

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 236 of 2016

BETWEEN : **AJITH SINGH T/A FAB WELDING & MAINTENANCE
WORK**
Plaintiff

AND : **SANDEEP LAL, ASHANI THANUJIKA PREMADASA
& AMRIT LAL**
Defendants

Counsel : Mr A Pal for Plaintiff
Mr V Kumar for Defendants

Hearing : 26-28 November 2018

Judgment : 29 November 2024

JUDGMENT

[1] The parties entered into an agreement in 2015 for the Plaintiff to construct a residential dwelling for the Defendants. The parties agreed a price and terms. Several months into the construction, the Defendants terminated the agreement and proceeded to complete the construction themselves. The Plaintiff brought these proceedings on the basis that the termination was unlawful. They seek compensation for the unpaid portion of the agreed price. The Defendants counterclaim seeking damages for rectification of what they say was substandard workmanship by the Plaintiff.

[2] The trial was conducted in November 2018. Sadly, the learned trial Judge passed away before issuing a decision. The matter came before me earlier this year. In August 2024, counsel agreed that a decision is made by the Court on the evidence produced at trial.

Pleadings

- [3] According to the pleadings, the parties entered into two written agreements, signed on 22 July 2015 and 1 August 2015. The main agreement is the latter, dated 1 August 2015 ('the Main Agreement'). The contract price was \$129,500, payable to the Plaintiff at different stages of the construction as per an agreed Schedule. The actual construction started several days after the Main Agreement was signed. On 10 March 2016, the Defendants terminated the agreement effective immediately.
- [4] The Plaintiff pleads in his Statement of Claim filed on 19 September 2016 that the termination was unlawful, that at the time of the termination the Plaintiff had completed four stages of the construction and had been paid the amount of \$51,700. The Plaintiff pleads that he was owed \$11,500 for works already completed and owed the outstanding balance of \$77,800 as per the amount of the contract price of \$129,500. He seeks payment of the amount of \$77,800, legal costs of \$10,000, interest at 8% from 10 March 2016 until judgment and post-judgment interest of 8% per annum.
- [5] As per the Defendants' Statement of Defence filed on 18 October 2016, they admit the fact of the two agreements as well as the notice of termination in March 2016. The Defendants' say that the termination was lawful and in accordance with the agreements due to the substandard workmanship of the Plaintiff. The Defendant counterclaims for the cost of rectifying these defects estimated at about \$27,000 plus liquidated damages of \$50 per day from 31 January 2016 (in accordance with clause 5 of the Main Agreement), and interest at 13% per annum.

Evidence at trial

- [6] The viva voce evidence at trial is recorded in the learned Judges trial notes. There is also a partial audio recording of two of the witnesses (Mr Shalit Kumar for the Plaintiff and Mr Sandeep Lal for the Defendants). The Judges notes and the audio recording have been transcribed. Also available are the exhibits tendered at trial by both parties.

- [7] Each party called two witnesses. The Plaintiff provided evidence along with Mr. Kumar, a Manager with the Bank of South Pacific (BSP). The Plaintiff stated that he commenced constructing residential houses in 2012 and had constructed four dwellings. He stated that construction of the Defendant's dwelling began a few days after signing the Main Agreement on 1 August 2015.¹ Around this time, the Defendants made an adjustment changing the dwelling from a two-storey construction to a three-storey dwelling. The Plaintiff prepared an amended Schedule for the construction identifying 10 stages and the payments payable for each stage.² The total construction price increased from \$129,000 to \$145,200.
- [8] The construction was supervised by Engineered Designs. Their engineers inspected the construction from time to time and would certify when the work for a particular stage had been satisfactorily completed. On occasion, the engineers would identify work that required rectification and these works would be rectified by the Plaintiff to the satisfaction of the engineers before they certified completion of the stage. Engineered Designs did so for stages 1, 2, 3, 4 and 5. Payments were released from BSP to the Plaintiff upon completion of each stage.
- [9] Following completion of stage 5, the Plaintiff commenced the stage 6 works. On 6 February 2016, the Plaintiff wrote to BSP seeking variations to the construction to include another retaining wall.³ The additional amount indicated for these works was \$15,800. On 10 March 2016, the Defendants sent a notice of termination to the Plaintiff, terminating the agreement effective immediately.⁴ By this time, the Plaintiff states that he had completed about 80% of stage 6. As per the termination letter, the Plaintiff removed all his equipment and cleared the site.
- [10] The Plaintiff stated that all the works done by him were passed by the local town council, Engineered Designs as well as inspected by BSP. He did not accept that his work was substandard. He confirmed the figures sought in his Statement of Claim.

