

BETWEEN: IRWIN ALSOP PACIFIC PTY LTD
a duly incorporated company
having its registered office
at Suva, Fiji:

PLAINTIFF

A N D: FARANI POSALA of Pesega,
Architect:

DEFENDANT

A N D: RIPINE RIMONI of Apia,
President:

THIRD PARTY

Counsels: R. Drake for the Plaintiff
E.F. Puni for the Defendant
L.S. Kamu for the Third Party

Date of Hearing: 23rd July 1992

Date of Judgment: 18th September 1992

JUDGMENT OF SAPOLU, CJ

This is a claim for professional fees in respect of structural engineering services rendered by the Plaintiff to the Defendant. However at the start of the hearing counsel for the Plaintiff indicated that this is the case of a contract of service and the Plaintiff's case appeared to proceed on that basis rather than on the basis of a claim based on quantum merit. The Defendant denies the claim and counterclaims against the Plaintiff for loss arising from negligence on the part of the Plaintiff. The Defendant also seeks contribution or indemnity from the third party should the claim by the plaintiff be successful.

Facts as between Plaintiff and Defendant:

On 21 February 1990 there was a telephone conversation between a representative of the Plaintiff in Suva, Fiji, and the defendant for the Plaintiff to provide certain structural engineering services for the defendant. That is confirmed in a fax letter dated 23 February 1990 sent by the Plaintiff's representative in Suva to the defendant. That letter is headed "Re Services of a

Structural Engineer" and refers to Alistair Stevenson as structural engineer to be sent by the Plaintiff to Apia to work with the Defendant for four days at the rate of F\$55.00 per hour plus costs of airfares and provision of suitable accommodation with weekend travelling time not to be included. The letter then says that on completion of the contract, payment could be made in US dollars or direct into the Plaintiff's account at the Pacific Commercial Bank (PCB) in Apia at the equivalent dollar exchange rates. By a fax letter dated 1 March 1990 the defendant replied to the fax letter from the Plaintiff's representative in Suva confirming the engagement of the structural engineer based on the conditions set out in the plaintiff representative's letter. That letter is headed "Structural Engineer for Iliili Church Building Project, American Samoa". Alistair Stevenson travelled to Apia and started working with the defendant on 3 March 1990. Whilst in Apia, Alistair Stevenson gave the defendant a written summary dated 7 March 1990 of the plaintiff's total fee of F\$10,000.00 for the whole job for the SDA church, which was the defendant's client for whom the defendant had requested the plaintiff's structural engineering services. In the same written summary, Alistair Stevenson states that the amount of \$2,730.00 for fees and expenses already earned and incurred by the Plaintiff were to be paid into the plaintiff's account at the PCB before any further work was to be done. The outstanding balance of \$7,270.00 of the plaintiff's fee was to be paid into the PCB before the calculations and drawings would be forwarded to the defendant. The defendant was also given the plaintiff's account number at the PCB. A copy of the written summary of the plaintiff's fee was also sent to its office in Melbourne, Australia. When Alistair Stevenson returned to Suva, he sent a formal notice account dated 23 March 1990 to the defendant setting out the fee and expenses earned and incurred being F\$2,730.00 in total for the services rendered to the defendant in Apia. That notice is headed "SDA Church - Structural Services" and was prepared in the plaintiff's office in Melbourne.

Then by a fax letter dated 19 April 1990 the defendant acknowledged having received on 11 April 1990 Alistair Stevenson's letter of 23 March 1990 and indicated that the plaintiff's account for \$2,730.00 would be paid the following morning. It appears from the evidence of the third party that the account was paid off by cheque on 20 April 1990. In the same letter of 19 April 1990, the defendant requested Alistair Stevenson to advise as to when the documents would

be ready as the defendant's client was very anxious as they had been waiting for them for some time and would appreciate immediate attention on the matter. The defendant also states that on completion of documentation to advise him accordingly so that they could pay for the balance of the plaintiff's quoted fee - "memorandum 7 March 1990".

