

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 326 of 2018

BETWEEN : **TOYOTA TSUSHO (SOUTH SEA) LTD trading as ASCO
MOTORS**

PLAINTIFF

AND : **MAMANUCA EXPRESS LTD**

DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Ms. K. Singh for the Plaintiff**
: **Mr. V. Sharma for the Defendant**

Date of Hearing : **16 October 2023**

Date of Judgment : **5 February 2024**

JUDGMENT

1. The plaintiff's action is for recovery of the balance price of \$67,239.04 for goods sold and delivered to the defendant. The plaintiff's statement of claim states that the parties entered into an agreement on 3 November 2017 for the supply of 2 Yamaha F250DETU boat engines bearing the description 250 HP, 4.2 liter V6 OBM with DOHC, EFI NVCT, ultra long shaft standard rotation ("the goods"). The total purchase price of the goods was agreed at \$79,500.00. Subsequently, the defendant placed an order for the purchase of additional parts to the value of \$3,933.04.
2. The plaintiff says that it delivered the goods to the defendant on 25 April 2018 on a 14 day trade account and installed the goods on the defendant's boat. The plaintiff says that upon delivery, ownership and risk of the goods have passed to the defendant. The plaintiff raised invoice N14952 showing a balance outstanding of \$43,683.04 and invoice N14953 with a balance of \$39,750.00. The total balance owed for the goods was \$83,433.04 as at 23 April 2018, but the defendant made a payment of \$20,000.00 on 20 May 2018; the payment is described as a deposit.
3. The plaintiff says that although it has requested the defendant to pay the balance sum this has not been done. On 10 September 2018, the plaintiff through its lawyers demanded the balance purchase price together with interest. The plaintiff says that the defendant is in possession of and continues to use the goods and generates income to the plaintiff's detriment.
4. In its statement of defence, the defendant denied that the plaintiff delivered goods in terms of their agreement, and says that the 250GETU engine that was delivered is not the same as agreed upon. The defendant says that soon after the engines were delivered, a component in one of the engines was damaged and needed repair. The defendant says that it advised the plaintiff to either change the engine or to take the engine back and make a refund of the deposit that was paid. The defendant says that although the plaintiff agreed to remove the engine

it did not do so. The defendant says that the plaintiff wrongly advised it that the spare parts for F250DETU is the same as F250GETU. The defendant says that it has suffered losses as a result of being supplied with a different model of the engine, and says that it will return the engine once it is fully refunded the deposit of \$20,000.00. The defendant's counter claim is to recover the deposit.

5. The plaintiff filed a reply to defense and defense to counter claim denying the positions taken by the defendant.

6. The parties raised the following issues:

- i.* Did the defendant accept delivery of the two Yamaha F250DETU engines?
- ii.* Were the two Yamaha F250DETU engines accepted by the defendant in good order?
- iii.* Did the delivery of the two Yamaha F250DETU correspond to the description given by the plaintiff?
- iv.* Whether the plaintiff failed to deliver the Engine F250DETU to the defendant as per the agreement?
- v.* Whether a few weeks after the engine was delivered to the defendant, a part got damaged which needed repairs?
- vi.* Whether, after obtaining the spare part, the defendant discovered that the said part could not fit in the engine delivered by the plaintiff?
- vii.* Whether the defendant then advised the plaintiff of the unfitting part and requested the plaintiff to change the engine subject to no further cost or alternative return the engine subject to the deposit of \$20,000.00?
- viii.* Did the plaintiff wrongly advise the defendant that the spare parts for the Yamaha F250DETU engine was the same for Yamaha F250GETU engine?
- ix.* If the advice was wrongful, did the defendant as a result thereof suffer any loss?
- x.* Whether the plaintiff agreed to accept the return of the engine subject to a refund of \$20,000.00 to the defendant?

