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

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABUOO68 OF 2006
(High Court Civil Action No. HBC 191 of 2005)

BETWEEN	:	**VIDYA MAHARAJ**	*Appellant*
AND	:	**KENNETH MARK FORD** and **MERELYN RAE FORD**	*Respondents*

Coram : John E. Byrne - Justice of Appeal
D. Pathik - Justice of Appeal
I. Mataitoga - Justice of Appeal

Counsels : P. Sharma for the Appellant
Ms P. Salele for the Respondents

Date of Hearing : 28th August 2007
Date of Judgment: 7th September 2007

JUDGMENT OF THE COURT

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[1] On the 14th of December 2004, the parties entered into a Sale and Purchase Agreement **"(the Agreement)"** for Lot 11, Sovereign Quays DP 9135 situated at Denarau, Nadi. The Appellant was the Purchaser and the Respondents the Vendors. At all relevant times the Appellant lived in Suva and the Respondents in Auckland, New Zealand. A dispute arose

as to the interpretation of Clauses 1 and 2 of the Agreement and the matter came before Jitoko J. in the High Court by way of originating summons.

[2] The provision in question read as follows:

"WHEREAS IT IS AGREED AS FOLLOWS:

1. The Vendor will sell and the Purchaser will purchase all that property described in the Schedule hereto (hereinafter called "the property").

2. The purchase price for the property shall be FJD$360,000 (Three Hundred and Sixty Thousand Fijian Dollars) inclusive of VAT (if any) which shall be paid as follows –

(a) ***by payment of a deposit of FJD $36,000 (Thirty Six Thousand Fijian Dollars) to Q.B. Bale and Associates in trust and as stakeholder for both parties within 5 working days of this Agreement becoming unconditional pursuant to the terms of Clause 3 of this Agreement.***

(b) ***by payment of the balance of FJD $324,000 (Three Hundred and Twenty Four Thousand Fijian Dollars) within 90 days of the Agreement being signed by the Vendors (hereinafter called "the date for completion").***"

[3] The parties are agreed that VAT does not apply to the transaction because the Respondents are not carrying on any taxable activity within the meaning of Section IV of the Value Added Tax Decree 1991 **"(the Decree)"**. In the meantime the sale had proceeded. The Appellant had already paid $320,000.00 to the Respondents' solicitors while a disputed sum of $40,000.00 was placed in trust with the Appellant's solicitors pending the decision of the Court.

[4] The issue before Jitoko J. was whether, in the light of VAT not being applicable to the transaction, the purchase price of FJD $360,000.00 remained the same or, put another way, whether the Appellant was entitled to a 10 per cent refund from the Respondents for a VAT payment that was not due.

[5] The Appellant argued before the High Court that Clause 2 was capable of only one interpretation, namely, that since the Agreement states that the purchase price is VAT inclusive and VAT is not payable, then the price must be $360,000.00 less the VAT component. The Appellant then argued that she would

be extremely prejudiced as the Respondents would be unjustly enriched by receiving in addition, the VAT component of the sale.

[6] In the High Court it was argued by the Respondents that the price quoted in Clause 2 was the only price agreed to by the parties. The $360,000.00 was intended to absorb VAT if VAT was payable, otherwise the price remained fixed at $360,000.00, VAT or no VAT. They submitted that the phrase **"$360,000.00 inclusive of VAT (if any)"** is incapable of any other meaning.

[7] In his Judgment the learned Judge referred to a submission by the Appellant that Clause 2 was unambiguous. It had been submitted to him that the Clause was drafted by the Respondents' Real Estate Agents in New Zealand who ought to have known that the Appellant as Purchaser would rely on the plain and literal meaning of the Agreement. This was that the term **"VAT"**, (if any) clearly meant that VAT was included in the price.

[8] The Respondents argued in the High Court that the price quoted in Clause 2 was the only price agreed to by the parties. It remained constant regardless of whether VAT was payable.

