

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 248 OF 2008

BETWEEN: **IMPALA CHEMICALS PTY LIMITED** a limited liability company having its registered office at Coburg, Victoria, Australia.

PLAINTIFF

AND: **BITU INVESTMENTS LIMITED** a limited liability company having its registered office at c/- Price Waterhouse Coopers, 7th Floor, Civic Tower, Victoria Parade, Suva.

DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Counsel: **Ms S. Devan for the Plaintiff**
Mr A. Reddy and Mr A. Chand for the Defendant

Date of Judgment: **30 January 2018**

JUDGMENT

Introduction

1. On 5 August 2008, Plaintiff caused Writ to be issued with Statement of Claim claiming for Judgment in the sum of AUD\$67,913.70, interest and costs for supply of raw materials.
2. On 8 October 2008 and 15 October 2008, Defendant filed Acknowledgement of Service and Statement of Defence respectively.
3. On 18 December 2008, Plaintiff filed Reply to Statement of Defence.
4. On 15 December 2008, Plaintiff filed Summons of Direction ("**SD**") and on 3 March 2009, Order in terms of SD was made.
5. On 8 April 2009 and 28 May 2009, Plaintiff and Defendant filed Affidavit Verifying List of Documents respectively.
6. This matter was called on 16 July 2010, after a lapse of more than a year before then Master who directed parties time to file Agreed Bundle of Documents and Minutes of Pre-Trial Conference (**PTC**) by 29 July 2010, and adjourned this matter to 30 July 2010.
7. Thereafter this matter was called on 30 July 2010, 26 August 2010, 9 September 2010, 13 October 2010 and 14 November 2010 for parties to comply with direction given on 16 July 2010.
8. On 19 November 2010, Plaintiff filed Minutes of PTC.
9. On 2 October 2010, Master directed Plaintiff to file Order 34 Summons, Copy Pleadings and Agreed Bundle of Documents.
10. On 8 March 2011, Plaintiff filed Order 34 Summons and Copy Pleadings.
11. On 7 April 2011, Master directed Registry to refer file to Judge.
12. On 26 July 2012 (after a lapse of more than a year) this matter was called before His Lordship Justice Balapatabendi (as he then was) and adjourned to

11 and 12 March 2013, for trial but date was vacated due to His Lordship sitting in High Court, Labasa on those dates.

13. This matter was called on 28 March 2013 and adjourned to 7 and 8 October 2013, for trial.
14. Due to His Lordship Justice Balapatabendi departing Judicial Department this matter was called in this Court on 7 October 2013, where counsel for the Plaintiff sought adjournment on the ground that they needed to sort out documents and attend to discovery.
15. On 7 October 2013, the trial date was vacated and Plaintiff was granted leave to file Supplementary Affidavit Verifying List of Documents and this matter was adjourned to 11 November 2013, to fix trial date.
16. On 1st November 2013, Plaintiff filed Affidavit Verifying Supplementary List of Documents and on 19 November 2013, this matter was adjourned for trial on 13 and 14 May 2014.
17. The trial proceeded on 13 May 2014, and concluded on that day.
18. At conclusion of trial both parties were directed to file Submissions with Judgement to be delivered on Notice.
19. Following documents were tendered as Exhibit:-

Exhibit No. Documents Bitu Investments Limited

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|-----|--|
| P2. | Photocopy of Order from Bitu Investment Ltd to Plaintiff. |
| P3 | Photocopy of Order No. 04304 dated 21 April 2006, from Bitu Investment Limited to Plaintiff. |
| P4 | Photocopy of letter dated 20 December 2006, from Bitu Investments Limited to Plaintiff. |
| P5 | Plaintiff's Westpac Banking Corporation Sydney Bank Account Statement for the period 30 November 2006 to 29 December 2006. |

- P6 Credit Advice Confirmation dated 22 December 2016, from Westpac to Plaintiff.
- P7 Photocopy of Order No. 05372 from Bitu Investment Limited to Plaintiff.
- P8 Photocopy of Statement dated 2 August 2007, from Plaintiff to Bitu Investment Limited with hand notes.
- P9 Photocopy of email dated 2 May 2007, from Plaintiff to Bitu Investment Limited.
- P10 Neel Shivam Lawyers, Company Search Report Form dated 12 May 2014 - Garment Processing (Fiji) Limited.
- P11 Neel Shivam Lawyers, Company Search Report Form dated 17 May 2014 - Bitu Investment Limited.

