C P HOMES LIMITED -v- MAHLON ALI (Trading as HOVAH HARDWOOD ENTERPRISES)

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 196 of 1994

Hearing: 7 June 1995

Judgment: 15 June 1995

A. Radclyffe for Plaintiff

P. Tegavota for Defendant

PALMER J. By a Management Contract dated the 29th April 1993 (hereinafter referred to as the "contract", and made between the parties in this case, it was agreed inter alia, that the Plaintiff would provide plant machinery and management services to the Defendant. Subsequent to this, it was alleged that a verbal agreement was made whereby the Defendant hired two bulldozers from the Plaintiff at an agreed charge of $35,000.00 per month per bulldozer. The Plaintiff alleges that the Defendant is in breach of those two agreements in that he has failed to pay the following amounts as set out in his Statement of Claim:

1. $8,164.52, being for goods and services supplied;
2. $560,000.00, being for hire of two bulldozers from November 1993 to June 1994.

It was a clear term of that "contract" at Clause 6, that it would remain valid until the 31st of October, 1993. In June and July of 1993 two bulldozers; a D612 bulldozer and Komatsu D65E bulldozer (also known as the Komatsu D7 bulldozer), were shipped to the Defendant's place at Linggutu for logging purposes. There is however, no term in the "contract "setting out the hire charges. Mr Dyer, General Manager of the Plaintiff, who was called to give evidence states that there was a verbal agreement made between the parties in which it was agreed that the hire charges per month per bulldozer would be $35,000.00. He says that the verbal agreement was made between himself and the Defendant, in June of 1993. Subsequently, he has billed the Defendant for those hire charges as contained in invoice numbers 412 to 416. He says, and this is clearly proven on evidence adduced before this Court, that those hire charges have been duly paid without any objections raised. He says that this is evidence in support of his claim, of the existence of a verbal agreement between them.

The Defendant on the other hand, is hazy about the existence of such an agreement. He says, that he doesn't quite remember, if anything was said concerning a figure of $35,000.00 per month.

Under cross-examination, he conceded that he paid up on the hire charges billed by the Plaintiff, up to October of 1993. He however, hesitatingly pointed out that he paid up only because he had been told to do so by Mr. Dywer.

It is my view, that there was indeed a verbal agreement made between the parties concerning the hire charges of the bulldozers at $35,000.00 per month per bulldozer, as spelled out in the evidence of Mr Dyer. But even if it could be said, that there was no written or verbal agreement on this issue, it is my view that an agreement can in fact be inferred from the conduct alone of the parties; as can be noted from the evidence adduced before this Court.

The crucial matters raised in the Statement of Claim however, do not relate to the period in which the "Contract" subsisted. The claim pertaining to the outstanding bulldozer hire charges relate to the period after, the expiry of the "contract"; on the 31st of October, 1993.

If we take the view, that the verbal agreement entered into in June of 1993, also expired on the 31st of October, 1993, and it seems that this has been the approach taken by the parties, then the next material question to consider must be, whether any new agreement or further agreement was entered into, after the 31st of October, 1993, as between the parties.

In his examination in chief, Mr Dyer concedes that no further agreement in writing, was entered into after the 31st of October, 1993. There was however, an "understanding" he says, as to what would happen with the two bulldozers. He referred to "another contract" to do other work at another area by the Defendant. What that "other contract" however, was not identified, or expounded upon. He did say though, that the machines were left with the Defendant and an option given for purchase, or further hire of the machines.

He also says that, Mr Ali was informed that if he no longer required the use of the machines, then he should give notice in writing to the Plaintiff.

Under cross-examination, he says that the question of renewal of the "Contract" was discussed at the home of the Defendant with another person called Joseph Zio. He also added, that he was only advised to leave the country for two weeks, in September of 1993,

and so it was expected that he would be back in the country before the "Contract" would expire.