[9] At page 5 of his judgment the Judge remarked that the fact that the Agreement was prepared by New Zealand Real Estate

Agents *"who are unfamiliar with our VAT legislation lends credence to the Plaintiff's argument as to the reason of why the phrase* ***"inclusive of VAT (if any)"*** *was added to Clause 2."* In any case, he said, it seemed to him to be a sound conveyancing, if not legal, practice to state categorically in terms whether the purchase price also included VAT if it were payable. In the result the learned Judge accepted the Respondents' arguments and held that the purchase price was agreed at $360,000.00 notwithstanding the consequence of VAT. He gave judgment for the Respondents and ordered the sum of $40,000.00 held in trust by the Appellant's solicitors be paid to the Respondents.

[10] From that decision the Appellant now appeals to this Court. Four grounds are given as follows:

1. That the learned Judge erred in holding that the Respondents and their Real Estate Agents were uncertain of Fiji's VAT provisions and whether such provisions applied to the sale or not.

2. That the learned Judge erred in not giving due weight to the fact that the Respondents had accepted that the purchase price of $360,000.00 was a VAT inclusive price and as such the true purchase price of the property was $360,000.00 less the VAT component.

3. That the learned Judge erred in holding that the Respondents could retain the VAT component of the purchase price.

4. That the learned Judge erred in holding that the intention between the parties was clear that the purchase price of the property was $360,000.00 notwithstanding the consequences of VAT.

All the grounds are related and we shall consider them together.

[11] It is submitted that there was no evidence to show that the New Zealand Real Estate Agents were not aware of Fiji's VAT legislation. It is said that if the Agreement was drawn up in New Zealand then one must ask what the VAT law is in that country.

[12] We were then referred to the following passage from His Lordship's judgment:

> ***"The Court could only construe the Agreement and specifically Clause 2 in the light of the facts that emerged surrounding the transaction. The fact that the Vendors and their agents who prepared the Agreement were non-nationals and***

the mechanics of payments of specific amounts without contingencies for VAT, can only contribute to the conclusion by this Court that the intention was clear. The purchase price was agreed at $360,000.00 notwithstanding the consequence of VAT."

[13] It is submitted that there was no basis on which to draw such a conclusion as to the intention of the parties in this manner. The mere fact that the Vendors and the Real Estate Agents were non-nationals does not necessarily allow the Court to impute that they were unaware of the VAT law in Fiji. It is submitted that the Court would need to know how many deals the Real Estate Agents concerned have made in the past to ascertain this evidence and to make such findings of fact. It is submitted that it was not proper for the Judge to draw the inferences of fact which he did.

[14] Next it is submitted that what was clear at the time the Agreement was signed was that both parties accepted that the purchase price included VAT and the Respondents were bound to pay the VAT component to the Inland Revenue Authority out of this sale price. It is common ground that at the time the Agreement was entered into neither party knew whether VAT was actually payable. The exemption in this case was only confirmed prior to the date of settlement. Therefore it is said that it was perfectly valid for the Appellant to argue that if VAT

was not payable then she would be entitled to a reduction in the purchase price. The learned Judge is then criticized for placing much emphasis on the fact that the payment schedule in the Agreement for Sale and Purchase also referred to the total purchase price. In doing this, it is argued the Judge failed to take into account that at the time the Agreement was signed the issue of whether VAT was payable was not clear and the purchase price was deemed to be inclusive of VAT.

[15] Lastly it is submitted that by allowing the Respondents to retain the VAT component of the purchase price would result in unjust enrichment to them.

The Respondents' Submissions

[16] We do not propose to go into much detail on the Respondents' submissions which may be briefly stated as arguing that the Trial Judge was correct in his interpretation of the contract.

[17] First they refer to the rule in **Mallan v. May** [1844] 13 M&W 511, 517 and the rule in **Tielens v. Hooper** [1850] 5 Exch. 830 which is as follows:

> ***"Words are to be construed according to their strict and primary acceptation unless from the context of the instrument, and the intention of the parties to be collected from***

it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect".

