

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 306 OF 2007

BETWEEN : JOSEVATA WAQALIVA VULUMA of Regent Road, Narewa, Nadi,
Businessman.

1ST PLAINTIFF

AND : J VULUMA & VATUNITU & COMPANY of Narewa, Nadi.

2ND PLAINTIFF

AND : MERCHANT FINANCE & INVESTMENT COMPANY LIMITED a
limited liability company having its registered office Level 1, Ra
Marama House, 91 Gordon Street, Suva.

1ST DEFENDANT

AND : AUTOMART LIMITED a limited liability company having its
registered office at 27 Sautamata Street, Lautoka.

2ND DEFENDANT

Appearances : Mr I. Fa for the plaintiffs
Mr K. Patel for the 2nd defendant
No appearance for the first defendant

Date of Hearing : 21 August 2017

Date of Submissions: 29 September 2017 (plaintiff), 3 November 2017 (2nd defendant)

Date of Judgment : 22 November 2017

J U D G M E N T

Introduction

[01] The plaintiffs issued these proceedings against the defendants and seek the following relief:

- i) That the 1st defendant restores all the 1st plaintiff's units in Fijian Holdings Unit Trust that it has unlawfully liquidated together with interests.
- ii) That the 1st and 2nd defendants pay damages to the plaintiffs in the sum of \$2 million for being unable to fulfil its contract with Fiji Pine Trust Limited as a result of the failure by the 1st and 2nd defendants to fulfill their agreement with the 1st plaintiff to supply the equipment contracted for.
- iii) That the 2nd defendants repay the 1st plaintiff his deposit of \$19,000.00 plus interests at the rate of 12%.
- iv) An order for the costs against the 1st and 2nd defendants on an indemnity basis.

Background

[02] The statements of the plaintiffs in their statement of claim are as follows.

[03] In April 2006, Josevata Waqaliva Vuluma, the 1st Plaintiff entered into a hire purchase agreement with the 1st Defendant for the purchase of (i) *HINO 10 WHEELER DUMP TRUCK* and (ii) *HITACHI EXCAVATOR* (the equipment) for valuable consideration to be supplied by the 2nd Defendant, Automart Limited (the agreement).

[04] The 1st Defendant had acted in breach of the agreement by failing to supply the equipment contained in the quotation dated the 27 January 2006 obtained from the 2nd Defendant in that the 1st Defendant unilaterally acquired items from the 2nd Defendant, which the 1st Plaintiff did not order and charged the costs of those items to the 1st Plaintiff's account with the 1st Defendant even though the 1st Plaintiff did not take possession or delivery of the equipment and proceeded to charge interest and penalties against the 1st Plaintiff.

[05] As a result of the 1st Defendant's actions, the 1st Plaintiff lost his deposit of \$19,000.00 and unlawfully levied with a debt of approximately \$120,000.00 for the equipment which the 1st Plaintiff did not order or take delivery of.

[06] The 1st Defendant in breach of the Agreement unlawfully liquidated the 1st Plaintiff's Units in the Fijian Holdings Unit Trust and kept the proceeds for itself. As a result of the 1st Defendant's breach, the 1st Plaintiff has suffered substantial loss and damages.

1st Defendant's case

[07] The 1st Defendant in its Amended Statement of Defence states that the 1st Plaintiff had ordered a Kato Excavator and a Hino Truck, had inspected the Kato Excavator and Hino Truck and he had approved it. Based on this, the 1st Defendant authorized the 2nd Defendant to release the Hino Truck and Excavator to the Plaintiffs and undertook to make payments to the 2nd Defendant for the Hino Truck and excavator.

[08] The 1st Defendant further avers that the 1st Plaintiff was notified that the Hino Truck and Excavator had been ready for the Plaintiffs but they did not take delivery. They also allege that they gave notice to the 1st Plaintiff to discharge their obligations under the Hire Purchase Agreement but he failed to do so. Upon the Plaintiffs failing to do so, the 1st Defendant repossessed the Hino Truck and Excavator and sold it via public tender for \$95,000.00; after the sale there was a shortfall in the sum of \$48,391.00 that the 1st Defendant proceeded to exercise its rights over the 1st Plaintiff's Fijian Holdings Unit Trust – Unit Certificates.

