IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Judicial Review No. 3 of 2011
Converted to Action No. 222 of 2013

BETWEEN : 1. GENERAL MACHINERY HIRE LIMITED a limited liability company having its registered office at 21 Bouwalu Street, Lautoka.

2. PRAUSHILA DEVI SINGH of Lautoka, Company Director.

3. ALVIN KUMAR SINGH of Lautoka, Company Director.

4. AJNIL KUMAR SINGH of Lautoka, Company Director.

PLAINTIFFS

AND : CHIEF EXECUTIVE OFFICER of FIJI REVENUE AND CUSTOMS AUTHORITY

DEFENDANT

Appearances : Mr B. C. Patel with Mr C B Young for the plaintiffs

Mr F. Haniff for the defendant

Date of Judgment : 9 March 2018

JUDGMENT

Introduction

[01] The Plaintiffs brought this action against the defendant seeking the following relief:

(a) A declaration that the Deed of Settlement dated 9 July 2010 was lawfully entered into by and was binding on the defendant.

(b) A declaration that the Deed of Settlement dated 9 July 2010 was lawfully varied on 25 November 2010 and the variation was binding on the defendant.

(c) A declaration that the Deed of Settlement dated 9 July 2010 as lawfully varied on 25 November 2010 continued in full force and effect beyond 24 February 2011 and was binding on the defendant.

(d) A declaration that the Deed of Settlement dated 9 July 2010 as lawfully varied on 25 November 2010 was further varied on 10 March 2011 and such variation was binding on the defendant. Alternatively, the variation made on 25 November 2010 was confirmed on 10 March 2011 and was to continue in full force and effect beyond 10 March 2011 and was binding on the Defendant.

(e) A declaration that all the Notices of Garnishee issued by the defendant in respect of the second, third and fourth named plaintiffs between 9 July 2010 and 10 August 2011 were unlawful and null and void.

(f) A declaration that the DPOs issued by the defendant against the second, third and fourth named plaintiffs on 24 May 2011 and 27 June 2012 were unlawful and null and void.

(g) A declaration that the plaintiffs have overpaid to the defendant under the Deed of Settlement dated 9 July 2010.

(h) An order that the defendant refund to the plaintiffs all monies overpaid under the Deed of Settlement dated 9 July 2010 together with the interest thereon calculated from the due date to the date of payment at the rate of 12% per annum compounded monthly or at such other rate or for such other period as may seem just to this Honourable Court.

(i) An order that any provision of the Deed of Settlement dated 9 July 2010 as varied which is unenforceable should be severed from it and the remaining Deed as severed confirmed as binding on the defendant.

(j) Exemplary or aggravated damages for misfeasance in public office.

(k) Alternatively, exemplary or aggravated damages for acting without jurisdiction and unlawfully under s.27 and/or s.31 of the Tax Administration Decree 2009.

(l) Exemplary or aggravated damages for acting unlawfully and/or in bad faith between 25 November 2010 and 30 June 2012.

(m) Damages for loss of business etc. (to be quantified at trial).

(n) Costs of these proceedings on an indemnity basis.

(o) Such further or other Orders as this Honourable Court deems just.

[02] The claim is based on three causes of action namely loss of personal liberty; loss of reputation and loss of business. Basically, the claim arises out of a Deed of Settlement (the *Deed*) entered into between the parties in relation to the payment of income tax as assessed in the amended assessment issued by the defendant (now *FRCA*) The plaintiffs plead that:

(a) Breach of the Deed of Settlement as varied on 25 November 2010;

(b) The tort of misfeasance in a public office; Alternative to (b),

(c) Unlawful DPOs;

(d) Unlawful Garnishees; and

(e) Acting in bad faith.

[03] Initially, the action was brought by way of judicial review but was subsequently converted to a writ action by the Court of Appeal order delivered in Civil Appeal No. ABU 20 of 2012 on 5 March 2014.