This statement of the law is linked to what is known as the Parol Evidence Rule.

[18] It is often said to be a rule of law that ***"If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given .... so as to add to or subtract from, or in any manner to vary or qualify the written contract".***

[19] Those words are taken from the judgment of the Court in **Goss v. Lord Nugent** [1833] 5 P. & AD. 58, 64.

[20] In 1897 in **Bank of Australasia v. Palmer** [1897] A.C. 540, 545, Lord Morris accepted that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract. It has been said that one purpose of the "parol evidence rule" is to eliminate *"great inconvenience and troublesome litigation in many instances"* – **Mercantile Agency Co. Ltd. v. Filtwick Chalybeate Co.** [1897] 14 T.L.R. 90.

[21] The Respondents concede that there was no direct evidence before Jitoko J. that the Estate Agent was not familiar with the

VAT law of Fiji but argued that the Court should not speculate about this. We agree. It is perhaps regrettable that the learned Judge should have assumed, albeit briefly at page 5 of his judgment, that the New Zealand Agents were unfamiliar with our local VAT legislation and concluded from that that this was the reason why the phrase **"inclusive of VAT (if any)"** was added to Clause 2 but the Judge clearly did not attach great store to such an inclusion because in the next sentence he says, and we agree. *"In any case, it seems to me to be a sound conveyancing, if not legal, practice to state categorically in terms if the cost price or bid also included VAT if it is payable".*

[22] If the Appellant had any doubts or misgivings as to the meaning of Clause 2 then there was no reason why she should not have requested an alteration or clarification of the Clause, but she did not.

[23] In the High Court the Appellant relied on two local cases, **Charan-Katonivere Holdings Ltd. v. NBF Asset Management Bank HBC** 585/1999 and **Tacirua Transport Company v. Vakatora Holdings & Ors**. HBC 191/1998.

[24] In the former case Shameem J. found that the acronym **"VIP"** meant **"VAT inclusive price"** and this in turn meant that if it were found that VAT was not payable, then the Vendor could

not retain the VAT component. A similar conclusion was drawn by Scott J. in the second case.

[25] His Lordship, properly held that these two cases were clearly distinguishable from the facts of the present case. In both of them, the Court had ordered the return of the VAT components because it found as a matter of fact that the parties were fully aware that VAT was intended to form part of the sale or tender price. He also relied on two overseas cases, **Capital Enterprises Ltd. v. Stewart** [1998] 18 NZTC 13, 870 & **Jay Marke Development Ltd. v. Elinacre Ltd.** (In liquidation) & Ors. [1992] STC 575, a decision of the Scottish Court of Exchequer.

[26] In **Capital Enterprises Ltd. v. Stewart** a Sale and Purchase Agreement expressed the purchase price to be *"inclusive of GST (if any)"*. The High Court of New Zealand held that by inserting the clause *"inclusive of GST (if any)"* after the price, the parties provided for, or at least contemplated, what was to happen if GST was assessed on the transaction. They expressly provided that if there was any such assessment it was not to affect the price paid by the purchaser.

[27] Likewise in the Scottish case the purchase price of some agricultural land was stated as *"deemed to be inclusive of value added tax"*. The Court held that the words of the clause were capable of bearing the meaning that the purchase price was

payable in full whether or not value added tax was payable by the sellers and, in the context of the contract as a whole, that meaning was to be preferred.

[28] In our judgment both these cases bear directly on the present one and are almost on all fours with it.

[29] We find that the learned Judge committed no error and that his decision must be upheld. For these reasons we dismiss the appeal and order the Appellant to pay the Respondents' costs which we fix at $1,000.00.

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Byrne JA

FIJI COURT OF APPEAL

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Pathik JA

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Mataitoga JA

At Suva

7th September 2007