He also referred to written instructions which he had faxed to Mr John Lee, the Managing Director of the Plaintiff, whilst he was outside the country. A copy of this is annexed to the affidavit of Mahlon Ali filed on the 8th of December, 1994 and marked "Exhibit G". At page 3 of that document it reads:

> *"Regarding the bulldozers, I would suggest you offer them to Hovah hardwood Company, as is where is for a total of $170,000.00 $100,000.00 for the Komatsu D65E $70,000.00 for the Cat D6C. Offer him the sale on 20% (34,000.00) deposit, the balance $134,000, to be secured by payment authority at the NBSI against the funds from the letter of credit from the next log shipment to Tung Shing Developments Limited contract no. TIM 3/134/2.*
>
> *If they do not wish to purchase the equipment, you should insist upon another contract to cover the hire of them until end January 1994. You should point out that this would cost more than the purchase of the machines".*

I will comment on the content of this document later.

In contrast to the evidence of Mr Dyer on this point, Peter Reeks, the witness called in support of the Defendant's case, stated that he was not aware of the existence of any written or verbal agreement made between the parties after the expiration of the "Contract". He also stated that there was no verbal agreement as to the continuance of the hiring of the two bulldozers.

The Defendant, also gave evidence under oath, that he was not aware of any verbal or written agreement after the 31st of October, 1993. He says that he denies having any discussions with Mr Dyer as to the use of the two bulldozers after that date. He also pointed out that it would have been impossible for any discussions to have been held between them, as he had gone to another part of the Western Province at that time, to supervise other logging work.

Having heard the evidence, it is my view that no discussions or agreement were ever made as between Mr Dyer and the Defendant, as to what would happen to the machines after the 31st of October, 1993. The evidence adduced supports rather the version given by the Defendant.

The faxed document ("Exhibit G" to the affidavit of Mahlon Ali filed on the 8th of December, 1994), when read in its context showed conclusively that the offer for sale of the bulldozers was raised for the first time in that document. There is however no reference in that document, to any previous verbal discussions or arrangements, as stated by Mr Dyer in his evidence.

It is my view, that it is more likely that Mr Dyer may not have said or discussed anything with the Defendant, prior to his departure on the 24th of September, 1993, if he was of the view that he would be back in the country within two weeks, and well before the expiration of the "Contract", such that he would be in a position then to deal with the Defendant as to the continued hire of the two bulldozers, or whatever. The evidence of the Defendant and Mr Reeks is more convincing on this point.

I am not satisfied therefore that it has been proven to the required standard that there was a verbal agreement which envisaged the continuance of the hire of the two bulldozers in the same terms as previously agreed.

This then raises the question as to the state of affairs as between the parties regarding the two bulldozers, after the 31st of October, 1993.

First, there can be no arguing about the fact that both parties knew that the written agreement would lapse on the 31st of October, 1993. In the absence therefore, of any written or verbal agreement, the conduct of the parties thereafter is crucial. If the Defendant was of the view, that the Contractual relationship between him and the Plaintiff had ceased on the 31st of October, 1993, and that he had no intention to enter into any new legal relationships with the Plaintiff thereafter, then he should have informed the Plaintiff straight-away, whether in writing or by spoken words, of his clear intention and not touch the machines. Whilst the machines were in his custody and control at the time of expiry of the Contract, the minimum duty that could be imposed on him would be for the safe custody of those machines, until such time as suitable arrangements could be made for their safe transport and return to the Plaintiff.

The conduct of the Defendant however, is totally contrary to that of a person who would not wish to create further legal relations with the Plaintiff. There is clear evidence that he continued to use the Cat Dozer D6C after the 31st of October, 1993.

In those circumstances it is only logical and reasonable to conclude that he intended to create legal relations with the owner of that bulldozer; being the Plaintiff.

Some sort of suggestion has been made that the Defendant was under a mistaken belief that the Cat Dozer D6C belonged to Mr. Reeks. Unfortunately, the evidence adduced does not support the view that the Defendant could reasonably be under such belief. The machines were delivered to him by the Plaintiff and hire charges incurred by him, were duly paid to the Plaintiff. At no time was it ever conceded by the Plaintiff that those bulldozers did not belong to them, and at not time too, were they ever informed by the Defendant that the Cat Dozer D6C did not belong to them, but to Mr Reeks, and that he the Defendant therefore did not consider it proper to pay any further hire charges to them. If the Defendant was genuine about his belief too then he should have sought for refunds for the hire charges made by the Plaintiff inrespect of that Cat Dozer D6C. There is no evidence that such refunds were ever claimed, or any objections raised. Accordingly, I am not satisfied that the issue of mistaken belief could be accepted as a valid defence.