[04] On 3 November 2016, the court made consent orders to admit 8 Affidavits as evidence of their deponents, subject to cross examination. At the trial, both the parties gave oral testimony. Mr Ajnil Kumar Singh, the 4th plaintiff (PW1) & Ms Lusiana Marama (PW2) gave evidence for the plaintiff while Mr Moala Nata (DW1); Mr Rajnesh Lal (DW2); Mr Mohammed Asif Haniff (DW3) and Ms Laisa Draunibaka (DW4) gave evidence for the defendant.

[05] I am very grateful to Mr B. C. Patel, counsel for the plaintiffs and Mr F. Haniff and their team for the quality of arguments they have presented by way of written submissions.

Background

[06] I have extracted the background facts from the defendant's written submissions.

[07] In 2010, FRCA (the defendant) carried out an audit of the plaintiffs' tax affairs for the tax years ending 2000 to 2007. The audit related to income tax for those years only and company VAT. The audit of company VAT was limited to the sale of sub-divided commercial lots. As a result of the audit, the plaintiffs were assessed the additional undeclared income of FJ$8,612,400. The tax payable out of the undeclared income of FJ$8,612,400 was $2,079,952.00. The penalties excluding tax were $1,017,845.37. The total taxes and penalties for the discovered undeclared income were $3,097,797.37.

[08] Subsequently, FRCA issued Amended Notices of Assessments to the plaintiffs. This amount assessed for each of the plaintiffs was as follows:

Amended Assessments

Praushila Devi Singh	$ 1,164,800.00
Alvin Kumar Singh	$ 748,800.00
Ajnil Kumar Singh	$ 748,800.00
General Machinery Hire Ltd (Income Tax)	$ 2,800,000.00
General Machinery Hire Ltd (VAT)	$ 3,150,000.00
TOTAL	**$ 8,612,400.00**

[09] The total taxes, excluding penalties, payable for the additional undeclared income of FJ$8,612,400.00 was FJ$2,079,952.00. This figure was made up as follows:

Total Taxes excluding Penalties

Praushila Devi Singh	$ 377,104.00
Alvin Kumar Singh	$ 242,424.00

Ajnil Kumar Singh	$ 242.424.00
General Machinery Hire Ltd (Income Tax)	$ 868,000.00
General Machinery Hire Ltd (VAT)	$ 350,000.00
TOTAL	**$ 2,079,952.00**

[10] The total penalties for additional undeclared income of FJ$8,612,400.00 was $1,017,845.37. This figure was made up as follows:

Total Penalties Excluding Taxes

Praushila Devi Singh	$ 282,828.00
Alvin Kumar Singh	$ 181,818.00
Ajnil Kumar Singh	$ 181,818.00
General Machinery Hire Ltd (Income Tax)	$ 283,881.37
General Machinery Hire Ltd (VAT)	$ 87,500.00
TOTAL	**$ 1,017,845.37**

[11] The total taxes payable, including penalties by the plaintiffs arising out of the additional undeclared income of FJ$8,612,400.00 was $3,097,797.37. The figure was made up as follows:

Total Taxes & Penalties

Praushila Devi Singh	$ 659,932.00
Alvin Kumar Singh	$ 424,242.00

Ajnil Kumar Singh	$ 424,242.00
General Machinery Hire Ltd (Income Tax)	$ 1,151,881.37
General Machinery Hire Ltd (VAT)	$ 437,500.00
TOTAL	**$ 3,097,797.37**

(See Exhibit 6 at paragraphs 14 to 17)

[12] There was a further integrated audit carried out relating to plaintiffs company VAT and plaintiffs' income. Further assessments were issued to the first plaintiff. There are court proceedings on foot in the Tax Court in Suva over these assessments. (Exhibit 15 and Exhibit 16 being the Statement of Claim and Defence respectively in the Tax Court of the High Court of Fiji Action No. HBTC 1 of 2013)

Plaintiff Proposes Settlement

[13] Following the issue of the Amended Assessments, the plaintiffs proposed settlement of their tax liabilities and penalties. The parties then signed a Deed of Settlement for the Amended Assessments issued by the defendant.

