

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

Civil Action No. **HBC 39 of 2004L**

**BETWEEN** : **PACIFIC PARASAIL LTD**

**Plaintiff**

**AND** : **ALL ENGINEERING (FIJI) LTD**

**Defendant**

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**FINAL JUDGMENT**

**Of: Inoke J.**

**Counsel Appearing: Mr Anu Patel for the Plaintiff**  
**Mr Donald Gordon for the Defendant**

**Solicitors: SB Patel & Co for the Plaintiff**  
**Gordon & Co for the Defendant**

**Date of Hearing: 7 & 8 July 2008**  
**Date of Judgment: 15 September 2009**

**INTRODUCTION**

[1] The Plaintiff ("Parasail") gave its six cylinder *Yanmar* marine engine to the Defendant ("All Engineering") to repair. One of the tasks was for All Engineering to replace and fit a new valve seat. The engine belonged to Parasail's dive boat "*Kalo*" used for its diving operation, taking tourists from the *Beachcomber* and *Treasure Island* Resorts reef diving.

[2] Five weeks after the repair work was done, the valve seat failed and caused a catastrophic engine failure. Parasail could not use the vessel *Kalo* for several weeks and now claims for the losses it suffered.

[3] This is one of those cases where the trial took place in July 2008 but judgment was not able to be delivered by the learned trial Judge so both

Counsel agreed on **31 July 2009** that I deliver judgment on the papers rather than a hearing *de novo*.

### **THE PLAINTIFF'S CLAIM**

[4] Parasail filed its Writ of Summons and Statement of Claim on **16 February 2004**. It claims \$38,582 for special damages and unspecified general damages, interest and costs. The Statement of Claim alleges that in December 2002, in reliance on the representations and reputation of All Engineering, Parasail gave the engine for them to, amongst other works, machine and fit a valve seat in the engine head for the number 3 cylinder. Parasail alleges that it was an express term of the agreement that All Engineering would "*carry out the said works in a competent professional and workmanlike manner and would use appropriate and suitable material fit for the purpose of a seat valve (sic)*". That and the other repairs were done on **10 December 2002**. The cost of the number 3 cylinder valve seat refit itself was only \$45. On **1 February 2003**, the engine suffered serious damage, Parasail alleges, because All Engineering did the works in breach of that express term.

[5] All Engineering's defence was that there was no such express term and denies that it did the work negligently, incompetently, in breach of representation or agreement, or unworkmanlike, or that it used inappropriate, unsuitable or material not fit for the purpose. It admits that it specialises in the type of repair work that was asked of it but denies that it was responsible for Parasail's loss.

### **ADMITTED FACTS**

[6] It was admitted that All Engineering is an expert in this line of work. Sometime in December 2002 it accepted Parasail's *Yanmar* marine engine to machine and fit a valve seat into the engine head for cylinder number 3. The work was done on 10 December 2002, the engine handed back, Parasail was

charged and paid \$132 VIP. The case proceeded on the basis, though not expressly admitted, that there was an agreement to effect repairs.

### **THE TRIAL EVIDENCE**

[7] The trial took two days. Mr Cottrell, one of the owners and a director of Parasail, and an expert witness, a Professional Metallurgist, gave evidence on behalf of the Plaintiff. The Managing Director of Ali Engineering, Mr Kumar, and the employee that did the repairs gave evidence on behalf of the Defendant.

[8] The following evidence came out as not in dispute. The number 3 cylinder valve seat failed. The seat fell out and embedded itself in the top of the piston. This caused a catastrophic failure of the engine that required the engine to be completely overhauled, parts replaced and the engine rebuilt.

[9] I have read and considered the learned trial Judge's notes and come to the conclusion that the other relevant facts of this case are as follows.

[10] Mr Cottrell and Mr Kumar have had a long association. They have known each other for some twenty years. All Engineering has done similar repairs for Parasail over those years. Some have been good and some not. This is the first incident that a catastrophic failure has resulted. Sometime in December 2002, Mr Cottrell brought the *Yanmar* engine head to Mr Kumar's workshop with 6 new genuine valve seats for fitting. After Mr Kumar had them fitted he tested the head and found number 3 cylinder valve seat loose. He showed it to Mr Cottrell. Mr Cottrell did not have a spare new Yanmar valve seat so he asked Mr Kumar what his options were. Mr Kumar said he could manufacture one from material available in Fiji. The employee that actually carried out the repair said in evidence that he was authorised to use 1040 steel, approved by Mr Kumar. Mr Cottrell said he relied on Mr Kumar's expertise and gave the go ahead. After Mr Cottrell received the head he