It is only logical, proper and fair therefore to infer from the conduct of the parties, the existence of a hire agreement inrespect of that bulldozer *(see "Anson's Law of Contract" 25th Edition by A.G. Guest, pages 23-24).* And again in the absence of any express term, written or spoken, as to what the hire charges are, it is only reasonable and fair to conclude that the rate imposed under the previous agreement would also apply in any such new agreements. It is not for the court to impose any new term, or even consider what is reasonable. All it can do is to seek to give "business efficacy" to the agreement between the parties. In so doing, I am satisfied that in the circumstances of this case, the rate of $35,000.00 per month per bulldozer, would be something so obvious that it goes without saying. The defendant was aware of this figure being used in the former agreement and therefore would not have been taken by surprise. Further, there is evidence to show that the Plaintiffs were amenable to continued hiring of the machines on the same terms as the first agreement; if not expressly, then it could be easily implied from their conduct.

I am satisfied accordingly that the Plaintiff is entitled to be paid hire charges for the Cat Dozer D6C at the rate of $35,000.00 per month for the period from the 1st of November, 1993 to June of 1994, as set out in the Statement of Claim (a total of 8 months). The amount due therefore is $280,000.00 ($35,000.00 x 8), plus interest at 5% with effect from the 1st of July 1994, and I so order.

As to the question of the use of the Komatsu D7 bulldozer, there is clear evidence provided by the Defendant, in which he says that that bulldozer, broke down sometime before the 31st of October, 1993, and had not been used since, right up until the time it was transported back to the Plaintiff in August of 1994. In his evidence under oath, the Defendant says that sometime in January of 1994, he verbally informed Mr John Lee of C.P. Homes Limited, to have that bulldozer collected. He says that someone was sent down soon

thereafter, to inspect the bulldozer and make arrangements for its return shipment to the Plaintiff, in Honiara. Nothing further however was done, until August of 1994.

In his submissions, Mr. Radclyffe referred to a letter from Mr John Lee to the Defendant dated 21st June 1994, as evidence of continued hiring of the machines. Unfortunately, Mr Lee was not called to give evidence in rebuttal to the evidence of Mr Ali concerning the discussions held in early 1994, as to the return of the Komatsu D7 dozer, and to be cross-examined as to the contents of that letter. The weight to be attached therefore to that letter is minimal.

I am not satisfied therefore that the Komatsu D7 dozer was ever used after the 31st of October 1993 until its return to the Plaintiff in August of 1994. The claim for hire charges inrespect of that bulldozer accordingly should be dismissed.

This then brings me to consider the claim for $8,164.52.

I have cross-checked all the invoices from no. 410 - 416, including the document marked "Exhibit 5 (a copy of this is annexed to the affidavit of Mahlon Ali filed on the 8th of December, 1994 and marked "Exhibit F"). There are two amounts which I think may have been double charged. The first one is in Invoice No. 413, page 1, third to the last line, it reads:

"31.7 Motor Corporation Inv. 52613 $296.40"

At Invoice No. 414, at page 1, third line from the top, it also reads:
"31-7 Motor Corp. Inv. 52613 $296.40".

If I am correct in what I have said, then this amount plus 20% of $296.40 (which is $59.28 + $296.40) should be deducted from the amount of $8,164.52.

The only other figure which may also have been double charged can be seen at Invoice No. 416, page 1, third line and it reads *"1/9 Tong Corp. Inv. 43005 $50.00".* In *'Exhibit 5'*, page 1 in the September 1993 summary, there is also a record of $50.00 under the name of Tong Corporation. What I suggest should be done is that those two figures should be cross-checked by the parties and confirm whether they refer to the same item from Tong Corporation, or two separate items each priced at $50.00. If they refer to only one item, then that amount of $50.00 plus 20% of $50.00 (which is $10 + $50), should also be deducted from the amount of $8,164.52.

Subject to the above confirmations, which I suggest should be settled amicably between the parties themselves, the amount of $8,164.52 is hereby allowed; and if both amounts above are ascertained to have been double-charged then the amount awarded in favour of the Plaintiff would accordingly be reduced to $7,748.84.

Costs also awarded in favour of the Plaintiff.

ALBERT R. PALMER

(Albert R. Palmer)
JUDGE