Deed of Settlement

[14] The Deed of Settlement (Exhibit 7 at Annexure MN 7) gives the background to the Deed of Settlement. It says:

> [1] In early 2010, FRCA issued a number of Amended Assessments in relation to tax audits of General Machinery Hire Limited and its directors.
>
> [2] On 20 May 2010, General Machinery Hire Limited and its directors lodged an objection to the Amended Assessments with FRCA followed by another objection lodged in the same matter by Munro Leys on 5 July 2010, on behalf of General Machinery Hire Limited.

[3] Whilst FRCA was processing the objection and auditing other tax issues, General Machinery Hire Limited and its directors, on the 8 July 2010, proposed for a settlement of the tax liabilities.

[4] General Machinery Hire Limited and its directors and FRCA have agreed to settle the tax liabilities in the matter set out in this Deed".

Main Terms of the Deed of Settlement

[15] The main terms of the settlement is recorded at Clause A, B and E of the Deed of Settlement. Clauses A, B and E say:

"[A] *General Machinery Hire Limited and its directors will pay the amount of FJ$1,729,952.00 to FRCA (on signing of this Deed) representing income taxes in respect of the years 2000 to 2007.*

[B] *In relation to [A] above the settlement to be effected as follows:*

(i) *FJ$500, 000.00 as part payment of the outstanding tax liability of FJ1, 729,952.00.*

(ii) *The balance to be paid FJ$50,000.00 per month for four months for review by 31st October 2010 in view of full settlement.*

(iii) The full settlement to be cleared by 15th December, 2010 for Company and its directors.

[E] ***Full waiver of penalties upon settlement of full tax liability of FJ$1,729,952.00 as in clause (A) above by 15th December 2010.*** *(My emphasis)*

[F] *VAT Audit to be suspended until full settlement of income taxes by 15th December 2010."*

Payment Mechanism under Deed of Settlement

[16] $500,000.00 was payable immediately on the signing of the Deed of Settlement in terms of Clause B (i) of the Deed of Settlement. Clause B (ii) required that a 'balance to be paid FJ$50,000.00 per month for four months for review by 31 October 2010, in view of the full settlement.

[17] On 20 August 2010, the defendant applied for a refund of $308,888.93 towards the outstanding taxes and penalties under the Deed of Settlement. After 31 October 2010 (the review date), the balance owing under the Deed of Settlement was $768,703.07. This amount was to be paid by 15 December 2010, in terms of the Deed of Settlement.

[18] Notably, the Deed of Settlement provides no repayment schedule for the period between 1 November 2010 and 15 December 2010. The $50,000.00 per month was for four months only i.e. by 31 October, 2010 – Clause B (ii).

[19] The plaintiffs defaulted in the payment as per the Deed of Settlement. The remaining balance of $768,703.07, which was to be paid by 15 December 2010 (See Clause B (iii)).

[20] According to the plaintiffs, they applied for an extension of time for payment beyond 15 December 2010 and it was allowed by the FRCA.

[21] The FRCA denies granting any extension for payment beyond 15 December 2010. The FRCA issued process such as DPO and Garnishee to recover the remaining balance payable under the Deed of Settlement and recovered.

[22] The plaintiffs bring this action against the FRCA and claim damages on the ground that the DPO and the Garnishee issued by the FRCA against the plaintiffs are unlawful and null and void given that there was an extension of time allowed by the FRCA to make payment beyond 15 December 2010.

The Issues

[23] The following issues were raised for determination by the court.

(a) Was the Deed of Settlement signed on 9 July 2010 ("the Deed") binding on the defendant?
(b) Was the Deed validly varied on 25 November 2010?
(c) Did the Deed continue to apply after 24 February 2011?
(d) Was the defendant's purported termination of the Deed by letter dated 25 February 2011 (served at midday on 24 February 2011) valid?
(e) Were the DPOs issued against the second, third and fourth plaintiffs on 24 May 2011 lawful?
(f) Were the Garnishees dated 18 May 2011 to Bank of Baroda, Lautoka, lawfully issued and executed?
(g) Did the defendant commit the tort of misfeasance in public office or act in bad faith?
(h) Are any of the plaintiffs entitled to damages against the defendant for (i) deliberate breach of the Deed (ii) misfeasance in public office or alternatively for (iii) unlawful DPOs, (iv) unlawful Garnishees and (v) for acting in bad faith?
(i) Was there an overpayment of $100,187.57 under the Deed on 31 March 2011?

