corresponding to Tax Invoice P30].
- D8** - Sub-Contractor Progress Valuation Certificate, dated 4 April 2008. [Corresponding to Tax Invoice P31].
- D9** - Sub-Contractor Progress Valuation Certificate, dated 15 May 2008. [Corresponding to Tax Invoice P32].
- D10** - Sub-Contractor Progress Valuation Certificate, dated 6 June 2008. [Corresponding to Tax Invoice P33].
- D11** - Interim Certificate of Payment, dated 30 July 2008. [Corresponding to Tax Invoice P34].
- D12** - Interim Certificate of Payment, dated 5 September 2008. [Corresponding to Tax Invoice P35].
- D13** - Interim Certificate of Payment, dated 20 October 2008. [Corresponding to Tax Invoice P36].
- D14** - Sub-Contractor Progress Valuation Certificate, dated 8 December 2008. [Corresponding to Tax Invoice P37].

- D15 - Sub-Contractor Progress Valuation Certificate, dated 16 February 2009. [Corresponding to Tax Invoice P38].
- D16 - Sub-Contractor Progress Valuation Certificate, dated 20 March 2009. [Corresponding to Tax Invoice P39].
- D17 - Sub-Contractor Progress Valuation Certificate, dated 9 April 2009. [Corresponding to Tax Invoice P40].
- D18 - Sub-Contractor Progress Valuation Certificate, dated 5 May 2009. [Corresponding to Tax Invoice P41].
- D19 - Sub-Contractor Progress Valuation Certificate, dated 16 June 2009. [Corresponding to Tax Invoice P42].
- D20 - Sub-Contractor Progress Valuation Certificate, dated 12 August 2009. [Corresponding to Tax Invoice P43].
- D21 - Sub-Contractor Progress Valuation Certificate, dated 17 September 2009. [Corresponding to Tax Invoice P44].
- D22 - Sub-Contractor Progress Valuation Certificate, dated 6 October 2009.
- D23 - Sub-Contractor Progress Valuation Certificate, dated 23 December 2009. [Corresponding to Tax Invoice P46].
- D24 - Sub-Contractor Progress Valuation Certificate, dated 23 December 2009. [Corresponding to Tax Invoice P47].

[20] At the conclusion of the hearing both Counsel for the Plaintiff and Counsel for the Defendant were granted time to file written submissions. Accordingly, the parties filed detailed written submissions, which I have had the benefit of perusing.

ANALYSIS AND DETERMINATION

[21] From the facts of this case the primary issues for determination by this Court can be summarized as follows:

Whether there was an enforceable contract or contracts between the Plaintiff and Defendant with respect to:

- a) Air conditioning works at Tappoo City;
- b) Fit out works at Tappoo City;
- c) Mechanical services at the Duty Free Traders premises at Nadi Airport.

- [22] The onus is on the Plaintiff, to prove on a balance of probabilities that there was an enforceable contract or contracts between the Plaintiff and Defendant with respect to the above.
- [23] The Defendant is challenging the validity and enforceability of these contracts on the basis that the Plaintiff was not the party with whom it had contracted.
- [24] It is an agreed fact that the Plaintiff is a building subcontractor providing services in respect of the installation and maintenance of mechanical, heating and air conditioning systems and other building works and that the Defendant is a builder and general contractor. It is also agreed that Ausmech Services Australia PTY Limited is now de-registered.
- [25] The Defendant called for tenders for certain mechanical services at Tappoo City, Suva. It is admitted by the Plaintiff that it was Ausmech Services Australia PTY Limited, who submitted the initial tender for the said mechanical services. After negotiations a revised tender was submitted on 6 February 2007 **(P2)**. Even the revised tender was submitted in the name of the Australian Company. This revised tender was accepted by the Defendant. Confirmation of the acceptance was by communication dated 1 March 2007 **(P3)**.
- [26] Ausmech Services Australia PTY Limited and the Defendant further negotiated and varied the original tender to include mechanical services for all six floors of Tappoo City Building and not just floors 1 to 3. This is established by the email dated 3 August 2007 (fax copy), sent by Satish Padarath to Jagdish Chandra, Neo (Fiji) Limited **(P4)**.
- [27] A copy of the Certificate of Exemption from Fiji Revenue and Customs Authority (FIRCA), dated 27 September 2007, was tendered to Court **(P5)**. It is clear from this

document that the Tax Exemption had been obtained in the name of the Plaintiff Company.