Issues for Determination

20. The issue to be determined by this Court and stated in PTC Minutes are as follows:-

- “1. *Whether the Defendant ordered the raw materials from the Plaintiff or not?*
2. *Whether the Defendant is liable to pay the Plaintiff the sum of AUD\$67,913.70?*
3. *Whether the Plaintiff is entitled to interest at the rate of 13% per annum on the judgment sum pursuant to section 3 of the Law Reform (Miscellaneous) (Interest) Act Cap 27?*
4. *Whether the Plaintiff is entitled to costs on an indemnity basis?”*

Plaintiff's Case

21. Plaintiff called Neil Martle Davies as its only witness (**PW**).

22. PW during examination in chief gave evidence that:-

- (i) He is director/shareholder of Plaintiff Company which was incorporated in 1976 in New South Wales, Australia by his late Frederick Ernest Davies and he became director in 2003 and shareholder in 2006;
- (ii) Plaintiff company was engaged in selling all chemicals (except dye) to textile industry;
- (iii) Plaintiff through its director and shareholders had good business and social relationship with Defendant and its director/shareholder Fred Sutch;
- (iv) Fred Sutch is director/shareholder of Garment Processing Limited ("**GPL**") and Defendant;
- (v) Plaintiff started trading with GPL at first through his father;
- (vi) Plaintiff was trading with other textile companies in Fiji at that time;
- (vii) Trading with GPL was on gentlemen's terms and invoices was raised at the end of each month and payments were made once invoices were issued;
- (viii) For most part Plaintiff invoiced GPL but last three (3) transactions were invoiced to Defendant;
- (ix) Plaintiff started trading with Defendant after orders from GPL were changed to read Defendant's name and when he contacted Vikashni who placed order and organised payment at GPL she informed him that company name has changed but contact and directors remained same;
- (x) The amount claimed is supply of high grade textile processing chemicals;

- (xi) He contacted Fred Sutch who informed him that all was okay and that the boiler was up for sale and ten thousand dollars (\$10,000.00) out of the sale price will come to Plaintiff;
- (xii) When Defendant came into the picture he discussed GPL debt with Vikashni and she said that when payments will be made fifty percent (50%) will negate GPL debt;
- (xiii) His understanding of who Defendant was that it was same company (GPL) which just effected name change and place of operation, directors, staff and contact detail were exactly the same;
- (xiv) Plaintiff sent Statement to Defendant (Exhibit P1);
- (xv) Order faxed on 6 October 2006, (Exhibit P2) had name changed to Defendant and had Defendant's stamp which was in similar fashion to Order received from GPL (Exhibit P3);
- (xvi) He was not advised about change of name but when he called Defendant, it sent fax dated 20 December 2006 advising new name of company with details (Exhibit P4) with Fred standing for Fred Sutch and Viki for Vikashni;
- (xvii) Suresh Mani would on occasion drive him around Fiji and he came to know him during his dealings with GPL;
- (xviii) He was never told that GPL and Defendant were two separate companies (separate entities);
- (xix) After receiving letter from Defendant, Plaintiff started trading with Defendant and wanted payment of Defendant's invoice upfront and he chose to do so because old debt was not being paid except for \$1,100.00 sent by Defendant;
- (xx) Defendant paid \$3,472.00 by direct credit to Plaintiff's account on 20 December 2006, of which \$1,100.00 was taken towards GPL debt;