Agreed Facts

[24] At the PTC, the following facts are admitted by the parties:

1. The first named plaintiff is, and was at all material times, a limited liability company having its registered office at 21 Bouwalu Street, Lautoka.

2. The second, third and fourth named plaintiffs are, and were at all material times, the directors and shareholders of the first named plaintiff.

3. The first named plaintiff has been carrying on the freight and cartage business from Lautoka since 1983.

4. Each of the named plaintiff is, and was at all material times, a registered tax payer under the Income Tax Act having Tax Identification Number as follows:

Company	-	TIN: 50-06705-0-7
Praushila Devi Singh	-	TIN: 19-11899-1-7
Alvin Kumar Singh	-	TIN: 19-35774-0-6
Ajnil Kumar Singh	-	TIN: 19-39428-0-8

5. At all material times the defendant acted by his Acting General Manager Taxation and Compliance Auditor.

6. On 26 May 2010, the defendant served Departure Prohibition Order ("DPOs") at 21 Bouwalu Street, Lautoka for:

   (i) The second named plaintiff, Praushila Devi Singh;
   (ii) The third named plaintiff, Alvin Kumar Singh; and
   (iii) The fourth named plaintiff, Ajnil Kumar Singh.

7. On 17 June 2010, the defendant issued Notices of Garnishee in respect of the second, third and fourth named plaintiffs to:

   (i) Bank of Baroda, Suva in respect of Praushila Devi Singh for $918,345.98;
   (ii) Bank of Baroda, Suva; ANZ Bank, Suva and Westpac Banking Corporation, Suva in respect of Alvin Kumar Singh for $418,029.46.
   (iii) Bank of Baroda, Suva; ANZ Bank, Suva and Westpac Banking Corporation, Suva in respect of Ajnil Kumar Singh for $414,006.47.

8. At the plaintiffs request made in writing on 9 July 2010, and following a meeting between the fourth named plaintiff and Acting General Manager Taxation, the defendant exercised its powers under section 25 and 48 of the Tax Administration Act 2009 a compromise was reached between the plaintiffs and the defendant.

9. The agreement between the plaintiffs and the defendant was reduced to writing and contained in a Deed of Settlement dated 9 July 2010.

10. Pursuant to the Agreement:

   (i) The plaintiffs paid $500,000.00 to the defendant on 9 July 2010;

(ii) The defendant withdraw all the Garnishees and DPOs on 9 July 2010; and;

(iii) The plaintiffs and defendant signed the Deed of Settlement on 11 and 13 July 2010 respectively.

11. The Deed of Settlement provided inter alia:

"A. General Machinery Hire Ltd and its directors will pay the amount of FJ$1,729,952.00 to FIRCA (on signing of this Deed) representing income taxed in respect of the years 2000 to 2007).

B. In relation to (A) above the settlement to be effected as follows:

(i) FJ$500,000.00 as part payment of the outstanding tax liability of FJ$1,729,952.00.

(ii) The balance to be paid FJ$50,000.00 per month for four months for review by 31st October 2010, in view of full settlement.

(iii) The full settlement to be cleared by 15th December, 2010 for the Company and its directors.

C. Departure Prohibition Orders to be revoked upon settlement of part payment as in clause B (i) above.

D. Garnishee Orders to be revoked upon settlement of part payments as in clause B (i) above.

E. Full waiver of penalties upon settlement of full tax liability of FJ$1,729,952.00 as in clause (A) above by 15th December 2010.

F. VAT Audit to be suspended until full settlement of income taxes by 15th December 2010.

G. The tax audits by FRCA on General Machinery Hire Limited and its directors in respect of income tax issues for the years 2000 to 2007 are now closed.