2nd Defendant's case

[09] The 2nd Defendant while admitting that they provided the 1st Plaintiff with the two quotations for the Hino 10 Wheeler Dump Truck and the Hitachi Excavator on 27 January 2006 for the sums of \$60,000.00 and \$55,000.00 respectively claims that no deposit in the sum of \$19,000.00 had been paid by the Plaintiff.

[10] The 2nd Defendant put forward a counterclaim against the Plaintiff in the sum of \$2,900.00 as storage fees for the Kato Excavator and Hino Dump Truck for a period of 4 months and 25 days at \$10.00 per day.

The Issues

[11] I now set out the issues to be decided by the court. The plaintiff raises three primary issues as follows:

- (i) Whether the 1st and 2nd Defendants breached the agreement they had with the plaintiff.
- (ii) Whether the 1st and 2nd defendants acted in a deceptive and misleading manner against the 1st Plaintiff with intent to mislead and deceive him in the course of trade and commerce contrary to section 75(1) of the Commerce Commission Act 2010 (COMC).
- (iii) Whether the 1st and 2nd Defendants were engaging in the supply of goods to the 1st Plaintiff in an unconscionable conduct contrary to section 76 of the COMC.

The Law

[12] COMC sections 75 and 76 provide:

COMC 75 Misleading or deceptive conduct

75 (1) *A person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

(2) *Nothing in this Division shall be taken as limiting by implication the generality of subsection (1).*

COMC 76 Unconscionable conduct

76 (1) *A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person (in this section referred to as the customer), engage in conduct that is, in all the circumstances, unconscionable.*

(2) *Without limiting the matters to which regard may be had for the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services, regard may be had to –*

- (a) the relative strengths of the bargaining positions of the supplier and the customer;*
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;*
- (c) whether the customer was able to understand any documents relating to the supply or possible supply of good or services;*
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer (or person acting on behalf of the customer) by the supplier in relation to the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and*
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier.*

(3) *A supplier shall not be taken for the purposes of the section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a customer only because the supplier institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.*

(4) *For the purpose of determining whether a supplier has contravened subsection (1) in connection with the supply or possible supply of goods or services to a customer –*

- (a) regard shall not be had to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and*
- (b) regard may be had to conduct engaged in, or circumstances existing, before the commencement of this Act.*

(5) *Any person who fails to comply or contravenes this section is guilty of an offence.*

Evidence

Plaintiff's Evidence

[13] The plaintiff called two witnesses: Mr Josevata Vuluma, the 1st Plaintiff (PW1), and Atunaisa Tuwawa, a former employee of the plaintiffs.

[14] PW1 in his evidence states:

- (i) *In December 2005, he obtained 2 quotations from Bhima's Construction and Machinery in Ba for a 10 Wheeler Dump Truck and an Excavator and took it to the 1st Defendant for financing. The 1st Defendant declined to finance and advised him that it would only provide finance for purchase of motor vehicles or equipment if it was purchased from one of its approved dealers like Automart.*
- (ii) *He intended to use the equipment to fulfill a contract that he was negotiating with the Fiji Pine Trust of Lautoka to undertake logging and excavation work in one of its plantations. On 2 March 2006, he entered into a contract with the Fiji Pine Trust.*
- (iii) *On 27 January 2006, he provided the 1st Defendant with two quotations from Automart for the purchase of the equipment: **HINO 10 WHEELER DUMP TRUCK (Total Price-\$60,000.00), HITACHI EXCAVATOR (Total Price \$55,000.00).***
- (iv) *The 1st Defendant approved his loan for the purchase of the equipment and on 26 April 2006 entered into an Agreement for the purchase of the equipment through hire purchase.*
- (v) *It was a condition of the approval that he is to pay the deposit for the equipment to the 2nd defendant and to provide the 1st defendant with a*

contract from Fiji Pine Trust where the machines would be working. He complied with this condition.