- (xxi) Plaintiff did not receive any other payments from Defendant for old but received payments for goods sold to Defendant;
- (xxii) As for GPL debt Vikashni said she will pay it when Plaintiff supplied goods but has not been paid;
- (xxiii) Vikashni promised to clear GPL debt in writing by facsimile and he wanted Defendant to clear earlier debt;
- (xxiv) Handwritten note on Statement dated 2 May 2007 (Exhibit P8) was faxed to him on 2 May 2007, and in response he e-mailed (Exhibit P9) Vikashni to inform that if payment is not received then he will need to recover the debt;
- (xxv) After his e-mail he did not receive any response from Defendant;
- (xxvi) He did not receive any objection from Defendant that they will not pay because debt belonged to GPL;
- (xxvii) Plaintiff engaged services of Global Solutions to handle matter in proper legal manner who then instructed Neel Shivam Lawyers (“**NSL**”);
- (xxviii) NSL conducted company search and when it was found out that GPL and Defendant are two (2) separate entities (Exhibits P10 and P11);
- (xxix) Despite Court proceedings Defendant did not make any payments;
- (xxx) Plaintiff supplied goods in good faith and did not know GPL would be wound up and will sell all its assets.

23. During cross-examination PW:-

- (i) Stated that he was not aware that GPL and Defendant were separate legal entities but was aware at time of giving evidence;
- (ii) Orders were placed verbally in writing by GPL and when Defendant came into practice then Defendant did;

- (iii) Stated that he checked with Defendant and was informed that GPL had changed its name to Bitu Investments Ltd and he did not do a company search because he was not in habit of doing it, and because of the relationship the parties had;
- (iv) Stated that he was made aware of name change by Vikashni and he was not aware that GPL and Defendant were separate entities and he was of the assumption that he was supplying to same company;
- (v) Stated that Defendant should pay the debt because they are same company and as Defendant confirmed that it will pay;
- (vi) When asked as to why he did not go after GPL he stated that he left it in hands of collectors and lawyers;
- (vii) When asked if he has anything in writing to show his assumption as correct he stated he has Orders;
- (viii) In reference to Exhibit P2 (Order) he stated that he does not know if it has a signature and that Vikashni is not a director or shareholder of Defendant;
- (ix) In reference to Exhibit P4 he stated that it has signature and the email address freddie@connect.com.fj could have been written by Vikashni because she wrote the letter;
- (x) In reference to Exhibit P1 (Statement) he stated that he has Gibson Freight document and Bill of Lading to GPL to support it;
- (xi) Denied that he manufactured any documents;
- (xii) In reference to Exhibit P2 he stated that he cannot see Order number and it is dated 30 August 2006, he changed details of items in the Order and he did not ask Defendant to change it;

- (xiii) In reference to Exhibit P3 he stated Order was raised by GPL and when asked why he did not change details here he stated that it has different date;
- (xiv) Agreed that Defendant was paying upfront for materials supplied and stated that he was hoping that they will pay old debt;
- (xv) When asked if he has anything in writing to say so he stated that Vikki wrote but agreed that it has no signature and there is a possibility it could be someone else;
- (xvi) In reference to Exhibit P6 he stated that \$1,100.00 was overpayment and taken towards GPL debt;
- (xvii) Agreed that Exhibit P4 says new company details and when asked, even then he is saying he did not understand, he did not answer;
- (xviii) When it was put to him that there was no other e-mail after 20 December 2006 until e-mail of 2 May 2007, he stated that Vikki wanted him to send the e-mail;
- (xix) Stated that he understands that he created confusion and Orders were raised by GPL but denied that he lacked knowledge or was negligent.

24. During re-examination PW:-

- (i) In reference to Exhibit P4 he stated that there is no record that Defendant is a separate entity, it does not say Defendant and GPL is not related and it does not say that Defendant will not be responsible to GPL's debt;
- (ii) He wrote e-mail (Exhibit P9) because he was not ready to supply chemicals on credit.