H. That in relation to the tax liability as comprised in amended assessments for the years 2000 to 2007 for the sum of FJ$1,729,952.00, there shall be no objection/appeal by General Machinery Hire Limited and its directors, in respect of that amended assessments. The objection letter lodged by Munro Leys on behalf of General Machinery Hire Limited on 5th July is now withdrawn in full.

I. There shall be no further objection/appeal by General Machinery Hire Limited and its directors, their representatives or agents or nominees in respect of any amended assessments for the years 2000 to 2007.

J. Upon signing of this Deed, any matter directly or indirectly relating to the subject matters, as contained in Clauses 1, 2, 3 and 4 of this Deed, shall not be further disputed by either party, their representatives or agents or nominees.

K. There shall be no proceedings taken by party, their representatives or agents or nominees in respect to any clause of this Deed, in any court of law.

L. The parties undertake to maintain strict confidentiality of this Deed and its terms.

12. The plaintiffs made payments to the defendant for the months of August, September and October 2010, pursuant to paragraph B (ii) of the Deed of Settlement.

13. The plaintiffs paid to the defendant:

(a) $350,000.00 on 25 November 2010, including November payment of $50,000;

(b) $50,000.00 on 29 December 2010; and

(c) $50,000.00 on 31 January 2011.

14. The defendant, by letter of 11 February 2011, demanded payment of income tax arrears, VAT arrears and penalties from the plaintiffs as follows:

    (i) the second named plaintiff, Praushila Devi Singh, a total of $973,906.50;

    (ii) the third named plaintiff; Alvin Kumar Singh, a total of $321,722.14; and

    (iii) the fourth named plaintiff, Ajnil Kumar Singh, a total of $329,200.41.

15. On 24 February 2011, the plaintiffs paid to the defendant the sum of $50,000.00.

16. After receiving the $50,000 on 24 February 2011, the defendant purported to repudiate the Deed of Settlement by serving his letter dated 25 February 2011, at midday on 24 February 2011, stating therein that the defendant will no longer comply with the Deed *"since it is null and void of any legality soon after the company breached Clause B (ii)..."*.

17. On 25 February 2011, the plaintiffs wrote to the defendant. Despite that letter, the defendant issued letters on the same day, 25 February 2011, to the second, third and fourth named plaintiffs seeking information about matters settled by the Deed of Settlement.

18. On 16 March 2011, the defendant advised the plaintiffs that the Deed of Settlement was *"now null and void of any legality"*.

19. On 31 March 2011, the plaintiffs made the March payment of $50,000.00 to the defendant.

20. On or about 6 April 2011 the defendant issued fresh Notices of Garnishee to:

    (i) Bank of Baroda, Suva in respect of Praushila Devi Singh for $869,820.58 and $65,886.27;

(ii) Westpac Banking Corporation, Suva in respect of Alvin Kumar Singh for $286,998.58; and

(iii) Westpac Banking Corporation, Suva in respect of Ajnil Kumar Singh for $290,612.03.

21. On 13 April 2011, the plaintiffs wrote to the defendant.

22. The defendant did not reply to the plaintiffs letter of 13 April 2011.

23. The plaintiffs then Solicitors, Vijay Naidu & Associates, wrote to the defendant on 15 April 2011; 6 May 2011; 9 May 2011 and 18 May 2011.

24. On 28 April 2011, the plaintiffs paid $40,000.00 to the defendants and the defendant obtained $10,000.00 under fresh Garnishees to make up the April payment of $50,000.00.

25. On 19 May 2011, the defendant replied to the plaintiffs Solicitors, Vijay Naidu & Associates.

26. On or about 24 May 2011, the defendant issued fresh DPOs against the second, third and fourth named plaintiffs.

27. The plaintiffs paid $50,000.00 to the defendant on 31 May 2011.

28. On 1 June 2011, the defendant issued Notices of Garnishee in respect of the second named plaintiff, Praushila Devi Singh to:

(i) Receivers of Denarau Investment Ltd & Denarau Internal Limited for $256,401.00;
(ii) Receivers of Denarau Investment Ltd & Denarau International Limited for $83,343.78.
(iii) Manjula Jeram of Denarau Investment Ltd for $82,343.78; and
(iv) Manjula Jeram of Denarau Investment Ltd for $628,941.00

29. On 8 July 2011, the defendant made a demand on the third named plaintiff, Alvin Kumar Singh, and fourth named plaintiff, Ajnil Kumar Singh, to pay $244,874.91 and $248,006.72 respectively.