fitted it to the engine and conducted sea trials, ran the engine, changed the oil, rechecked and readjusted the engine as necessary and ran the engine in for ten hours before putting the vessel to commercial use, with strict instructions to captains not to heavily load the engine for a further forty hours. All went well until **1 February 2003** when the *Kalo* suffered a total engine failure. She was towed from the Beachcomber Resort to Vuda Marina where it was lifted out of the water and put on hard stand. When the engine was opened up both Mr Cottrell and Mr Kumar inspected it and found that the exhaust valve insert for cylinder number 3 had fallen off and broken up and pieces embedded into the piston head. All the other 5 cylinders which had the genuine *Yanmar* parts were intact.

[11] The head was taken by Mr Kumar for repairs but this time Mr Cottrell supplied a genuine *Yanmar* part. The whole engine had to be disassembled and reassembled by Mr Cottrell. He said it took many hours.

[12] I do not accept that Mr Kumar explained or alerted Mr Cottrell to the risks of using non-genuine material. I believe he expressly held himself out as an expert in this line of work and that he was capable of doing the repairs in question, either verbally or by conduct. Mr Cottrell relied on that representation of expertise and gave approval for the repairs to be done by All Engineering.

### **THE EXPERT EVIDENCE**

[13] The firm of ETRS was engaged by Mr Cottrell to do a report on the failed valve insert. ETRS was given a sample of the failed valve insert and a genuine *Yanmar* part for comparison. The Report<sup>1</sup> concluded that "*the test results indicate that the submitted materials are of a different manufacture. The genuine product appeared to be of conventional design with resistant*

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<sup>1</sup> P Ex 3

*weld metal on the working face. The broken insert was manufactured from free machining bar."*

[14] The expert evidence was that the failure of the valve seat was due to the use of the wrong type of steel. He said in evidence that suitable materials for such use are very specialised and complex alloys. They require special equipment and complex and precise technology to produce. The material used in this case was free machining steel with not hardening treatment. It may have been suitable for other purposes, but not suitable for Yanmar marine engines. All Engineering did not conduct any tests or seek expert advice on the suitability of Grade 1040 steel for use as a valve seat for such an engine. In Mr Kumar's own words: "*After-market is not the genuine material. I have no idea what it is composed of – Grade 1040 – that is the standard grading material – similar to mild steel.*" The unsuitability of the material used is indeed confirmed by the fact that after the engine was rebuilt with genuine *Yanmar* valve seats, the engine was still operational at the time of the trial. Mr Kumar himself said that the valve seat in the original and subsequent repairs were inserted in exactly the same way. The only difference was in the material.

[15] Neither the expert nor Mr Cottrell and Mr Kumar could explain why the valve seat fell out. In my view, there are only two possible reasons, or a combination of both, why this could happen. Firstly, if the valve seat was not properly machined and fitted, it could fall out when the valve moves up and down and get jammed and disintegrate. Secondly, if the material from which the seat was manufactured could not withstand the heat and corrosive environment in the combustion chamber of cylinder number 3 the seat could disintegrate when the engine is running. In this case, it is not necessary for me to decide which of these events caused the failure because both tasks, i.e. the machining and fitting of the valve seat and the choice of material, were to be carried out by the Defendant.

**LIABILITY**

[16] The case of **Uluivutia v Western Wreckers Ltd** [2004] FJHC 330; HBC0445J.2000S (12 July 2004) was cited by Mr Gordon as authority for the proposition that the seller of second hand car gave no express or implied warranty to a seller who relied on his own judgment. That is correct but the facts of the present case are different.

[17] I find that there was an express representation, and hence a term of the agreement to repair, that All Engineering would use material suitable for a valve seat for Parasail's *Yanmar* marine engine.

[18] I also find that there was a breach of that term by All Engineering and the breach caused loss and damage to Parasail.

[19] I also find that the Defendant did not carry out the repairs in a competent professional and workmanlike manner.

[20] The rule for damages for such a breach of contract is in **Hadley v Baxendale** [1854] 9 Exch. 341, 354-5:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

[21] I also find that because of the close relationship of the parties over the years, Mr Kumar knew that the vessel was used as a dive boat and that he

must have known or ought to have known that any lay up of the vessel could cause loss of business earnings to the Plaintiff. In any event, I do not think that the Defendant seriously challenged the claim for loss of profit other than on the issue of quantification.

[22] I therefore find that the loss and damage suffered by the Plaintiff was a natural consequence of the Defendant's breach.