- (vi) He said that under his contract with Fiji Pine Trust, he would be paid \$200.00 per hour for the hire of the Hino 10 Wheeler Truck and \$100.00 per hour for the digger. He calculated his weekly income at \$10,000.00.*
- (vii) The 1st defendant asked him to execute a lien in favour of the 1st Defendant. On 26 April 2006, he executed a collateral security over his Unit Trust Certificate for the equipment he had purchased on hire purchase basis.*
- (viii) He, having paid the deposit of \$19,000.00 and having signed the Hire Purchase Agreement and the collateral security with the 1st Defendant, awaited the delivery of the equipment until the next day but the 1st and 2nd Defendants failed to deliver the same.*
- (ix) As a consequence, he demanded the 1st and 2nd Defendants to cancel the hire purchase agreement and for the return of the deposit, but the 1st and 2nd Defendants refused.*
- (x) On 6 December 2006, the 1st Defendant called and told him that he was in default. The 1st defendant sold the equipment for \$95,000.00 and deemed his liability after the sale was at \$48,391.00. The 1st Defendant then proceeded to liquidate his assets in the Fijian Holdings Unit Trust to clear his debt.*

[15] Under cross-examination PW1 states that:

- (i) He had the contract with Fiji Pine Trust. He denied he had chosen a Kato Excavator and another Dump Truck, which the 2nd Defendant had made available but which he rejected. He confirmed that he purchased the 10 Wheeler Hino Dump Truck and the Hitachi Excavator for working his contract with Fiji Pine Trust.*
- (ii) He got only one quotation and took it to Merchant Finance;*
- (iii) He sighted and identified to the 2nd Defendant the machines that he wanted.*

- (iv) *He signed all the loan documents in the Merchant Finance office.*
- (v) *He saw "Kato" written on one of the loan documents and he questioned the officer about it, who told him that they would change it to Hitachi;*
- (vi) *The contents of the documents was not explained to him. No one told him to go and seek legal advice. The document was signed in the Merchant Finance office and he was told: he cannot take it out.*
- (vii) *He confirmed that he has two companies, one is a limited liability company and other is a private company.*
- (viii) *He admitted that he entered into an agreement with the Fiji Pine Trust on behalf of the limited liability company.*

[16] PW2's evidence is that:

- (i) *He was a former employee of the Plaintiffs.*
- (ii) *On 26 May 2006, he went with the 1st Plaintiff to the 2nd Defendant's yard in Nadi to check on a Digger and Dump Truck.*
- (iii) *He said that the Digger and Dump Truck they saw had defects and the 1st Plaintiff pointed out the defects to the employee of the 2nd Defendant who was showing them around.*

1st Defendant's Evidence

[17] The trial proceeded in the absence of the 1st defendant. The 1st defendant offered no evidence.

2nd Defendant's Evidence

[18] The 2nd defendant called three (3) witnesses namely Chandar Deo, a Prosecuting Officer of the LTA (2DW1), Salesi Vulakoro, Personal Administration Officer for

the Fiji Pine Trust (2DW2) and Hasmukh Lal Patel, Operations Manager of the 2nd defendant (2DW3).

[19] 2DW1 explained the LTA procedures on vehicle registration. He said a transfer is done through a transfer form and the buyer and the seller need to sign.

[20] 2DW2 in his evidence states that:

- (i) The contract between Josevata Vuluma and Fiji Pine Trust was a valid one but was subsequently terminated due to non-performance.
- (ii) He said: we don't revoke the Fiji Pine Trust contracts. If you don't obey the terms we revoke.
- (iii) He confirmed that the contractor must have the necessary machines before the agreement.
- (iv) He also confirmed that the Fiji Pine Trust had a contract with Vuluma and Vatunitu Limited and not with J Vuluma and Vatunitu & Company.