Defendant's Case

25. At close of Plaintiff's case, Counsel for Defendant made application for nonsuit when this matter was stood down after lunch break to hear submissions on the application.
26. After brief submission by Counsel for the parties Defendant by its Counsel withdrew non-suit application and called Frederick John Sutch, Company Director (**DW**) as its only witness.
27. DW during examination in chief gave evidence that:-
 - (i) He is director of Defendant Company which is engaged in laundry business for export garments;
 - (ii) Defendant Company was incorporated close to year 2000 with him and Davendra Prasad as director but became operational in the year 2006;
 - (iii) Before Defendant Company became operational he was director of GPL and Defendant Company first started dealing with Plaintiff after September 2006;
 - (iv) Defendant Company did not order any items from Plaintiff from 1993 to 2006;
 - (v) In reference to overpayment of \$1,100.00 he stated that he could not recall if it was overpayment or for chemicals used from GPL which he felt obliged to pay;
 - (vi) No discussion took place between Plaintiff and himself;
 - (vii) Other directors for GPL are N.K. Chong and T.K. Chen with him holding 99% share and Divendra Prasad holding 1% share and Defendant Company is his company;
 - (viii) GPL does not owe any money to Defendant Company;

- (ix) Defendant Company does not owe any money to Plaintiff but GPL does owe money to Plaintiff;
- (x) Defendant Company never ordered goods on behalf of GPL.

28. During cross-examination DW:-

- (i) Stated that GPL was incorporated in 1993 and he bought it, maybe as a self company;
- (ii) GPL traded with Plaintiff until Defendant Company came into the picture;
- (iii) In relation Defendant Company agreed that he purchased it as self-company and acquired shares in it with T.K. Chen;
- (iv) Director for Defendant Company was Divendra Prasad and himself with T.K. Chen being appointed later;
- (v) T. K. Chen and him were directors of Defendant Company with N. K. Chong;
- (vi) Stated that when Defendant Company came into operation it took order book of GPL and had same clientele;
- (vii) Agreed that both GPL and Defendant Company:-
 - (a) Have registered offices at Price Waterhouse Coopers;
 - (b) Operating from same place as garment processors;
 - (c) Have same contact details; and
 - (d) Have same employees;
- (viii) Both companies have two authorised employees namely Vikashni and Suresh Mani;

- (ix) Agreed that when Defendant Company took over operations of GPL it continued dealing with Plaintiff;
- (x) When it was put to him that Defendant did not inform Plaintiff that Defendant is separate company he stated that according to correspondent from Vikashni it would appear that Plaintiff was well aware that Defendant was the company to deal with from September 2006 onwards;
- (xi) In reference to Exhibit P4 agreed that nowhere it is stated that:-
 - (a) Defendant is a separate company;
 - (b) Defendant has no relationship with GPL;
 - (c) GPL is not trading with Plaintiff anymore;
 - (d) Defendant will not be liable for GPL's debt;
- (xii) Agreed that no form of evidence was given by him to Plaintiff that Defendant was a separate entity;
- (xiii) When it was put to him that, because this information was not given to Plaintiff it continued trading thinking that Defendant and GPL is one and same company stated that he does not know what Plaintiff thought;
- (xiv) When asked if he did not think he should have informed Plaintiff, he stated that he had General Manager Suresh Mani and it was his job to deal with suppliers and he had no idea if Vikashni or Suresh Mani informed Plaintiff;
- (xv) When it was put to him that Vikashni told Plaintiff that they were arranging to pay GPL's debt, he stated that he has no idea and if so then she could be doing so on instruction of General Manager and not him;