### **QUANTUM**

[23] I will now consider whether Parasail has proven its loss and damage.

### **SPECIAL DAMAGES**

[24] The cost of removing the old cylinder 3 valve seat, machining and fitting a new one as per invoice<sup>2</sup> of 10 December 2002 was **\$45.00**. The cost of the expert's report as per the invoice<sup>3</sup> was **\$825.00**.

[25] Many of the parts were not available in New Zealand or Australia and had to be imported from Japan. On **5 March 2003**, Mr Cottrell wrote to Mr Kumar holding Ali Engineering responsible for the cost of repairs and the losses suffered by Parasail claiming **\$38,582**, including the sum of \$26,000 for loss of earnings, with copies of invoices for the cost of new parts for the second repair, transportation, labour and other costs. The originals were brought to a previous hearing that did not proceed but have now been misplaced and Mr Cottrell does not know where they are. Mr Gordon objected to proof of loss in this way because he wanted to challenge the "authenticity" of the invoices. The trial Judge appears to have upheld the objection and allowed only originals to be accepted into evidence. Mr Cottrell said that all invoices have been paid except for the ones due to Ali

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<sup>2</sup> P Doc 2

<sup>3</sup> D Doc 14

Engineering for the second repair. He was taken through all the invoices in cross examination by Mr Gordon and justified all expenditures claimed in those invoices.

### **LOSS OF INCOME**

[26] Objection was taken by Mr Gordon for the Defendant as to how Mr Cottrell calculated the loss of income when the *Kalo* was laid up awaiting further repairs. It was overruled. Mr Cottrell produced a statement<sup>4</sup> on how he arrived at the loss of earnings, which he said was a conservative estimate, from 1 February 2003 to 26 February 2003, of \$2,070 per day gross. He however claims only \$1,000 per day which computes to a total loss of **\$26,000**.

### **THE LAW ON PROOF OF QUANTUM**

[27] I agree with Mr Patel for the Plaintiff that quantification of loss and damage is not an exact science and that "strictly proved" means there must be some basis to prove the claim. It is often pleaded in Defences, as was done here, that the plaintiff is put to "strict proof". This is not proper pleading. There is no such law. In civil cases, the proof is "on the balance of probabilities".

[28] Mr Gordon for the Defendant cited **Krishna Brothers v Post and Telecommunications Ltd** [2005] FJCA 36; ABU0028.2004S (29 July 2005) as supporting his submission that for proof of special damages, documentary evidence is required. Examination of that case shows that it is not such authority. **Krishna Brothers** was a case where the Defendant did not appear at the trial and the Magistrate proceeded to hear evidence from the Plaintiff. The Court of Appeal did not accept the Defendant's submission that the Magistrate required documentary proof of special damages. The Court of

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<sup>4</sup> P Doc 2

Appeal said: *"Had there been a challenge to those figures, the court may well have felt that such evidence was necessary but, in the absence of challenge, the court was entitled to find, as it did, that the plaintiff's evidence on that matter was credible and needed no further proof."*

[29] He also cited **Shandil v Air Fiji Ltd** [2005] FJCA 25; ABU0046.2004S (15 July 2005) as authority for the submission that an accounting exercise by the Plaintiff is insufficient proof of damages. Loss must be actually proved. In this case, the defendant published a defamatory report of the plaintiff's airline. In proof of loss of earnings allegedly caused by the report, the Plaintiff relied on an accountant's report which failed to link the loss to the report. The Court of Appeal said :

"As an exercise in accounting, the calculation is no doubt accurate; but, from the standpoint of assessing the damages caused by the defamatory publication, it is in our view not an adequate method of proving the actual loss resulting from that particular event. For one thing, it assumes that the incidents (the fatal accident on 24 July, and the defamatory publication on 3 August) each contributed a constant or steady percentage of the loss of revenue sustained throughout the period in 1999 under review. In fact, the impact of the fatal crash and the adverse publicity surrounding it was likely to have overwhelmed and outlasted any effect brought about by or associated with publication of the defamatory matter on 3 and 4 August 1999. News of a mechanical failure that caused no crash or loss of life and produced no graphic photographs or vivid personal stories of human loss or suffering is obviously much less memorable or long-lasting in its impact on human perceptions of events. In addition, the method of calculation adopted leaves out of account all other social and political factors and events as possible operating causes of the loss of income sustained."