To pause here for a moment, it appears to me that what Alistair Stevenson said in his written summary dated 7 March 1990 to the defendant was that the balance of \$7,270.00 for fees was to be paid before the calculations and drawings were to be forwarded to the defendant whilst the defendant in his letter of 19 April 1990 was saying that the balance of the fee could be paid on completion of documentation referring to the memorandum of 7 March 1990. Looking at these two letters of 7 March 1990 and 19 April 1990 I am unable to say from those two(2) letters that the parties reached agreement as to when the balance of the plaintiff's fee was to be paid.

About the second half of April the plaintiff experienced some difficulties in contacting the defendant whose phone at that time was out of order due to the devastation by Cyclone Ofa. On 15 May 1990 the plaintiff sent three sheets of drawings to the defendant through Mr O'Halloran of the PCB. By letter of the same date, 15 May 1990, Alistair Stevenson advised the defendant that the design and documentation were almost completed and one copy of each drawing marked "preliminary - not for construction purposes" would be forwarded by air mail for the defendant's comments. In that same letter Alistair Stevenson also included certain comments to which the defendant responded by fax letter the same day. The defendant in the same letter requested from Stevenson the progress to date on the project and also stated that his client was very anxious to start and he wanted advice as to when the preliminary drawings would be ready for checking and the sooner the preliminary drawings were sent over the better for the defendant in avoiding pressure from the Church. The defendant also advised that his phone was still out of order.

According to John Alsop who gave evidence for the plaintiff the preliminary drawings were then despatched by express mail to the defendant on 18 May 1990 for checking and the defendant was advised in writing that the drawings were almost completed and that as soon as amendments (if any) suggested by the defendant were received they would charge immediately. From the evidence given by the defendant, he did not receive those preliminary drawings until 18 June 1990. John Alsop further stated in evidence that after the preliminary drawings were

sent over they did not hear from the defendant and they made several attempts to reach the defendant but were unsuccessful and Alistair Stevenson also sent a letter to Mr Reeves of Reeves Construction to make contact with the defendant and to tell the defendant all the documents were completed and whether he had any amendments and if the defendant had any amendments to contact Stevenson regarding those amendments or give the drawings to Reeves to bring. On 7 June 1990, Alistair Stevenson received a fax letter dated 6 June 1990 from the defendant requesting advice on the progress of the SDA Church project and for the preliminary drawings to be sent over for checking. Those preliminary drawings, as already mentioned, were according to the defendant received by him on 18 June 1990. When cross-examined by counsel for the plaintiff on those preliminary drawings, the defendant stated that he did not respond in writing but he did discuss changes to the preliminary drawings with Alistair on the phone. However, the defendant in his evidence in chief did not mention any telephone conversation with Alistair Stevenson concerning the preliminary drawings he received on 18 June 1990 and there is no mention in the documentary evidence before the Court of such a telephone conversation. Alistair Stevenson's fax letter dated 12 September 1990 clearly does not suggest that such a telephone conversation took place. I conclude that no telephone discussion took place between the defendant and Alistair Stevenson concerning the preliminary drawings sent to the defendant on 18 May 1990.

It then followed that there was no further communication between the plaintiff and the defendant as from 6 or 7 June 1990 until 31 July 1990 when two representatives Dretzke and Allan of the plaintiff came to Apia with what the plaintiff's witness terms the final drawings which were not to be released to the defendant until the plaintiff's account had been paid. One of the plaintiff's representative Dretzke visited the defendant's office close to lunch time on 31 July but the defendant was not in his office. He was told by a man in the office that the defendant would not be back in the office until 2.00pm. So a message was left at the defendant's office to the effect that someone had come to deliver drawings from Alistair Stevenson and that he was staying at Aggie Grey's Hotel, and could the defendant call him there at Room 208 to pick up the drawings.