- xi.* Whether the defendant notified the plaintiff that they will return the engine subject to \$20,000.00 full refund?
 - xii.* Does the defendant owe the plaintiff a sum of \$67,239.04 (Sixty Seven Thousand Two Hundred and Thirty Nine Dollars and Four Cents) being balance purchase price for the goods?
 - xiii.* Is the defendant still in possession of and has continued to use the goods and generated income for itself to the detriment of the plaintiff?"
7. The plaintiff's production manager, Richard Qoro, gave evidence on behalf of the plaintiff. The plaintiff and the defendant entered into an agreement for the purchase of two outboard engines. Thereafter, separate agreements were entered into in respect of the two engines for which separate invoices were raised. The witness said that the model described in the documentation – F250DETU – is the same as another model sold in the US market, and that both models use the same parts. The witness referred to a written confirmation of this by Yamaha Motor Company Ltd of Japan, which supplies boat engines to the plaintiff. He said that the F250DETU model engine is marketed in the Asia Pacific region. The witness admitted that soon after installation, there was an issue with the engine, which, he said, was fixed. The witness said that the defendant was continuing to use the engines in its boat in Denarau.
8. In cross examination, the witness admitted that the defendant was advised of the change of engine model only during installation of the engines. He conceded that between the time of the sale and purchase agreement on 3 November 2017 and the final invoice, the plaintiff did not inform the defendant of the model change. The witness explained that the model change of the engine did not mean it was a different product. He says it is the same product. The witness agreed that there were issues with the engines about five days after installation, but the plaintiff provided a gear box and rectified those issues.
9. The witness said that the plaintiff was willing to take the engines back, but the defendant did not allow it to be taken away, even though the plaintiff was in communication and made efforts to take the engines away. He said the plaintiff did not refund the deposit of \$20,000.00, as the engines remained with the defendant, and was being used.

10. Adnan Mohammed, a director, gave evidence on behalf of the defendant. He said that the company chose to fix F250DETU engines as its boats have previously been fitted with the same engines and the company has engine spare parts in stock for the model it ordered. The witness said that a few days after installation, the boat broke down and it was at that point the defendant found that it is not the same engine. He said the company supplied a gear box from an old engine, which the plaintiff's technicians suitably modified.
11. The witness admitted that an officer of the plaintiff called him and sent an email on 14 August 2018 regarding the removal of the engine, and for a discount on the price. The witness said that the defendant continues to buy engines from the plaintiff, as it currently has the models that it requires. The witness admitted that the defendant is continuing to use the engines that were supplied by the plaintiff. The defendant has been using the engines for over five years. He said that the defendant is ready to return the engines after receiving a refund of the monies paid to the plaintiff. The witness said that he verbally communicated with the plaintiff and informed them that they could remove the engines. He was agreeable to a proportionate payment for usage of the engine.
12. The plaintiff's action is for the price of the goods. The evidence makes it clear that the plaintiff did not deliver goods corresponding to the description agreed by the parties. The plaintiff's witness admitted that the model change was communicated to the defendant after installation. The defendant was entitled to have rejected the goods when it became aware of the difference in the model. It did not do so. Repairs were carried out and the defendant continued to use the engines, even though the plaintiff says it has called for their return. The plaintiff cannot insist on payment of the price as it has not complied with the description of the goods requested by the buyer. But, it is entitled to an immediate return of the goods. The defendant cannot continue to use the goods without payment. The defendant has used the engines for more than five years. The extent of use is not in evidence. The defendant has used the goods to derive profits. It is safe to assume a significant depreciation of the engines. The payment referred to as the deposit is a part of the price paid by the defendant. It is reasonable, in the

circumstances, for the plaintiff to retain the sum of 20,000.00 paid by the defendant. This amount will compensate the plaintiff for use of the engines from the time they were installed in the defendant's boat. Subject to these directions, the plaintiff will not succeed in its action.

ORDER

- A. The defendant is to return the goods to the plaintiff.
- B. The defendant is to forfeit the sum of \$20,000.00 paid to the plaintiff.
- C. Parties will bear their respective costs.

Delivered at **Suva** on this 5th day of **February, 2024**.



M. Javed Mansoor
Judge