

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 334 of 2000L

BETWEEN : **CREDIT CORPORATION (FIJI) LIMITED** a limited liability company having its registered office at Credit House, 4 Gordon Street, Suva in the Republic of Fiji Islands

Plaintiff

AND : **MOHAMMED SHAMIM KHAN** (f/n not known to the Plaintiff) of Nadi in the Republic of Fiji Islands

Defendant

FINAL JUDGMENT

Of: Inoke J.

**Counsel Appearing: Mr Anu Patel for the Plaintiff
Unrepresented – in person**

**Solicitors: S B Patel & Co for the Plaintiff
Self represented**

Date of Hearing: 2 September 2009

Date of Judgment: 11 September 2009

INTRODUCTION

[1] The Defendant, Mr Khan, secured a bulldozer under an Asset Purchase Agreement (the "Agreement") from the Plaintiff financier, Credit Corp, in January 1996.

[2] Mr Khan took the bulldozer to the hills in Nadarivatu and used it for earth works there. The bulldozer fell into disrepair and Mr Khan subsequently failed to keep up with

his repayments under the Agreement. Credit Corp repossessed it and sold it. The price was not enough to cover the balance owed under the Agreement and Credit Corp's now sues for it.

LEGAL REPRESENTATION & MEDIATION

[3] On the morning of the hearing Mr Haroon Ali Shah of Counsel appeared and applied for leave for Mr Khan's solicitors on the record to withdraw. It turned out that some two weeks prior to that, those solicitors had written to Mr Khan asking him to come to their offices and prepare for the hearing otherwise they would have no alternative but to withdraw. It was only on the night before the trial that Mr Khan contacted the solicitors. On that basis the solicitors asked to be withdrawn. Mr Patel for the Plaintiff insisted on the hearing proceeding.

[4] This matter had been in the Registry since 6 October 2000 when the writ was first filed by the Plaintiff's in-house Counsel. The Pleadings were closed in June 2001. Mr Khan was represented by different lawyers at the time. On several occasions, neither he nor his lawyers appeared when the matter was called in Court. He had been personally served with Court documents throughout 2004 and 2005. In July 2005 the Plaintiff appointed SB Patel & Co as its solicitors. In March 2006 the current solicitors on record were appointed as Mr Khan's solicitors. In July 2008, those solicitors filed an application to withdraw as solicitors for lack of instructions. Mr Khan must have come good because the solicitors continued to act for him. The matter laboured on till March 2009 when it was set down for hearing on 2 September 2009.

[5] In these circumstances, I gave leave for those solicitors to withdraw because this matter had been going on unresolved for too long. I was not prepared to delay it any further bearing in mind that Mr Khan himself had been responsible for some of the delays and with the current busy schedule of this Court, the matter may not be heard until next year. Mr Khan was left unrepresented so out of fairness to him I directed

that the matter go before the Master for mediation so the Master could provide him with some objective legal assistance. Unfortunately, the parties did not come to any agreement so the matter came back before me for hearing.

ORDER OF SPEECHES

[6] In opening, Mr Patel applied under **O 35** of the **High Court Rules 1988** that I direct that Mr Khan begin first because he had the burden of proof. He relied on **O 35 r 5(6)** and the case of **NBF Asset Management Bank v Naicker** [2001] FHC; HBC 228 of 2001L. He submitted that Mr Khan had not denied the existence of the Asset Purchase Agreement or liability under it. I agreed with him that Mr Khan's Amended Defence was evasive in the way it had been pleaded so he has implicitly admitted the fact of entering into the Agreement but Mr Khan had gone further and pleaded in paragraph 7 that the contents of the Agreement were never explained to him and that Credit Corp had misrepresented the correct position. In those circumstances I felt that the Plaintiff should begin first and ordered accordingly.

THE TRIAL EVIDENCE

[7] The Manager West for Credit Corp gave evidence for the Plaintiff and Mr Khan gave evidence on his behalf. After hearing them and watching them give evidence I have come to the conclusion that Mr Khan knew exactly what he was entering into. He had been in similar transactions with Credit Corp on his own behalf and for his father on previous occasions. He is a businessman well familiar with the need to maintain the asset that is being purchased and to meet repayments.

[8] He admits that he signed the Asset Purchase Agreement on 5 January 1996 and that he agreed to the total amount financed of \$21,312, repayment amount of \$592 per month and the default interest of 25% on overdue monies. In cross examination, he

agreed that he made his first repayment on 31 March 1996, the second on 4 September 1996 but thereafter did not make any further repayments.

[9] His claim that the bulldozer did not work properly or that parts of it were missing, which claims were denied by Credit Corp and which denials I uphold, have no basis because the provisions of clause 4, for example 4(a) make the hirer (Mr Khan) responsible for keeping the bulldozer in good order and repair and properly operated and serviced.

[10] The bulldozer was repossessed in 1997 and sold for \$2,000 plus 10% VAT. That amount was credited to Mr Khan's account as appears from the Statement of Account. The bulldozer was not operating so they had to hire a crane to move it. Those costs have also been charged to Mr Khan's account.

[11] Mr Khan claimed that the machine was in good condition when it was repossessed and should have been sold for much more. When asked if he had any proof he said that he had photographs but they were at home. He did not bring them to Court that morning. In these circumstances I cannot accept his evidence.

[12] On 29 September 2000, Credit Corp served a demand on Mr Khan for \$17,674.29 being the amount due and owing on the Agreement as at 23 September 1999, as per the Statement of Account. That amount remains unpaid.

BALANCE DUE ON THE AGREEMENT

[13] I find that the Plaintiff has proven its claim for the sum of **\$17,674.29**.