30. On 15 June 2011, the defendant made a demand on the second named plaintiff, Praushila Devi Singh, to pay $339,745.18.

31. On 15 August 2011, the plaintiffs issued judicial review proceedings against the defendant.

32. On 25th October 2011, the Defendant withdrew the DPOs against the second, third and fourth named plaintiffs.

33. On 27 June 2012, the defendant issued new DPOs against the second, third and fourth named plaintiffs and these DPOs were still in force on 20 December 2013.

The Evidence

Plaintiffs

[25] In his first affidavit dated 12 August 2011, Ajnil Kumar Singh, the 4th named plaintiff (**Exb.1**) deposed that:

(a) General Machinery Hire Limited was engaged in the freight and cartage business from Lautoka since 1983. Plaintiffs 2, 3 and 4 are the Directors of the Company being the Mother and her two sons, respectively. Following an audit of the plaintiffs tax affairs, the defendant issued Notices of Amended Assessment to the Company on 4 May 2010, and to each of the Directors on 21 May 2010, for the tax years ending 31 December 2000 to 31 December 2007. They were assessed with additional income taxes and penalties.
(b) The defendant issued DPOs and Garnishees against the Second, Third and Fourth plaintiffs.
(c) The plaintiffs filed an Objection to the Amended Assessment through Munro Leys, Lawyers of Suva.
(d) But the plaintiffs desired to settle the demands for tax and penalties with the defendant for the following reasons deposed by Ajnil at paragraph 12 of his first affidavit:

"Meeting with Mr Nata – 9/7/10

12. *I made an appointment to see Mr. Moala Nata of Fiji Revenue & Customs Authority, Suva on 9 July 2010 to discuss the Notices of Amended Assessments dated 21 May 2010; the DPOs and the*

> *Notices of Garnishee.* ***The Notices of Garnishee had the effect of freezing all our business and personal accounts. That effectively crippled the operation of the Company's business. It became imperative to get the Defendant to withdraw the Notices of Garnishee urgently to allow the operation of the Company's business.***
>
> *On the previous day, 8 July 2010, my mother, my brother, the company Accountant, Magan Lal, and I discussed the matter at great length and came to the conclusion that the quickest way forward was to reach a compromise with the Defendant and offer to pay a large down payment. We then persuaded Bank of Baroda to advance us $500,000.00 to pay the Defendant. The Bank issued the cheque payable to the Defendant on that day and I took that cheque with me to Suva on 9 July 2010."*

(e) The parties then entered into negotiations and eventually came to an agreement, which was reduced to writing in the form of the Deed of Settlement executed on 9 July 2010.

(f) The plaintiffs then withdrew their filed Objection to the Amended Assessment.

(g) The Deed provided for payment of the ***total tax liability of $1,729,952.00*** by payment of $500,000.00 upon signing and periodic payments of $50,000.00 per month for four months with full settlement on 15 December 2010.The plaintiffs paid the $500,000.00 and made payments of $52,360.00 for August and $50,000.00 for each of the months of September and October 2010.

(h) The Deed also provided **for review by 31 October 2010.** However, Nata was not able to meet with Ajnil on that day. They eventually met on 25 November 2010. At that meeting, Ajnil handed Nata a letter dated 24 November 2010 requesting an extension of the deadline of 15 December 2010, to the end of June 2011 with payments of $50,000.00 a month.

(i) Nata agreed to extend the deadline to 24 February 2011 and he also agreed that on which date **he would meet and review all arrangements. At Ajnil's request** he wrote in hand on the plaintiffs' copy of the letter.