- [28] Further negotiations and alterations were made regarding the tender between Ausmech Services Australia PTY Limited and the Defendant, which is evidenced from documents **P7** and **P8**.
- [29] Based on the above, the Plaintiff had carried out the mechanical services at Tappoo City. The Defendant had issued several Progress Valuation Certificates regarding the work completed by the Plaintiff. This is established by documents **P22 (a) (b) and (c)**, **P23**, **P29**, **D5**, and **D7 to D24**.
- [30] On receiving each valuation certificate, the Plaintiff then issued invoices corresponding to the said certificates. The invoices have been tendered to Court as **P30 to P47** and **D6**.
- [31] The Plaintiff claims that they have not received the full payment for the work carried out. As per document **P21**, Reconciliation of Progress Payment/Claim, dated 5 March 2012, the Plaintiff submits that the sum of \$333,670.44 is outstanding.
- [32] It is clear that from the progress valuation certificates referred to above, **D5** and **D7 to D24**, had been issued in the name of Ausmech Services Australia PTY Limited. However, **P22 (a) (b) and (c)**, **P23** and **P29** has been issued in the name of the Plaintiff Company. Furthermore, other than for tax invoice **D6**, all other tax invoices from **P30 to P47** have been issued in the name of the Plaintiff Company.
- [33] Moreover, it is an agreed fact that all payments received from the Defendant were banked into the Plaintiff's local bank account.
- [34] Lord Diplock in the case of *Sudbrook Trading Estate vs. Eggleton and Others* [1983] 1AC 444/ [1982] 3 All ER1 held:

"A contract is complete as a contract as soon as the parties have reached agreement as to what each of its essential terms is or can with certainty be

ascertained: for it is an elementary principle of the English law of contract id certum est quad certum reddi protest....."

[35] It was further held that:

"The parties to a contract must have agreed on the essential terms or have provided the method by which these are to be determined, and these must reasonably be certain, otherwise there is no contract. A mere agreement to agree or an agreement to negotiate is not considered to have any legal force. However, if the essential terms have been agreed, the facts that the parties have agreed to negotiate as to the remaining terms does not preclude the establishment of a contract; particularly in the case where the agreement contains within it criteria or machinery that the Court can use in order to resolve the point or points which the parties have left open."

[36] It was decided in ***Percy Trentham Ltd v. Archital Luxfer Ltd*** [1993] Lloyd's Rep 25,

"The Courts are particularly reluctant to conclude that a contract is too uncertain to be enforced where the parties have acted in reliance upon the agreement for a period of time."

[37] The Defendant submits that although they banked payments to the Plaintiff's account and had other dealings with the Plaintiff, the Defendant did not know that the Australian Company and the Plaintiff were two completely different companies with separate entities. In fact, the Defendant was of the view that the Australian Company was the same company that had the local bank account which the Defendant was paying monies into as the Australian Company was the one which tendered for the works. Accordingly, the Defendant denies that there was a contract made between the Plaintiff and the Defendant for the construction of the base building mechanical services.

[38] Considering all the facts and circumstances of this case, including the documents tendered by both parties, this Court is of the opinion that the Defendant cannot deny that there was a contract made between the Plaintiff and the Defendant for the

construction of the base building mechanical services. It is clear from the conduct of both the Plaintiff and the Defendant that throughout the dealing between the two parties the names of both the Plaintiff Company and Ausmech Services Australia PTY Limited have been used interchangeably as if one and the same.