[21] 2DW3's evidence is that:

- (i) He knows the 1st Plaintiff as a client of the 2nd Defendant.
- (ii) He confirmed that the quotations of 27 January 2007 were from the 2nd Defendant.
- (iii) Merchant Finance is a finance provider and arranges to hire purchase.
- (iv) He said Vuluma bought a Kato Excavator and a Dumper Truck.
- (v) He admitted receiving a letter written to his company by Mr Vuluma (Doc-11) but said: "We do not deliver. The customer has to come and take the machine and sign the delivery.
- (vi) He confirmed receiving payment from Merchant Finance for the invoices for Kato Excavator and for Hino Dumper Truck.

[22] Under cross-examination, 2DW3 stated that:

- (i) He confirmed that the 2nd Defendant had an Excavator and a Dump Truck ready for the 1st Plaintiff but they were not the ones in the quotation.

- (ii) When asked about a letter which Mr Vuluma wrote to them about non-delivery of the equipment, he said: "I did not reply. I reply verbally. I didn't need to.
- (iii) He said he didn't tell Mr Vuluma to come and pick the Units.
- (iv) He said "Technically yes" to the question that the Kato belonged to the Automart.
- (v) He also said that Mr Vuluma did not take delivery of the vehicles and that they were subsequently sold by the 1st Defendant.

Discussion

- [23] The 1st plaintiff entered into a loan agreement with the 1st defendant to provide financing for the purchase of the two equipment from the 2nd defendant (PE-6) described in the quotations given by the 2nd defendant to the 1st plaintiff on 27 January 2006 (PE-1). By letters dated 21 April 2006, the 2nd defendant confirms approval of finance for the purchase of **HINO 10 WHEELER DUMP TRUCK**, unregistered (amount approved \$55,000 (price-\$67,000.00-cash deposit-12,000.00)) (PE-24) and for the purchase of **HITACHI EX100 EXCAVATOR**, unregistered (amount approved \$48,000.00 (price-\$55,500.00-cash deposit-7,000.00)) (PE-26), (the intended equipment).
- [24] The loan agreement resulted in the signing of a hire purchase agreement between the parties concerning the two equipment (PE5).
- [25] The plaintiffs allege that the 2nd defendant did not deliver the equipment which the hire purchase agreement signed for. Instead, the 1st defendant offered different equipment, a **10 WHEELER DUMP TRUCK** and a **KATO EXCAVATOR** (the

different equipment) which the 1st plaintiff refused to accept. He wanted to have the purchase cancelled as a result. However, the defendants did not allow the 1st plaintiff to cancel the purchase. They arbitrarily went ahead with the purchase.

[26] On 01 May 2006, the 1st defendant had made the payment by cheque (\$122,000.00) to the 2nd defendant for the equipment before the plaintiff accepts the delivery of the equipment he intended to purchase from the 2nd defendant and debited the 1st plaintiff's loan account in the sum of \$122,000.00. Afterwards, the 1st defendant through the solicitors informed the 1st plaintiff that his loan account was in arrear in the sum of \$16,960.65 for non-payment of four (4) monthly instalments and demanded payment of the same (PE-13). On 12 October 2006, the plaintiff responded and denied liability as he has not received the intended equipment. However, the defendants proceeded to sell the different equipment on the basis that the 1st plaintiff had defaulted in the HPA for \$95,000.00.

[27] PW1 was a truthful witness. He gave clear straightforward evidence. His evidence was not shaken in the cross-examination by the 2nd defendant.

[28] The description in the quotations given by 2nd defendant and the schedule to the HPA clearly indicated that the 1st plaintiff wanted to purchase the intended equipment and not the different equipment. I accept that the 1st plaintiff wanted to purchase the intended equipment and not the different equipment from the 2nd defendant. I also accept that the 1st plaintiff applied for financing from the 1st defendant only in respect of the intended equipment. I do not accept that the 1st plaintiff agreed to purchase the different equipment.