¹ The Plaintiff produced his Certificate of Registration (Plaintiff Exhibit 1) and the two building contracts with the Defendants (Plaintiff Exhibits 2 & 3).

² Plaintiff Exhibit 4.

³ Plaintiff Exhibit 7.

⁴ Plaintiff Exhibit 8.

advising that his lost profit on the contract was about \$20,000, based on 15-20% of the contract price.

- [11] In cross-examination, the Plaintiff again denied that his work was substandard.
- [12] The second witness for the Plaintiff, Mr. Shalit Kumar, was a bank manager with BSP. He explained that the Defendants obtained a loan from BSP to fund the construction of the dwelling. He explained the process by which payments were released to the builder. At the end of each stage, the Plaintiff would seek payment for that stage. The bank would receive reports on the Plaintiff's work from the Nausori Town Council and Engineered Designs. The bank carried out its own inspection as well. If the reports confirmed that the work had been satisfactorily completed, and the Defendants authorized release of the payment, then BSP would make the payment to the Plaintiff. This process was followed for each stage from stages 1 to 5. From stage 6 onwards, payments were made to the Defendants as they took over construction on a self-build basis from that time. Mr Kumar was aware that there had been an issue between the Plaintiff and the Defendants and that this led to the latter terminating the contract. Mr. Kumar acknowledged that the letter that he had received from the Defendants dated 16 March 2016, informing BSP of the termination and attributing the termination to the Plaintiff's substandard workmanship, was at odds with the notice of termination to the Plaintiff dated 10 March 2016 wherein the Defendants attributed the termination to *'financial problems'*.
- [13] In cross-examination, Mr Kumar explained that the issues between the parties began about stage 3. He confirmed that the bank conducted an inspection of the work done after each stage *'at all times'*.
- [14] In re-examination, Mr Kumar stated that both parties expressed concern with the other during the construction. The owners expressed concern about the speed and standard of the work by the contractor whilst the contractor considered that the owner was being overly harsh. He reiterated that issues began at about stage 3 when the suggestion of additional cost was raised and *'at one time I even asked him to sit down and discuss this properly and sort it out... I think at a point they did come to an agreement and then*

it moved forward'. However, 'then there are some issues again with the wall itself and some cement works that I think took it further and they decided to end the contract'.

[15] The Defendants' also called two witnesses being Mr Lal (the first-named defendant) and Mr Vijay Krishna, a Civil Engineer with Engineered Designs.

[16] Mr Lal noted problems with the Plaintiff's workmanship from early on but approved payments for the first five stages, although with respect to stage 5, he stated that the work for that stage had not been completed, ie in respect to the decking, cantilever steel and the corridor part of the steel. He also stated that Engineered Designs had found significant problems with the retaining wall, the cavities had not been filled in and the retaining wall was weak. This led to the Plaintiff proposing a further retaining wall at an additional cost. Mr Lal produced several reports from Engineered Designs, prepared during the construction identifying problems with the construction.⁵ Mr Lal stated that he had agreed to approve payment for the completion of stage 5, despite the work being incomplete, on an assurance from the Plaintiff that he would rectify these shortfalls at a subsequent stage. He stated that this assurance was not honoured by the Plaintiff.

[17] Mr Lal stated that when the Plaintiff advised that a further retaining wall was required to be built at an additional cost of \$15,800 (in about February 2016) the Defendants did not have the finances for this and BSP did not approve the additional funding. He, therefore, had a discussion with the Plaintiff about terminating the agreement because of a lack of funds. Mr Lal stated that it cost the Defendants about \$25,000 to rectify the defects.

[18] In cross-examination, Mr Lal confirmed that each of the five payments made to the Plaintiff followed confirmation of completion of each of the stages by BSP and the engineers. He accepted that the Defendants had not issued any notices to the Plaintiff for incomplete or substandard work. Also, the Defendants had not written any letters to BSP expressing dissatisfaction with the contractor. Mr Lal stated that he prepared the termination notice of 10 March 2016.