> *".....accept the payments as it is ok.*
> *Apportion the $50,000.00 amongst the Directors equally.*
> ***I will meet and review all arrangements on 24/2/2011".***

(j) About two weeks before the promised meeting of 24 February 2011 took place, the defendant wrote to the plaintiffs on 11 February 2011 stating that *"in view of your default in the payment of taxes due, 25% late payment penalty has been charged under the provisions of s44 of the Tax Administration Decree"* and demanded payment of income tax, VAT arrears and penalties.

(k) The plaintiffs continued to make payments under the Deed including a payment on 24 February 2011.

(l) At midday on 24 February 2011, the defendant faxed a letter to the plaintiffs **(dated 25 February 2011)** stating that the plaintiffs had breached the Deed of Settlement and that the defendant *"will no longer comply with the deed since it is null and void of any legality soon after the company breached (the) clause (for full settlement by 15 December 2010). Therefore, the audit of your company directors for the years from 2000 to 2007 and thereafter will continue from now".*

(m) Between 25 February 2011 and 2 March 2011, the plaintiffs tried very hard to contact Nata for the meeting.

(n) On 2 March 2011, Ajnil met Mohammed Asif Hanif and Rajnesh Lal but Nata was not present. When explained the purpose of the meeting Hanif and Lal agreed Nata should be present and also agreed to meet with him on 10 March 2011.

(o) On 10 March 2011, Ajnil met Nata, Mohammed Asif Hanif and Rajnesh Lal at FRCA Office in Suva. When the meeting started, Ajnil briefly reminded Nata about the previous discussions at which point Nata said he did not wish to have anything further to do with General Machinery Hire Limited and left the meeting. Ajnil then handed a letter dated 9 March 2011, to Asif Hanif. He and Rajnesh Lal read the letter. Then both Asif Hanif and Rajnesh Lal told Ajnil to keep making the monthly $50,000.00 payment as per the arrangement with Nata of 25 November 2010. They did not discuss the matter further.

(p) On 16 March 2011, the defendant wrote to the plaintiffs reaffirming its earlier position that the Deed was null and void as far as he was concerned.

(q) The plaintiffs continued to make payments and the defendant, pursuant to garnishee orders, obtained payments from the plaintiff's bank account in March, April and May 2011, including the garnishee to Bank of Baroda on 18 May 2011.

(r) The plaintiffs' previous solicitors; Vijay Naidu wrote several letters to the defendant in April and May, but none were replied to until 19 May 2011, when the reply said to continue discussions with Nata.

(s) On 24 May 2011, the defendant issued DPO against the second, third and fourth plaintiffs.

(t) On 31 May 2011, the plaintiffs' accountant and solicitor met with Nata but were told that no further discussions would be entered into in respect of the Deed of Settlement.
(u) By then the plaintiffs had overpaid the amount due under the Deed by $100,187.57.
(v) On 25 October 2011, the defendant revoked the DPOs issued against the second, third and fourth plaintiffs.
(w) PW1 also filed a Supplementary Affidavit on 23 February 2012 **(Exb. 4)**, providing evidence of plaintiff's loss and damage.
(x) PW1 supplemented his affidavit evidence by his oral testimony.

Defendant's evidence

[26] Moala Nata (DW1), Rajnesh Lal (DW2), Mohammed Asif Hanif (DW3) and Luisa Draunibaka (DW4) gave oral testimony for the defendant.

[27] DW1 filed his first affidavit sworn on 12 October 2011 (Exb.2) in reply to Ajnil's first affidavit dated 12 August 2011.

Discussion

[28] This litigation arises out of the Deed of Settlement ('the Deed') that the plaintiffs, General Machinery Hire Limited ('GMHL') and its three directors and the defendant, Fiji Revenue & Customs Authority ('FRCA'), entered into. It is GMHL's case that FRCA failed to abide by the terms of the Deed and issued unlawful DPOs and Garnishees.

[29] FRCA's case is that GMHL repudiated the Deed by its default to pay and settle the tax and penalties compelling FRCA to proceed with the recovery process to recover such tax and penalties.

