Open Court
13.3.95

CJ

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 220/91

BETWEEN: MAHOGANY ESTATES LTD
Rm. #14 Jennett Building
George Town, Grand Cayman — PLAINTIFF

AND: RAUL GONZALES
Mahogany Way, Red Bay
Grand Cayman — DEFENDANT

For the plaintiff: Mr. P. Broadhurst.
For the defendant: Mr. A. Roy

HARRE CJ.

JUDGMENT

This case arises from an agreement between the parties. There is no longer an issue about the right of the plaintiff's company to sue on it.

A written agreement dated 12th December 1990 confirms an earlier parole agreement under which the defendant started to use the plaintiff's D8 bulldozer on or about the 19th November 1990.

The agreement read as follows -

> "I Lorenzo Berry of Bodden Town, Grand Cayman, B.W.I. Hereby made an agreement with Raul Gonzales that my bulldozer be use to clear property of Raul Gonzales this said on November 29, 1990.
>
> The agreement was made between Mr. Gonzales and Mr. Berry but instead of money been paid to Mr. Berry the payment will be made in marl at one load of marl for every hour the bulldozer work.
>
> This said agreement was made on the 19th day of Nov 1990.
>
> Lorenzo Berry
> Raul Gonzales
> Dic. 1990 witness"

It is not in issue that the parties intended the payment to relate to the hours when the bulldozer was actually in operation and not to when it was standing idle for whatever reason, but the unbusinesslike way in which these arrangements were implemented leaves the court in the position of having to determine whether those hours amounted to as few as 22 or as many as 200 in the period from 19th November 1990 to 4th January 1991.

Evidence for the plaintiff was given by Lorenzo Berry, its managing

director, Glarman Grant the bulldozer operator and Reynaldo Ramoon a worker for the Department of the Environment. All said, in ways to which I shall refer, that the bulldozer was heavily engaged throughout the period of hire.

The only witness to the contrary effect was the defendant himself.

The parties did not even agree as to how the bulldozer reached Mr. Gonzales' compound. Mr. Berry and his operator say that they discovered it missing and found it being operated by Mr. Gonzales at his site, where they correctly guessed it would be. Mr. Gonzales himself says that he was given permission to take it. It is not an issue which goes to the heart of this case at all and it is certainly not one which caused the parties to fall out to the extent they did not come to an agreement that Mr. Gonzales could use the bulldozer for a subsequent period.

It is common ground that a D8 bulldozer would use about 10 gallons of diesel fuel per hour of continuous operation. If Mr. Berry's version of events, which is that he regularly visited the site in order to refuel the machine, is correct he would have brought along some 2000

gallons less the amount of 215 gallons which Mr. Gonzales says he put in himself. Mr. Berry said that he had a 500 gallon tank on his own compound and he took about 9 drums to the Gonzales site, or perhaps more, and was at that site approximately every other day. He described the drums as being of 55 gallons capacity and said that he had a pump which he used to discharge from the drums into the bulldozer. If he is right in saying that he supplied nearly all of the fuel for the 200 hours of operation he must have taken considerably more than 9 drums - between 30 and 35 - and it is surprising that he had no supporting documentation to indicate his purchases of fuel from Texaco during the relevant period or the disposition of the fuel purchased.

That is something which throws some doubt on the plaintiff's veracity but the real issue in this case stems from the quite different interpretation put forward for such documentary evidence as there is. The plaintiff's consists of a series of book entries relating to the hours which the operator, Grant, worked. They consist of 5 sheets each of which is headed "in return for marl, bulldozer list for operation for work already done for Raul Gonzales". The first entry relates to the 19th November 1990 and the last to Friday 4th January

1991. The total number of hours worked in that period is recorded as being 200 and there are cheques in favour of Mr. Grant which the date stamps of the cashing bank clearly shows to be contemporaneous. They amount to $2000 in all. That is consistent with Mr. Grant's evidence that he was paid $10 an hour. The other set of documents consists of pages produced by the defendant from a customer's order book. They run, with one exception, in numerical sequence and purport to show purchases of diesel fuel and other items for the bulldozer and hours of work. Mr. Gonzalez explanation for the lack of intervening entries in the book was lame, but did not lead me to think that the entries were more probably than not a later concoction. That would have had to have been with the connivance of Grant, who signed each sheet.

The main issue in this case is whether the hours of work recorded in the order book are the hours in which the bulldozer was actually in operation and for which Mr. Gonzales should pay or the hours which are to be subtracted from the total put forward by the plaintiff because the machine was out of action.

It was to be expected that the evidence of Mr. Grant, the bulldozer operator of what the machine did would be crucial and indeed

conclusive in this case. Unfortunately he was a completely unreliable witness. A previous hearing of this trial had had to be adjourned and it transpired during the course of the present hearing that Grant was to have been called as a witness for the defendant on the previous occasion on the basis of a statement which he gave and which was put to him in cross-examination. However, by the time of the hearing before me he appeared as a witness for the plaintiff and graphically described the hours which he worked for Mr. Gonzales which he said was "like working for a mule". The effect of his evidence was that the bulldozer was working from morning until night, and that the hours which he reported to Mr. Berry, and more, were those during which he was operating the machine. He said that he kept no written record of these hours to report to Mr. Berry but kept them all in his head. I did not believe him.