⁵ Defendants Exhibits 1, 3 & 7.

[19] The Defendant's second witness was Mr. Krishna. He was then employed with Engineered Designs, the engineers responsible for inspecting the construction. He stated that much of the work by the Plaintiff was substandard but he also acknowledged that such work had been rectified. He prepared a report dated 16 December 2016 identifying defects from their inspections.⁶ In cross-examination, Mr Krishna accepted that as engineers they were responsible for approving completion of works. He accepted that if such approval was provided then the builders had met the standards required.

Decision

[20] I have carefully considered the evidence from the trial and the parties pleadings. In my view, the key issue in this proceeding is whether the Defendants were entitled to terminate the agreement on 10 March 2016. It is the Defendants' case that they did so due to the poor workmanship of the Plaintiff.

[21] The Main Agreement of 1 August 2015 contains the terms governing the contractual relationship between the parties. Clause 23 reads:

If the Contractor fails to complete the building works to the satisfaction of the Owners or commits a breach under this agreement, the Owners may at their discretion terminate this contract and have the work completed by another contractor, company or person or carpenters and all costs exceeding contract price shall become payable by the Contractor by way of damages and compensation.

[22] Clause 23 permits the Defendants to terminate the agreement where they are satisfied that the work is substandard or there has been a breach of the agreement. For two reasons, I am unable to accept that the Defendants were entitled under this clause to terminate the agreement with the Plaintiff. Firstly, if the Defendants were relying on clause 23 to terminate the agreement for failure to properly complete the building works to their satisfaction, as they suggest, then the notice of termination should have

⁶ Defendants Exhibit 6.

expressly stated this. The notice of 10 March 2016 did not do so, instead purporting to terminate the agreement '*due to financial problems*'.

- [23] Secondly, I am not satisfied on a reading of all the terms in the Main Agreement that the Defendants could terminate the agreement with immediate effect on the basis of the alleged poor workmanship. The Defendants were required to adhere to certain procedures before they were permitted to terminate the agreement. For example, clause 10 provides:

If the Contractor shall fail to diligently perform the said work or any part thereof in accordance with this Contract the Owners or his agent may by notice in writing require the Contractor within seven (7) days after service of such notice to proceed with the due performance of the said work and if the Contractor shall thereupon still fail to diligently perform the said work, the Owners or his agent may by notice in writing terminate the Contract but without prejudice to any other of the Owner's rights hereunder, and thereupon the Contractor shall cease work and the Owners shall be reasonable and proper to complete the said work, and the cost thereof shall be paid and borne by the Contractor and may be deducted from the contract price.

- [24] The Defendants did not provide any notice to the Plaintiff under clause 10 to rectify the work. Nor did they purport under clause 10 to terminate the agreement for failure to comply with such notice.

- [25] Clause 19 is also relevant. It provides that '*Any dispute between the parties hereto shall (sic) referred to a single arbitrator appointed by the Owners and a decision so obtained shall be conclusive*'. This provision requires the parties to try to resolve any disputes by arbitration. The Defendants did not avail themselves of this remedy.

- [26] Moreover, having carefully considered the evidence, I am satisfied that there was no proper factual basis for the Defendants to terminate the agreement. The agreement certainly permitted that Defendants to terminate for good cause such as substandard work which had not been rectified. While certainly the evidence from the inspections by Engineered Designs demonstrate a number of failings by the Plaintiff, the Plaintiff

rectified these failings as evidenced by the engineers subsequent approval for each of the five stages undertaken by the Plaintiff – it is significant that this approval was supported by inspections from the Nausori Town Council and BSP. The Defendants contention that the workmanship of the Plaintiff was substandard does not sit well with the process in place for release of payments to the Plaintiff.

- [27] Accordingly, I find that the Defendants unlawfully terminated the agreement on 10 March 2016. They were not permitted under the contract with the Plaintiff to do so. The Plaintiff is entitled to compensation for the Defendant's breach of the contract.