The defendant in his evidence admitted having received the message left at his office and he did call Aggie Grey's Hotel at 5.30pm on 31 July and talked to someone whose name he was not sure of. Dretzke apparently did not meet with the defendant and the next morning he left Western Samoa after giving the drawings to another representative of the plaintiff to take back to Fiji.

On 21 August 1990 the plaintiff then tendered their account of A\$7,580.00 for structural services to the defendant advising the defendant that the drawings and computations were in the plaintiff's office in Suva and could be collected from the Resident Manager who in the meantime would be sending to the defendant a preliminary set of drawings for information. The defendant said he did not receive that letter until 13 September. By a fax letter dated 4 September 1990 the defendant requested Alistair Stevenson to advise on the status of the SDA project as his client was getting very, very anxious and were not happy with the delay. The defendant also stated in the same letter that a nameless man had left a note on his desk claiming he had with him plans for the SDA project but he was not sure where that man was then. When the plaintiff received that letter from the defendant, the plaintiff refaxed its letter of 21 August 1990 to the defendant.

Again by a fax letter dated 7 September 1990, the defendant requested urgent information on the progress of the SDA Church project as his client was very anxious and not happy with the delay. By fax letter dated 10 September 1990 to David Allan of the plaintiff's office in Suva, the defendant acknowledged receipt of the plaintiff's fax dated 21 August 1990. The defendant also advised in that letter that he would settle the plaintiff's account when he was satisfied that the final drawings were in order and he requested that the preliminary set of drawings be sent over to him for checking and confirmation that the work required were completed and that his client may release funds accordingly. By fax letter dated 11 September 1990 David Allan despatched a full set of preliminary drawings to the defendant and confirmed that he was in possession of the final drawings and computations which would be despatched when the preliminary drawings had been received by the defendant's client and the plaintiff's account had been settled. By fax letter dated 24 September 1990 David Allan enquired of the defendant whether he had received the semi final drawings despatched from Suva on 11 September 1990. That letter was acknowledged by the defendant in a fax letter dated 4 October 1990 where he said that they were working on the

drawings and any changes would be advised soon. On 3 December 1990 David Allan by fax letter to the defendant referred to the defendant's letter of 4 October 1990 and requested a project status report and settlement of the plaintiff's fee.

Facts as between defendant and third party:

In August or September 1989, the SDA Church at Iliili, American Samoa (also known as the Iakina Church) wanted to build a new church at a cost of approximately US\$250,000.00. They engaged the services of the defendant as architect at a meeting held in American Samoa. At that meeting the defendant indicated that his costs would not be more than US\$15,000.00 and he would need to hire the services of another consultant. The Iliili Church accepted the defendant's cost and the hire of another consultant. On 13 September 1989 the defendant went to see the third party who is the President of the SDA Mission at Lalovaea for payment to the defendant of the sum of \$12,000.00 in relation to the construction work for the Iliili Church. The third party paid only \$4,000.00 to the defendant. This was the third party's first involvement in this case. In October 1989 the defendant again saw the third party for payment of the balance outstanding and the sum of \$8,000.00 was paid to the defendant for the construction of the new church for Iliili SDA Congregation. As there was a prolonged delay in receiving the drawings for the construction of their new church, the Iliili SDA Congregation requested the third party to communicate with the defendant no doubt because both the defendant and the third party reside in Apia and it would be more convenient if the third party was to act for the Iliili SDA Congregation in American Samoa. In April 1990 the third party saw the defendant about the drawings for the Iliili Church and was told by the defendant that the drawings were to be sent from Irwin Alsop in Suva or Australia and the third party was shown the plaintiff's of F\$2,730.00 for services already rendered. That account was paid direct by the third party to the PCB on 20 April 1990. After that point, there appears to be contradictions in the evidence as to what happened between the defendant and the third party.