Reynaldo Ramoon said that he was working at a landfill adjourning where the bulldozer was during the relevant period. His job was to direct trucks to the appropriate place for the discharge of their loads, and he said that the trucks would arrive continuously, every minute. The Gonzales compound was 150-200 feet from where he was. He saw Mr. Berry coming there once or twice and claimed to have seen him

every time he came. He is indeed a hardworking man of his claim to have worked every day from 7:00 a.m. to 5:00 p.m. and, sometimes to 6:00 p.m. is true. I do not accept that and indeed his account of his hours and work varied during his evidence. I must nevertheless consider carefully his claim to have seen the bulldozer working every day. There was no particular reason why he should have paid attention to what was going on in the adjoining site while he was doing his own job. I am satisfied that Mr. Gonzalez evidence of there being 2 bulldozers there is true and Ramoon said that he saw three people, Gonzales, Grant and another unidentified person, operating a dozer. Mr. Ramoon's account of a busy days work being done all the time at the site does not call for the conclusion that all the bulldozer work was being done by the D8. My last observation about Ramoon's evidence concern Mr. Gonzalez's evidence that he was "two miles away" from his compound rather than a matter of feet. Mr. Gonzalez is a voluble speaker of English but it is of an idiosyncratic kind. The assertion is so obviously absurd if taken literally that I regard it of being a rhetorical expression meaning no more than "a great deal further". Mr. Gonzalez counsel acknowledged that that matter was never put to Ramoon in cross-examination at all.

Mr. Gonzales' version of events was this. He said that he had a smaller bulldozer - a D6 - already on site and he needed the D8 only for sporadic work involving the shifting of heavy items. He estimated that 30 - 40 hours of work would be what he would require. He discussed with Mr. Berry the use of his bulldozer because it was at that time doing nothing. He said also that he kept the written record of the hours worked by Mr. Grant and had that record signed by him in order to avoid the very problems which he was now facing in court. His version of Grant's activities was that he would drive the bulldozer from time to time, clean and grease it and would then sit down to complete his 8 hours of work. He personally assessed and agreed with Grant at the time how much work Grant had done and his brother who, unfortunately for this case, is now in Panama, prepared the work sheets. He saw Mr. Berry only about three times during the relevant period and never with diesel fuel in the compound. He had to do plenty of work on the machine to get it started and it was out of action for 7-10 days while a track pin was fixed. Those days were, he said, from the 27th November to 7th December and the record of work shows that none was done during those days. Indeed, he said, there were all kinds of problems with the old bulldozer, the main one being overheating.

On the evidence, I make the following findings. Grant is an unreliable witness. He completely disowns his previous statement, which he said he did not read, on the basis that "two against one is murder". He came some 4 years later with a completely different story. He has every reason to deny that his claim for a full days' work which he made to Mr. Berry was anything other than a genuine one. I do not accept Mr. Berry's account that he was regularly visiting the site and supplying fuel. There is nothing in the written agreement which obliged him to do that and he is only partially supported even by Grant who said that both he and Gonzalez supplied some and that he did see Berry on a hill and thought he was being spied on.

The plaintiff's difficulty in this case is that he has no independent record as agreed with the defendant as to what the hours worked were. He relied entirely on his own man, Grant. The hire of a piece of equipment by the hour over a period of weeks requires meticulous record keeping if the very problems which have arisen in this case are to be avoided. The very form which the agreement took is more consistent with Mr. Gonzalez account than Mr. Berry's. If it is contemplated that machinery hired is to be in more or less continuous operation over a period of weeks, why hire it by the hour? The method

chosen is entirely consistent with Mr. Gonzalez assertion that the D8 was to be used as a heavy duty backup for his own machine the D6. And unless Mr. Gonzalez intended throughout to cheat Mr. Berry by making maximum use of his machine without paying for it he would keep the use of that machine, at the equivalent of $140 per hour, to the minimum and make the maximum use of his own without charge. That is a credible explanation of the low number of hours he said the machine worked. The alternative view that the documents prepared by Mr. Gonzalez brother and signed by Mr. Grant represented a deduction from the total hours worked leaves unanswered the question of how that total was to be arrived at. Would Mr. Gonzalez meticulously record deductions while making no attempt to establish the sum from which the deductions were to be made thereby laying himself open to the enormous bill which was presented to him? I conclude that he would not.

There is one version of events which does achieve some degree of consistency in the evidence as a whole. Mr. Gonzalez says he never operated the D8. He does not say in terms that Grant never operated any equipment other than the D8 and I think it inherently unlikely that Gonzalez would let him sit around idle for nearly all the time he was there. To that extent I did not believe him. I infer that he

worked him hard, but not exclusively on the D8. That is consistent with Mr. Ramoon's evidence that he saw 3 men at work on a bulldozer. It is also consistent with Grant's claim for wages for the hours he worked which does not carry the implication that he worked, those hours in a manner which entitled Mr. Berry to claim for those same hours for the use of the D8.

I can do no more than decide this case on the balance of probabilities. That burden being on the plaintiff he fails except to the extent of having established his claim to be paid for 22 hours work at the rate of $140 per hour, that is to say $3,080. There will be judgment for the defendant on the counterclaim for $970.

I am satisfied that this money judgment can be made on the basis of a quantum meruit, rather than a judgment for delivery of loads of marl.

Dated 13 th March 1995.

G.E. Harre

Chief Justice