Calculation of the Plaintiff's compensation

- [28] The Plaintiff seeks the outstanding amount of the contract price that remains unpaid. The figure is identified in the pleadings as being the amount of \$77,800 – this is based on a contract price of \$129,500. The Plaintiff also seeks legal costs of \$10,000 and interest.
- [29] Both the Plaintiff and first-named defendant agreed in evidence that the Schedule contained in the Plaintiff Exhibit 4 correctly sets out the amounts payable to the Plaintiff following completion of each stage – this was prepared to take account of an adjustment made to the construction by the Defendants following the signing of the Main Agreement. There are 10 stages identified in the Schedule, the total amount payable for the construction being \$145,200. The undisputed evidence is that the Plaintiff received payments for the first five stages. Relying on the figures in the Schedule, the amount paid to the Plaintiff was \$66,700 (and not the amount of \$51,700 as pleaded). The outstanding balance on the total cost of the construction (of \$145,200) would be \$78,500, and not \$77,800 as pleaded.
- [30] The construction price in the normal course of events is partially consumed by expenses incurred by the contractor, such as materials, wages and subcontractor costs. The Plaintiff's evidence was that he had completed 80% of stage 6 when he received the termination notice. The amount payable for stage 6 in the Schedule was \$16,000 on completion; 80% thereof is \$12,800. In my view, the Plaintiff is entitled to payment of the amount of **\$12,800** for work undertaken on stage 6.

- [31] The outstanding amount payable for the remaining 4 stages of the construction was \$62,500. There is no evidence presented at trial that the Plaintiff incurred the cost of the materials for these 4 stages or suffered the cost of wages for employees for the total period of the construction. The Plaintiff gave evidence that he usually made a profit on each build of about 15-20% of the total construction cost. Applying the figure of 20% to the outstanding amount of \$62,500 results in the figure of \$12,500. Again, I am satisfied that the Plaintiff is entitled to payment for this loss.
- [32] Accordingly, the Plaintiff is entitled to compensation of \$25,300, being the amount of the Plaintiff's loss caused by the Defendant's unlawful termination of the agreement.
- [33] The Plaintiff is also entitled to interest on his loss under s 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. I am of the view that a reasonable rate is 6% per annum payable for the period from the date that these proceedings were filed to the date of trial.⁷

Defendant's counterclaim

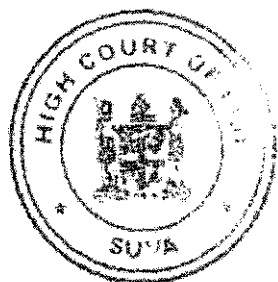
- [34] As the termination on 10 March 2016 was unlawful, the Defendants cannot succeed with their counterclaim. The Defendants were not entitled to terminate the agreement. They should have afforded the Plaintiff an opportunity to fix any defects as per clause 10 of the Main Agreement.
- [35] While the dwelling was not constructed by the contracted date, being 31 January 2016, the Defendants are not entitled under clause 5 of the Main Agreement to payment for late construction at the rate of \$50 per day. The Defendants did not take issue with the timeliness of the construction before or at the time of their purported termination on 10 March 2016. The construction date was recorded in the Main Agreement before the Plaintiff made the adjustment to the construction increasing the dwelling from a two-storey to a three-storey build.

⁷ In light of the delay by the court issuing its judgment it would not be reasonable to extend the period of interest up to the date of judgment.

Orders

[36] In light of the above, I make the following orders:

- i. Judgment is entered for the Plaintiff on his claim in the amount of \$25,300 for the unlawful termination of the agreement by the Defendants.
- ii. Interest is payable to the Plaintiff at the rate of 6% per annum on the amount of \$25,300 from the date these proceedings were filed on 19 September 2016 to the date of trial on 26 November 2018, being the amount of \$3,318.81.
- iii. The Defendants are liable to pay interest on the judgment debt of \$25,300 at the rate of 4% from the date of Judgment until the debt is satisfied.
- iv. The Defendants counterclaim is dismissed.
- v. The Plaintiff is entitled to costs summarily assessed in the amount of \$5,000, payable by the Defendants within 3 calendar months.




D.K.L Tuiqeregere
JUDGE

Solicitors:

AP Legal for the Plaintiff

Kumar Lawyers for the Defendants