DEFAULT INTEREST UNDER THE AGREEMENT

[14] The Statement of Claim seeks payment of 25% interest of the outstanding moneys based on that interest rate as specified in the Agreement. Counsel did not address me on this issue so I need to look at the terms of the Agreement. Mr Khan is

bound by the Asset Purchase Agreement to pay 25% pa interest on "overdue moneys". The Agreement was to come to an end on 20 January 1999. Instead, in my opinion, it terminated when Credit Corp seized the bulldozer in 1997. Certain obligations survived the termination, for example the obligation to repay the installments then overdue, but did the obligation to pay interest of 25% survive?

[15] The Schedule to the Agreement simply says "Default Rate on overdue moneys 25% per annum" and shows the "Entire Hiring Amount" as \$21,312. The Agreement further provides: "The entire hiring amount is payable at the times and by the hiring instalments hereinafter provided (each such amount so payable being hereinafter referred to as a 'Hiring Instalment')." Section 1 of the Agreement then sets out \$592 as the monthly payment commencing on 20 January 1996 to January 20 1999.

[16] Clause 8 of the Agreement provides: "Each part of the moneys payable under clause 6 or 7 shall bear interest at the Default Rate specified in the Schedule to this Agreement **from the date of expenditure thereof until repayment to the Owner.**" (my emphasis).

[17] Clause 6 provides:

- 6 (i) The Owner and Hirer agree that the Hirer's agreements set out in clause 4 (i) and 4 (p) and 7 (ii) (b) are essential conditions of this Agreement so that any breach thereof shall entitle the Owner by notice in writing to the Hirer to forthwith terminate this Agreement for breach and to damages for loss of this Agreement as a whole.
- (ii) In the event that the Owner shall exercise its right of termination:-
 - (a) In addition to Hiring Instalments and other charges then overdue there shall forthwith fall due and payable (by way of indemnity for the capital loss sustained in respect of Hiring Instalments not then accrued due) by the Hirer a liquidated debt equal to the sum of the present values of each of the Hiring Instalments not then accrued due but which would have thereafter accrued due if the Agreement had not been terminated, such present values being ascertained by applying to such Hiring Instalments a discount factor being the Rebate specified in the Schedule to this Agreement over the period by which the date of payment thereof is brought forward by virtue of this clause together with an amount equal to the stamp duty (if any) on the amount so payable; and

(b) (i) The Hirer shall at the expense of the Hirer forthwith return the goods to the Owner at such place as the Owner may reasonably require unless they are already in the possession of the Owner;

(ii) Upon the Hirer returning the goods to the Owner or upon the Owner being or coming into possession of the goods, the Owner shall sell the goods for the best price reasonably obtainable and the gross proceeds of sale actually received by the owner less all costs and expenses of and incidental to such sale shall be set off against the amount then due and payable by the Hirer to the Owner, if they exceed the amount then due and payable by the Hirer to the Owner the excess shall be paid to the Hirer.

[18] Clause 4(i) requires the Hirer to insure the goods and clause 4(p) requires the Hirer to pay the entire hiring amount as set out in the Schedule. Clause 7(ii)(b) requires the Hirer to deliver the goods to the Owner if the Owner demands their return. The rest of Clause 7 is not relevant for present purposes.

[19] These provisions do not put a time limit as to when interest is to be calculated to other than within this period: **“from the date of expenditure thereof until repayment to the Owner.”** It is open ended in this respect.

[20] Credit Corp asks that I award interest at 25% pa on the \$17,674.29 owing from 20 November 1998 until full payment. When the date of payment will be is not known. If the amount is paid now, 2009, the interest would compute to $25\% \times \$17,674.29 \times 11$ years = **\$48,600** rounded down.

[21] I find it difficult to accept that the law operates as harshly as this. Credit Corp has an obligation under law to mitigate its loss. It cannot just sit back and let the interest tap run for ever. As I have said above, the Agreement came to an end in 1997. The Agreement was for a 3 year period. Even if the Hirer defaulted on the very first payment, and Credit Corp sat back and waited for the whole 3 years to run, the default interest for that whole 3 year period will be $25\% \times \$21,312 \times 3 =$ **\$15,984**. Thus, for the worst case scenario for Mr Khan, Credit Corp will be entitled to no more than this amount under the Agreement, assuming of course that the cut off date for penalty interest is the last day of the contract period.

[22] As I have said, Credit Corp has a duty to mitigate its loss. It did so by seizing the bulldozer in 1997. A period of 1 year under the Agreement has run. In the circumstances I think Credit Corp should only be allowed default interest for that year, that is to say, $25\% \times \$21,312 = \mathbf{\$5,328}$.

[23] The total Judgment sum that is due to Credit Corp under the Agreement is therefore \$17,674.29 plus the interest component of \$5,328 giving a total of **\$23,000** rounded down.

INTEREST UNDER THE ACT

[24] I have discretion to grant interest under the **Law Reform (Miscellaneous Provisions)(Death and Interest) Act**. It is true that the Defendant has been responsible for some of the delay but at the end of the day the responsibility to prosecute its claim as efficiently and as timely as possible rests with the Plaintiff. Credit Corp itself ran its own case between 2000 and 2005 before its current solicitors took over. I have already awarded interest under the Agreement. I think that in the circumstances I exercise my discretion not to award interest under the Act.

COSTS

[25] The Plaintiff having won is entitled to its costs on a party and party basis which I set at **\$1500**.

ORDERS

[26] I therefore make the following Orders:

1. The Defendant shall pay to the Plaintiff the Judgment Sum of **\$23,000** being outstanding instalments and interest due under the Asset Purchase Agreement.
2. The Defendant shall pay to the Plaintiff costs of **\$1500** within 21 days.

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Sosefo Inoke

Judge