- (xvi) In reference to hand written notes in Exhibit P7 he stated that he never saw it before;
- (xvii) In reference to Exhibit P8 he stated that he never saw that handwritten note on it before;
- (xviii) Stated that Vikashni did not inform him of that arrangement;
- (xix) Agreed that it is possible she would have written it after instructions were given by Suresh Mani;
- (xx) Stated that Vikashni is his and Suresh Mani's Secretary;
- (xxi) Stated that he is not aware of the e-mail (Exhibit P9) and that Neil Davies should have sent it to him;
- (xxii) Stated that he did not know what payment of \$3,472.00 in Exhibit P6 is for and it is possible overpayment was charged to old debt and that he explained it earlier;
- (xxiii) Stated that when Defendant started to trade it is possible some GPL purchase orders were used because no order books were printed;
- (xxiv) In reference to Exhibit P2 he stated it could be possible name of GPL was replaced with Defendant but he never saw any documents crossed out;
- (xxv) Stated that he is not aware if Statement and Invoice were sent to Defendant Company and it should have been sent to GPL;
- (xxvi) Did not agree when it was put to him that Plaintiff is claiming from Defendant because Defendant Company by its employee undertook to pay old debt;
- (xxvii) Agreed that he did not inform Plaintiff that new company was incorporated and new company was dealing with Plaintiff;

- (xxviii) Stated that prior to 2005, he had dialogue with Plaintiff's directors, had cordial relationship with Frederick and trading started from that friendship;
- (xxix) Agreed that because of friendship they had lose arrangements on how goods were supplied and payments were made which continued when Defendant Company came into operation but at that stage Frederick had passed away and Suresh and Vikashni dealt with Neil Davies with Suresh in charge for procurement of chemicals.

29. In re-examination DW:-

- (i) Agreed that Defendant Company became operational in 2006;
- (ii) Stated that debt claimed in Statement of Claim is for period 31 March 2005 to 17 May 2006 which is prior to Defendant Company becoming operational;
- (iii) Stated that payment by Defendant was on cash basis.

30. After analysing the evidence and demeanour of the witnesses this Court finds that:-

- (i) Plaintiff Company was incorporated in New South Wales, Australia in 1976 with Frederick Ernest Davies ("**Frederick Davies**") as majority shareholder;
- (ii) On 2 February 1993, GPL was incorporated with Frederick John Sutch ("**Frederick Sutch**") as majority shareholder;
- (iii) Frederick Davies and Frederick Sutch became friends and in mid-1990's started trade between Plaintiff and GPL;
- (iv) Due to cordial relationship between the majority shareholders of Plaintiff and GPL they had lose arrangements in respect to supply of chemicals by Plaintiff to GPL and payment of invoices by GPL;

- (v) In 2005, Frederick Davies the majority shareholder in Plaintiff company passed away and his son Neil Martle Davies (“PW”) became the majority shareholder in Plaintiff company;
- (vi) On or about September 2006, Defendant Company which was incorporated on 24 September 1991, with Frederick Sutch as majority shareholder and director became operational;
- (vii) The shareholding, directorship, situation of registered office, contact details of GPL and Defendant company are the same;
- (viii) Defendant company did not produce new purchase order books and placed orders with Plaintiff using GPL Order books;
- (ix) From September 2006, being time Defendant Company became operational Neil Davies who became majority shareholder in Plaintiff Company after his father passed away dealt with Defendant Company;
- (x) From September 2006, Plaintiff Company dealt with Suresh Mani, the General Manager for GPL and Defendant Company and Vikashni, Secretary to General Manager and Frederick Sutch majority shareholder and Suresh Mani and Vikashni were authorised officers of Defendant company.
- (xi) Defendant Company after being operational in September 2006, took over the assets and business of GPL.
- (xii) Plaintiff traded with Defendant with the assumption that Defendant changed its name from GPL to Bitu Investment Limited.
- (xiii) Plaintiff through PW found out that Defendant Company and GPL are separate entities after Plaintiff engaged lawyers.