- [29] The different equipment was defective and the 1st plaintiff did not intend to purchase such equipment. The 1st plaintiff rightfully rejected and refused to accept the defective different equipment. There is no evidence.
- [30] The 1st plaintiff had the HPA (loan agreement) with the 1st defendant to provide finance for the purchase of the intended equipment. The 1st defendant was under obligation to ensure that the 1st plaintiff had taken delivery of the intended equipment. The 1st defendant was in a hurry to make payment to the 2nd defendant. They had made the payment even before the plaintiff accepts delivery of the intended equipment and debited the sum paid (\$122,000.00) into the 1st plaintiff's loan account. This is an artificial debit in the 1st plaintiff's loan account. In other words, the 1st defendant had made the payment for the different equipment even before the 1st plaintiff acquiring the intended equipment. Acquire includes in relation to goods, acquire by purchase or exchange or by taking on lease or on hire purchase (see COMC 4, Interpretation section).
- [31] Having heard the evidence in this case I find the 1st defendant breached its primary obligation under the HPA by making payment to the 2nd defendant for the different equipment even before the plaintiff accepts the delivery of the intended equipment from the 2nd defendant. The 1st defendant must have obtained confirmation from the plaintiff of the delivery of the equipment before making the payment. There was no evidence before the court that the plaintiff ever accepted the delivery of the intended equipment from the 2nd defendant. I further find that the 2nd defendant breached its primary obligation by not delivering the intended equipment to the plaintiff. Both the defendants are liable for breaching the agreement the 1st plaintiff had with them. Every failure to perform a primary obligation is breach of contract.

[32] I now turn to the issue of damages to be paid to the plaintiffs. Damages for breach of contract are available as of right, on proof of breach. In calculating these damages, I would place focus on the plaintiffs' claim. The basic aim of contractual damages is to compensate the claimant for the loss the claimant has suffered as a result of the breach of the contract.

[33] The plaintiffs claim that the 1st defendant restores all the 1st plaintiff's Units in Fijian Holdings Unit Trust that it has unlawfully liquidated together with interests. The 1st defendant artificially and unlawfully debited 1st plaintiff's loan account the sum of \$122,000.00 on account of purchase of the different equipment, of which the 1st plaintiff had never accepted the delivery from the 2nd defendant. Thereafter, the 1st defendant demanded payment of \$16, 960.65 from the 1st plaintiff alleging that his loan account was in arrear for non-payment of four monthly instalments. The 1st plaintiff denied liability on the basis that he did not receive the intended equipment. The defendants then sold the different equipment for \$95,000 on the ground that the 1st plaintiff had made default in the HPA. Afterwards, the 1st defendant claimed that still a balance of \$48, 391.30 under the HPA is due and owing. Subsequently, the 1st defendant liquidated the 1st plaintiff's Units in Fijian Holdings Unit Trust Limited to offset the alleged outstanding balance of \$48,391.30. The 1st plaintiff's Unit Trust held with Fijian Holdings Unit Trust was liquidated to offset the artificially created debit balance by the 1st defendant against the 1st plaintiff's loan account. Therefore, the plaintiff is entitled to immediate restoration of all the 1st plaintiff's Units Trust in Fijian Holdings Unit Trust together with interests.

Loss of profit

[34] The plaintiffs claim that the 1st and 2nd defendants pay damages to the plaintiffs in the sum of \$2 million for being unable to fulfil its contract with Fiji Pine Trust Limited as a result of the failure by the 1st and 2nd defendants to fulfill their agreement with the 1st plaintiff to supply the equipment contracted for. This claim arises out of loss of revenue for a Fiji Pine contract between Fiji Pine Trust and J Vuluma Vatunitu Limited, a limited liability company (PE-22). The 1st plaintiff's evidence was that he has got two companies: (i) J Vuluma and Vatunitu & Company and (ii) J Vuluma Vatunitu Limited, a limited liability company. He confirmed that his J Vuluma Vatunitu Limited had a contract with the Fiji Pine Trust. This contract was subsequently terminated for non-performance.

[35] None of the plaintiffs to this action was a party to the Fiji Pine contract. I do not accept that the plaintiffs can claim loss of profit in this case for loss of profit on behalf of a third party. I disallow this claim.

