

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0039 of 2018
(High Court No. HBC 172 of 2012)

BETWEEN : NEO (FIJI) LIMITED

Appellant

AND : AUSMECH SERVICES (AUSTRALIA) LIMITED

Respondent

Coram : Basnayake, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Mr F Haniff for the Appellant
Mr G O'Driscoll for the Respondent

Date of Hearing : 19 September, 2019

Date of Judgment : 4 October, 2019

JUDGMENT

Basnayake, JA

- [1] I agree with the reasoning and conclusions of Almeida Guneratne JA.

Almeida Guneratne, JA

- [2] This is an appeal from the judgment dated 17 May, 2018 of the High Court of Fiji at Suva.

Background facts

- [3] The learned High Court Judge laid down the background facts that had led to the dispute and the claim of the Respondent (plaintiff in the action), the defences of the defendant thereto (the Appellant), the Agreed Facts, reference to the evidence both documentary and oral (vide: pages 24 to 36 of the Copy Record) which I saw no reason to reproduce and crowd this judgment, (and which I adapt for the purposes of my own determination). However, I shall make a brief summary of the factual content.
- [4] The appellant as a general contractor called for tenders for certain mechanical works. Ausmech Services Australia PTY Limited (hereinafter referred to as the 'A U Company') a sub-contractor submitted the initial tender and subsequently several revised tenders.
- [5] Thereafter, the Respondent Company carried out the mechanical services and obtained a Tax Exemption Certificate from Fiji Revenue as well. It would appear that the joint involvement of the 'A U Company' and 'the Respondent' was on account of the fact that 'A U Company' was a foreign company (de-registered as the work was in progress) and therefore for logistical purposes, the Appellant had engaged in their dealings with the Respondents.
- [6] Although some negotiations had continued with the 'A U Company' moneys were paid by the Appellant to the Respondent. Progress Valuation Certificates and Tax Invoices were also in the name of the Respondent.

- [7] However, when it came to the last invoice the Appellant refused to make payment taking up the position that, it was not aware that, the 'A U Company' and the Respondent Company were two different companies and therefore there was no enforceable contract between it and the Respondent for the lack of privity of contract. (The Amended Statement of Claim, Amended Statement of Defence and the Amended Reply to Defence are at pages 49 to 68 of the Copy Record).
- [8] After trial the High Court held that there was an enforceable contract between the Appellant and the Respondent which the Appellant had breached and ordered damages. (The Judgment of the High Court is at pages 23 – 42 of the Copy Record).
- [9] It is against that judgment that, the Appellant has appealed. (The Grounds of Appeal are at pages 1–2 of the Copy Record).

Determination

- [10] I had no difficulty in agreeing with learned Appellant's Counsel's submission that, in the absence of 'Novation', or 'Rescission' a contract could not be said to have come into existence between the Appellant and the Respondent.
- [11] But, this is not a case where an existing contract had been replaced by a new contract for 'Novation' or 'Rescission' to have been brought into play. Indeed, even for there to have been an 'Assignment' or to apply the principles on 'Agency'.
- [12] It is true that the initial tender and revised tenders had been submitted by the Australian (AU) (PTY) Company. But, thereafter, most negotiations that followed, invoices forwarded by the Respondent Company, payments made to it by the Appellant, as recounted by the learned High Court Judge, at pages 32 to 36 of the Copy Record show that, the Appellant had been dealing with the two companies regarding them as being interchangeable. The period covered in that regard began with around February, 2007 and ended in December, 2009.

- [13] In that background of the facts (including the evidence given on behalf of the Appellant at the trial) the learned High Court Judge's assessment of the same was perfectly in order when he approached the matter on the basis that, the Appellant had impliedly (by conduct) admitted that it continued with the contract with the Respondent.
- [14] Consequently, I cannot see the relevance of "*the Corporate Veil*" doctrine as expounded in Saloman v. Saloman [1897] AC 22 (HL) which counsel for the Appellant (though referring to in passing) did not, in any event, make any argument based on that case.
- [15] Finally, Mr Haniff (Counsel for Appellant) in his characteristic and lucid style relied on the doctrine of "Privity of Contract" and submitted that, his client had no privity with the Respondent, in as much as, the Respondent fell into the category of "a stranger."

What is contemplated by the doctrine of Privity of Contract?

- [16] It means only that a non-party cannot bring an action on a contract. (vide: Cheshire & Fifoot and Furmston's *Law of Contract* (13th ed, 1996, Butterworths).
- [17] In the factual matrix which I have recounted earlier, I cannot say (the Respondent) could not have brought the action in question as being a non-party to the Contract under consideration.
- [18] Was the Respondent "a Stranger" to the Contract and who is a stranger? Is this a case where the Australia (PTY) Company sought to confer a benefit on the Respondent as being a stranger?
- [19] Two situations strike my mind in that regard.
- (1) A debt due to a third person from one of the contracting parties shall be discharged by the other party. Such a situation was tested in Crow v. Rogers as way back in 1724 and the Court refused to sanction it. [1726] 1 Stra 592.

(2) It may be desired to confer a benefit upon a third party towards whom no antecedent liability exists. That principle was enunciated in another old case (Tweddle v. Atkinson [1861] 1 B & S 393.

[20] Those decisions as old as they may be have withstood the test of time and the Appellant, in his oral or written submissions did not refer to any authorities to sway my mind to take a contrary view.

[21] In the result, I reject learned Counsel's contention.

Final assessment of the Judgment of the High Court

[22] Consequently, I have no hesitation in agreeing with the judgment of the High Court that, the Appellant was estopped from denying the Respondent's claim. I hold the view that, the contract in question had been created by conduct of the respective parties (as between the Appellant and the Respondent) in which regard I addressed my mind to certain other adjunct considerations as well:

- (i) The Australian (PTY) Company has in fact been de-registered.
- (ii) It is the Respondent that had done the work on the Tapoo City building and done that work to completion.
- (iii) To deny payment to the Respondent on its final claim will surely result in unjust Enrichment in favour of the Appellant.

[23] For the aforesaid reasons, I saw no reason to interfere with or disturb the judgment of the learned High Court Judge and proceed to make order dismissing the Appeal of the Appellant, affirming *in toto* the judgment of the High Court.

Re : the Respondent's submissions on its claim for Post-Judgment Interest on its damages claim and Indemnity Costs

- [24] Though, taken as a point in the Respondent's written submissions (which the learned High Court Judge had not dealt with) I found that, on that, there has not been a cross-appeal by the Respondent and the learned Counsel for the Respondent did not pursue the matter at the hearing before us in any event.

Jameel, JA

- [25] I agree with the conclusions and proposed orders of Almeida Guneratne, JA.

Orders of Court

1. The Appeal is dismissed with Costs in a sum of \$5,000.00 which shall be in addition to the costs ordered by the High Court.
2. The said sums shall be paid by the Appellant with 21 days of notice of this judgment.



Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Justice F. Jameel
JUSTICE OF APPEAL