31. This Court takes note of the fact that Defendants witness Frederick Sutch, majority shareholder in Defendant Company and GPL did not have definite knowledge of the dealings and arrangements between Plaintiff Company and Defendant Company for supply of chemicals by Plaintiff to Defendant.

32. According to his evidence, all dealings on behalf of Defendant was carried out by Suresh Mani and Vikashni and neither of them were called as witness.
33. It is not clear from Plaintiff's evidence that whether Vikashni agreed that Defendant Company will pay GPL's debt or she will arrange for GPL to pay its own debt.
34. It is quite obvious that Plaintiff and/or its Solicitors knew when this action was commenced that GPL did not change its name to Defendant's name and that Defendant and GPL are two separate entities.
35. At paragraphs 3, 4 and 5 of the Statement of Claim Plaintiff pleaded as follows:-

“3. That the Plaintiff supplied to the Defendant raw materials for garment manufacture between the period 30/03/2005 to 17/05/2006 amounting to a sum of AUD\$67,913.70 (Australian Sixty Seven Thousand Nine Hundred Thirteen Dollars and Seventy Cents);

4. That the particulars of the invoices raised by the Plaintiff for the goods supplied are as follows:

Invoice No.	Date	Sum (AUD)
00400846	30/03/05	56.00
00400847	30/03/05	3480.00
00400941	11/05/05	24,034.00
00410907	18/07/05	4640.00
00401183	22/08/05	10,674.70
00401365	15/11/05	4646.00
00401486	23/01/06	3936.00
00401540	16/02/06	6780.00
00401664	20/04/06	4753.20
00401717	17/05/06	4920.00

5. That the Defendant has since then failed to pay for the goods supplied and the sum of AUD\$67,913.70 (Australian Sixty Seven Thousand Nine Hundred Thirteen Dollars and Seventy Cents) remains unpaid and outstanding.”

36. Invoice listed at paragraph 4 of the Statement of Claim was issued to GPL and

not Defendant and relate to chemicals supplied to GPL prior to Defendant becoming operational. At paragraph 4 of the Statement of Claim Plaintiff provides details of invoice which appears in Exhibit P1 (Statement).

37. It is quite clear that the materials that were supplied by Plaintiff which is subject to this action was to GPL and not Defendant.
38. The Plaintiff as per evidence of PW should have pleaded the facts to show that goods were supplied to GPL and representation was made by Defendant through its authorised officers that Defendant will pay debt owed by GPL to Plaintiff.
39. Even if Plaintiff and/or its Solicitors had any doubt as to whether GPL and Defendant are separate entities when action was commenced they should have sought leave to amend the Statement of Claim to cure the defect in pleading.
40. The fact Plaintiff by its director assumed that Defendant and GPL were same company when it supplied the material do not assist the Plaintiff because of Court's finding that Plaintiff and/or its Solicitors knew or should have known when this action was commenced that GPL and Defendant Company are two separate entities.
41. This Court takes note of the fact legal action was commenced against Defendant after company search was conducted at Registrar of Companies Office to determine correct name of company and its registered office and this search should have indicated that Defendant is a separate entity.
42. In view of what has been stated in paragraph 30 to 41 of this Judgment this Court has no option but to dismiss and strike out Plaintiff's claim.

Costs

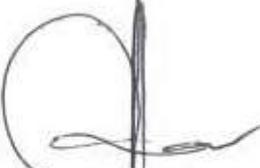
43. This Court takes into consideration trial lasted for a day and both parties filed Submissions.

Order

44. This Court makes following Orders:-

- (i) Plaintiff's claim against Defendant is dismissed and struck out;
- (ii) Plaintiff do pay Defendant's cost of this action assessed in the sum of Two Thousand Dollars (\$2,000.00) within fourteen (14) days from date of this Judgment.




K. Kumar
JUDGE

At Suva

30 January 2018

MESSRS. NEEL SHIVAM LAWYERS for Plaintiff

MESSRS. DIVEN PRASAD LAWYERS for Defendant