- [39] Therefore, I am of the opinion that there was an enforceable contract between the Plaintiff and Defendant for the Air conditioning works at Tappoo City.
- [40] Similarly, relating to the fit-out works at Tappoo City, document **P9** confirms that the Plaintiff submitted a tender, dated 4 January 2009, for fit-outs of Levels 1 to 3. Document **P9** has been issued in the name of the Plaintiff Company. Pursuant to further negotiations and alterations, the tender was accepted by the Defendant. This is confirmed by an undated letter marked **P10**.
- [41] In respect of the fit-outs works of Levels 1 to 3, the Plaintiff claims that they have not received the full payment for the work carried out. As per document **P24**, Reconciliation of Progress Payment/Claim, dated 8 March 2012, the Plaintiff submits that the sum of \$55,042.38 is outstanding.
- [42] It is apparent that both documents **P9** and **P24** were issued in the name of the Plaintiff Company.
- [43] The Plaintiff had later tendered for the fit-out works on Level 4 of Tappoo City. This tender document is marked as **P13** - Letter dated 28 June 2009, sent by Satish Padarath to Neo (Fiji) Limited, Re: Tappoo Departmental Store, Suva, Fiji - Sub: Level 4 fit-out. Document **P13** has been issued in the name of the Plaintiff Company. By letter dated 30 July 2009, the Defendant communicated the acceptance of the said tender (**P14**).
- [44] In respect of the fit-outs works of Levels 4, the Plaintiff claims that they have not received the full payment for the work carried out. As per document **P25**, Reconciliation of Progress Payment/Claim, dated 8 March 2012, the Plaintiff submits that the sum of \$31,529.17 is outstanding.

- [45] It is further apparent that both documents **P13** and **P25** were issued in the name of the Plaintiff Company.
- [46] Similarly, relating to the mechanical services at the Duty Free Traders premises at Nadi Airport, the Plaintiff has tendered Letter dated 23 July 2008 (**P6**). Attached to the document is a summary, dated 19 August 2008, whereby the Plaintiff submits that the sum of \$34,848.43 is outstanding. It must be conceded that the said document has been issued in the name of Ausmech Services Australia PTY Limited.
- [47] Considering all the facts and circumstances of this case, including the documents tendered by both parties, this Court is of the opinion that the Defendant cannot deny that there was a contract in force between the Plaintiff and the Defendant for the fit-out works at Levels 1 to 3 and Level 4 at Tappoo City and for mechanical services at the Duty Free Traders premises at Nadi Airport.
- [48] Accordingly, I am of the opinion that there were enforceable contracts between the Plaintiff and Defendant with respect to:
- (a) Air conditioning works at Tappoo City;
 - (b) Fit out works at Tappoo City;
 - (c) Mechanical services at the Duty Free Traders premises at Nadi Airport
- [49] Furthermore, I hold that by the refusal of the Defendant to make good the outstanding payments due to the Plaintiff, the said contracts have been breached.
- [50] Throughout this case, the position taken up by the Defendant was that there was no privity of contract between the Plaintiff and the Defendant. However, the Defendant has not denied that the outstanding sums were due.
- [51] Accordingly, I enter Judgment in favour of the Plaintiff in the sum of \$455,090.42 (Four Hundred Fifty Five Thousand Ninety Dollars and Forty Two Cents) against the Defendant. This sum is made up by the addition of \$333,670.44 + \$55,042.38 + \$31,529.17 + \$34,848.43.

[52] Since, this Court has made a determination that there were enforceable contracts between the Plaintiff and Defendant and that the said contracts have been breached, I find it inexpedient to delve into the other issues (5, 6, 7 (a), (b), (c), and (d) of the issues for determination by Court) as recorded in the Minutes of the Pre-Trial Conference.

[53] I do not deem it appropriate to make any order in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act No. 7 of 1935 (Chapter 27), for interest to be paid on the above sum for any part of the period between the date the cause of action arose until the date of this judgment.

[54] However, in terms of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Act No 46 of 2011, I order interest at 4% per annum on the judgment sum (\$455,090.42) from the date of this judgment until the same shall be satisfied.

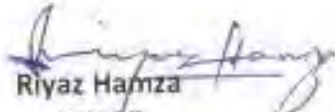
FINAL ORDERS

- a. Accordingly, I order the Defendant to pay the Plaintiff the sum of \$455,090.42.
- b. I also order that the Defendant pay interest at 4% per annum on the judgment sum (\$455,090.42) from the date of this judgment until the date of realization.
- c. I make no further order with regard to costs.



Date of this 17th Day of May 2018

Solicitors for the Plaintiff :
Solicitors for the Defendant :


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

O'Driscoll & Co., Barristers & Solicitors, Suva.
Lateef & Lateef Lawyers, Barristers & Solicitors, Suva.