According to the defendant, the third party called him on the telephone and asked for the drawings for the Iliili Church and he replied that all the documentation was with him. He also told the third party that the drawings were

incomplete and not to be used for construction purposes. On the 4 October 1990 the drawings were released to the third party by the defendant's draughtsman who handed the drawings to a man by the name of Ben. The defendant also stated that the third party did not come to his home at Lalovaea and complained about the semi final drawings. According to the third party he did not call the defendant on the telephone and spoke to him as alleged by the defendant. There was no direct communication or conversation between himself and the defendant. What happened was he went to the defendant's office on 3 October 1990 for the drawings as he was travelling to Pago on 5 October for an Executive Committee Meeting of the Church. He was told by the defendant's secretary that the defendant was not available but the drawings would be delivered to the third party's office. The next day the third party found the drawings in his office and his secretary, Amato Sione, told him that the drawings were given to her by a boy who told her to put the documents on the President's desk. Ben Tofilau who is the Accountant for the SDA Church testified that he could not recall anyone giving him any drawings or uplifting any plans from the defendant's office. When the third party arrived in Pago he discussed the drawings with the Iliili Church members and they were not happy with the drawings because of the notation on the drawings "not for construction purposes". The third party then advised the Iliili Church members that it was up to them to continue with the defendant or engage another architect. When the third party returned from Pago on Monday, 8 October, he went to see the defendant at his office the next day but the defendant was not there. So on Wednesday, 10 October he went to see the defendant at his home and asked the defendant about the notation on the drawings. He also told the defendant that the Iliili Church have waited for so long and yet the drawings were incomplete. The defendant replied that that was the final drawings but the people in Pago did not know how to obtain a building permit with those drawings.

To pause here, I must say that I prefer the evidence of the third party to that of the defendant on this aspect of this case. The third party's evidence was not only supported by notations in his diary which was produced in evidence but also by the evidence of Ben Tofilau and Amato Sione. I was also impressed by his demeanour in the witness stand. Perhaps the defendant could not recall what actually took place between himself and the third party. It must also be mentioned at this point that according to the witness Papafo Taala who was the pastor for the Iliili Church, their congregation had already decided to find

another architect because of the delay in receiving the drawings by the time they received the drawings in October. The congregation also declined Papafo's request to continue to have the defendant as their architect as they had waited for too long.

Claim by defendant against third party:

Dealing first with the claim by the defendant against the third party, I accept the evidence of the third party as to what transpired between himself and the defendant and therefore there is no basis for the defendant's claim for contribution or indemnity from the third party. In any event, the Iliili Church members had already decided to change architects by the time the third party came to Pago in October 1990 with the drawings because of the lengthy delay. The Iliili Church members had engaged the services of the defendant in August or September 1989 and just more than a year later they were still waiting for the drawings. That they decided to engage another architect before the third party came to Pago in October 1990 is quite understandable. Accordingly the claim against the third party for contribution or an indemnity is dismissed.

Claim by plaintiff against defendant and counterclaim by defendant:

Turning to the claim by the plaintiff and the counterclaim by the defendant, the plaintiff is claiming professional fees for structural engineering services rendered. The defendant in essence contends that until the drawings have been checked by himself and approved and the final drawings are issued by the plaintiff, the defendant is under no obligation to pay the amount owing on the plaintiff's fee. Secondly the contract is now frustrated due to the negligence of the plaintiff and the defendant has lost a job worth US\$15,000.00. There is thus no dispute that the plaintiff had rendered structural engineering services to the defendant. What is now in dispute is whether the balance of the plaintiff's fee is now payable. To determine the time when that fee is payable due one has to look at the contract between the plaintiff and the defendant. As I have already mentioned in this judgment, there was no real agreement between the parties as to when the balance of the plaintiff's fee was to be paid. The plaintiff demanded in its written summary of costs dated 7 March 1990 that the balance of its fee should be paid before calculations and drawings were released and it maintained more or less that position throughout in subsequent correspondence with the defendant. The defendant on the other hand in his fax letter

of 19 April 1990 responded that the balance of the plaintiff's fee was to be paid on completion of documentation and maintained substantially the same position in some of its subsequent written communications to the plaintiff. In the absence of any agreement between the parties on this point, I am of the view that it would be most difficult for the defendant to maintain its present position and refuse to pay the plaintiff when the plaintiff hands over the final drawings unless the defendant succeeds on the issue of frustration with which I will now deal.