Refund of deposit

[36] The 1st plaintiff asks for the refund of his deposit of \$19,000.00 plus interests at the rate of 10% back dated to 2007. The 1st plaintiff paid the deposit to the 2nd defendant in view of the purchase of the intended equipment. The purchase did not eventuate. The 2nd defendant breached the contract. Therefore, the 1st plaintiff is entitled to claim refund of the deposit he made with interest.

General damages

[37] The plaintiffs claim general damages in the sum of \$200,000.00 against the defendants for breaching the contract. The plaintiffs are entitled to claim damages, for they have proved breach of the contract by the defendants.

[38] Additionally, the plaintiffs are also entitled exemplary damages as the defendant had made profit from their wrong. In *Rooks v Barnard* [1964] AC 1129, the House of Lords had limited the ability to exemplary damages in tort to three situations:

- Oppressive conduct by government officials;
- Where the defendant's conduct is calculated to make a profit from his wrong; and
- Where statute expressly so provide.

[39] The 1st defendant did the following wrongs towards the 1st plaintiff:

- (a) Failed to afford an opportunity to the 1st plaintiff to consult his solicitor before signing the HPA.
- (b) Refused to issue the Schedule to the agreement which described the equipment the 1st plaintiff intended to purchase from the 2nd defendant.
- (c) Made the payment to the 2nd defendant hurriedly before the delivery of the intended equipment by the 2nd defendant to the 1st plaintiff.
- (d) Struck a deal with the 2nd defendant to sell the different equipment of which the 2nd defendant was the owner and in which 1st defendant had financial interest.

[40] The 2nd defendant failed to deliver the intended equipment and insisted the plaintiff to accept the different equipment instead. The 2nd defendant forced the 1st plaintiff to accept the different equipment in which the 2nd defendant had personal interest.

[41] The 1st plaintiff was a customer of the defendants. The defendants in their trade conducted deceptively against COMC 75. Their conducts were unconscionable in dealing the trade with the 1st plaintiff which violated COMC 76.

[42] The defendants' conducts are calculated to make a profit from their wrongs. I, therefore, find both defendants are liable to pay exemplary damages.

[43] I quantify general damages at \$20,000.00 and exemplary damages at \$30,000.00 totalling \$50,000.00.

Interest

[44] The plaintiffs are entitled to interest on the judgment sum. I accordingly order the defendants to pay interest on the judgment sum at the rate of 8% per annum from the date of writ of summons (5 October 2007) till the date of the judgment (22 November 2017).

Costs

[45] The plaintiffs seeking an order for costs against the 1st and 2nd defendants on an indemnity basis. I find this is a fit and proper case to grant cost on indemnity basis. I therefore order the defendants are to pay costs on their indemnity basis to be assessed before the Master.

The Results

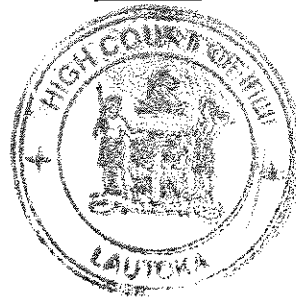
1. I give judgment for the plaintiffs.
2. The 1st defendant will restore all the 1st plaintiff's units in Fijian Holdings Unit Trust Limited that the 1st defendant wrongfully liquidated with interest.

3. 1st and 2nd defendants will jointly and severally pay damages to the plaintiffs in the sum of \$50,000.00.
4. The 2nd defendant is to refund the 1st plaintiff's deposit of \$19,000.00.
5. The plaintiff is entitled to interest on the judgment sum at the rate of 8% per annum from the date of the writ of summons (5 October 2007) till the date of the judgment (22 November 2017).
6. The plaintiffs are also entitled to costs on the indemnity basis to be assessed by the Master.

M.H. Mohamed Ajmeer
22/11/17

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

22 November 2017

Solicitors:

For the plaintiffs: M/s Fa & Company, Barristers & Solicitors

Non-appearance for the 1st defendant

For the 2nd defendant: M/s Krishna & Company, Barristers & Solicitors