[30] The case of **Attorney-General of Fiji v Cama** [2004] FJCA 31; ABU0021.2004S (26 November 2004), also cited by Counsel for the Defendant, is more to the point. In this case the plaintiff sued for loss allegedly caused by their forceful eviction out of their premises. The trial Judge assessed damages despite the lack of actual and precise proof and the parties appealed. The Court of Appeal upheld the trial Judge's assessment and said this:

"[15] The Ministry submitted that in the absence of better evidence of the value of the chattels, the award should have been for a nominal amount.

[16] We accept that the evidence called by Eagle did not establish, in precise dollar terms, the value of the chattels and therefore the extent of its loss. We also note the Judge's findings that at least some of the items had been lent to Eagle and that there was some doubt of the ownership of items such as the boats. But we do not accept that in these circumstances, the damages should have been nominal.

[17] In ***Newbrook v Marshall*** [2002] 2 NZLR 606, the Court of Appeal in New Zealand considered the proper approach where damages, in that case for loss of profits, could not be accurately assessed. Richardson P, delivering the judgment of the Court said at 614:

"Where there are variables involved, as usually occurs in assessments of business profits or losses, if precise figures had to be proved few plaintiffs could succeed. Where, as here, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the Courts. It is not a matter of whether an expert could give a reasoned assessment and could defend the number he or she came up with. As Lord Mustill said in ***Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*** [1997] AC 254 at p 269 "The assessment of damages often involves so many unquantifiable contingencies and unverifiable assumptions that in many cases realism demands a rough and ready approach to the facts"

[18] Richardson P referred to an earlier decision of the Court of Appeal in ***Walsh v Kerr*** [1989] 1 NZLR. It concerned the value of a guarantee, where its actual value had not been established. It was held that the Court should do its best to arrive at a figure, if satisfied there had been some real damage. Cooke P, delivering the judgment of the Court said at 494:

"There are cases where, although the assessment can only be largely speculative and the evidence is exiguous, the Court will do the best it can to arrive at a figure if satisfied that there has been some real damage. Cases on the value of a chance are well known. But perhaps the most instructive precedent is the Privy Council decision cited by Tipping J himself, ***Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory*** [1979] AC 91, where, having held that the true measure of damages was one to which neither the evidence nor the judgments in the Courts below had been directed, their Lordships came to "the conclusion that the ends of justice would be best served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is". See the judgment delivered by Lord Keith of Kinkel at p 106."

[19] This is the situation in the present case. There can be no doubt that Eagle has suffered some real and substantial damage resulting from the loss of or damage to the items in the schedules. Because of uncertainty concerning the value of those items and the accepted fact that some, but not many, of the items may not have been owned by Eagle, the loss cannot be precisely proved. In those circumstances, the Judge was entitled to take a robust view and to make a broad brush assessment of loss. That was the course adopted by Scott J. He was justified in doing so.

[31] The situation here as far as proof of both special and general damages is the same as in **Attorney-General of Fiji v Cama**. I therefore adopt the “rough and ready” approach advocated by Lord Mustill (supra) and take a robust view of the evidence as approved by the Court of Appeal in **Cama**.

[32] I do not agree that copies of invoices are not sufficient for proof of special damages. I think that once the Plaintiff produces a photocopy of an invoice, the onus shifts to the Defendant to show that it is not authentic. I would accept a photocopy as prima facie evidence of the amount expended or due. It is not sufficient for the Defendant to just simply say, “I challenge the authenticity of the copy or that I give notice that I will challenge its authenticity”, without doing more. Otherwise, as the New Zealand Court of Appeal said in **Newbrook** (supra), few plaintiffs could succeed.

[33] I am therefore satisfied that Mr Cottrell has proven his loss of income and special damages in accordance with the principles enunciated in the above case authorities.

[34] I therefore award damages to the Plaintiff in the sum claimed of **\$38,582**.

### **INTEREST**

[35] I also award interest on those damages under the **Law Reform (Miscellaneous Provisions)(Death and Interest) Act. Section 3** of the Act allows the Court, if it thinks fit, to award interest on the whole or any part of the damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. I therefore award interest at 6% pa from 2003 to 2009, calculated as follows: 6% x \$38,582 x 6years = **\$13,890**.

**COSTS**

[36] I also award costs to the Plaintiff. The trial took two days. It could have been much shorter had the Defendant not insisted, unnecessarily in my view, on "strict" proof of damages. I think costs of \$3,000 is justified. It is to be paid within 21 days.

**ORDERS**

[37] The final Orders are therefore:

1. The Defendant is to pay to the Plaintiff the sum of **\$38,582** as damages together with interest thereon of **\$13,890**.
2. The Defendant is to pay to the Plaintiff costs of **\$3,000** within 21 days.

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**Sosefo Inoke**  
**Judge**