There are five theories on frustration but the current prevailing theory on frustration is stated in the decision of the House of Lords in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 699; [1956] 2 All ER 145 where Lord Radcliffe said:

"...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *None haec in foedera veni. It was not this that I promised to do*".

The first point to note about the doctrine of frustration as stated in Davis Contractors case is that the frustration must have occurred without default of either party. Secondly, I am not satisfied on the evidence in this case that negligence on the part of the plaintiff caused the Iliili Church to cease engaging the services of the defendant. All along the plaintiff was ready and willing to perform its obligation notwithstanding what has been said about the plaintiff requiring payment of the balance of its fee before the final drawings were released. Even if it is assumed that the contract in this case was frustrated, I am not satisfied such frustration was the result of negligence on the plaintiff's part. Thirdly, the defendant himself is not entirely free from blame for the delay in finalising the drawings for the Iliili Church. And a party who is at fault or even partly at fault may not rely on a frustration which has arisen due to his fault or due partly to his fault. I am therefore of the view that the defence of frustration in this case cannot succeed.

I turn now to the counterclaim by the defendant based on negligence to have been caused from the delay on the part of the plaintiff. It is clear that in August or September 1989 the Iliili Church members engaged the services of the defendant as architect for their new church. On 21 February 1990 there was

a telephone conversation between the plaintiff and the defendant for structural engineering services to be provided by the plaintiff for the defendant. From 21 February 1990 until 18 June 1990 both the plaintiff and the defendant were ready and willing to perform their obligations. I am of the view that the critical period in this case started from 18 June 1990 when the defendant received the "preliminary drawings" from the plaintiff's representative in Suva. There was no response from the defendant and no further communications between the parties until 31 July 1990 when representatives of the plaintiff come to Apia with more drawings to be given to the defendant. The defendant also become aware of 31 July 1990 from the message which was left at his office that the plaintiff wanted to give him more drawings because the defendant did contact Aggie Grey's Hotel to talk to the person who had left the message at his office. That was all the defendant did until 4 September 1990 when he sent another fax letter to the plaintiff expressing the anxiety of his client concerning the delay. The plaintiff on the same day refaxed to the defendant its letters already faxed on 21 August 1990 but claimed by the defendant to have been received on 13 September 1990. Then there followed a fax of 10 September 1990 from the defendant to the plaintiff and a fax from the plaintiff to the defendant on the same day advising that preliminary drawings were despatched on the same day to the defendant. The defendant acknowledged receipt of those preliminary drawings on 4 October 1990.

It appears to the Court that with the knowledge that he had been engaged since August or September 1989 by the Iliili Church as architect for their new church, the defendant took no action on the drawings received by him from the plaintiff on 18 June 1990. Then on 31 July 1990 when he learnt that the plaintiff wanted to give him more drawings at Aggie Grey's Hotel the only action he took was a phone call and then no further action until 4 September. So for a period of about two and a half months the defendant did not respond to the drawings received by him on 18 June 1990 or even follow up matters with the plaintiff even though his telephone was again working after six(6) months being out of order. On those facts and the rest of the evidence the Court cannot say that the plaintiff was negligent. The counterclaim is accordingly dismissed.

The Court has found substantially for the plaintiff in this case and will let the plaintiff and the defendant sort out the question of when the balance of the plaintiff's fee is payable together with any ancillary matters incidental

thereto and then come back to the Court for a final decision. If the plaintiff and the defendant cannot resolve matters by 12 October 1992 then the case be referred back to the Court for decision. As the claim against the third party has been dismissed costs are awarded to the third party to be fixed by the Registrar.

T F M Sapala
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CHIEF JUSTICE