[30] By signing the Deed, GMHL accepted that the whole of the settlement sum of $1,729,952.00 was to be paid by 15 December 2010. It will be noted that GMHL, through this arrangement, were getting a discount of $1,367,845.37 on their tax liabilities on the condition that the whole amount of $1,729.952.00 was paid by 15 December 2010. According to FRCA, this was the basis upon which the defendant signed the Deed of Settlement.

[31] It is common ground that the payment of $1,729,952.00 was not paid in full by 15 December 2010. As at 15 December 2010, there was still a balance of $768,703.07 that had not been paid, in breach of the Deed.

Whether the Deed validly varied on 25 November 2010

[32] I have to decide on the issue whether the Deed was validly varied on 25 November 2010.

[33] The plaintiffs take the stance that there was a written variation of the Deed. The written variation relied on is:

> *"NMOMU/LEU/ACCU.D Lal.*
>
> *Accept the payment as it is ok.*
> *Apportion the $50,000 amongst the directors equally*
> *I will meet and review all arrangements on 24/2/2011*
> *MN 25/11/10"*

[34] It appears that the plaintiffs are relying on "I will meet and review all arrangements on 24/2/2011" in support of their assertion that there was a variation to the Deed.

[35] The Deed carries a review by 31 October 2010, in view of Full Settlement. **Clause B (ii)** provides:

> *"(ii) The balance to be paid FJ$50,000.00 per month for four months for review by 31st October 2010 in view of full settlement."*

[36] Ajnil met Nata on 25 November 2010, when Ajnil handed Nata a letter dated 24 November 2010 requesting an extension of the deadline of 15 December 2010 to the end of June 2011 with payments of $50,000.00 a month. Nata wrote in hand on a copy of that letter the words that appear in para 33 of this judgment. The plaintiffs' letter dated 24 November 2010 reads:

"We are in no situation to pay this large sum by 15th of December because our sale always goes slow from November mid till March. Our Major Contract with F.S.C. has also taken a wrong turn, where we are not able to get the volume for cartage thus cannot meet with the Bank repayments as well. Also, generally, imports and Exports have also dropped on which our General Cartage depends upon.

Sir, it is difficult time for General Machinery today to even meet bank repayments on timely manner but we assure you that with your approval for extension, it will benefit our Company and all the 300 employees that we employ currently.

We propose that we will pay $350,000.00 with $300,000 via Bank cheque and $50,000.00 with company cheque. The balance to be at $50,000.00 every Month from December to fulfill the requirements and Pay fully before end of June 2011. Sir, I think that this would be reasonable and we will both benefit from this new settlement."

[37] Mr Patel, counsel for the plaintiffs submits that the plaintiff had requested for a time until 30 June 2011 and Nata, at that time was not disposed to the request to meet and review all arrangements on 24 February 2011.

Tax Administration Act 2009 (TAA) (No 50 of 2009)

[38] The plaintiffs rely on sections 25 and 48 of the TAA to buttress their arguments of variation to the Deed. They contend that their request for an extension of time by way of their letter dated 24 November 2010 fell within the ambit of **s.25 TAA**, which states:

"Extension of time to pay tax

"25 (1) A taxpayer may apply, in writing, to the CEO for an extension of time to pay tax due under a tax law.

(2) If an application has been made under this section, the CEO may, having regard to the circumstances of the case –

(a) grant the taxpayer an extension of time for payment of the tax due; or

(b) *require the taxpayer to pay the tax due in such instalments as the CEO may determine, and the CEO must serve the taxpayer with written notice of the decision.*

(3) *If a taxpayer permitted to pay tax by instalments defaults in the payment of an instalment, the whole balance of the tax outstanding, at the time of default, is immediately payable."*

[39] Section 48 TAA contains provisions relating to penalty and remission of penalty payable by a person liable to pay a penalty. That section provides:

"General provisions relating to penalty

(1) *A liability for penalty is calculated separately with respect to each section in this Subdivision.*
(2) *A person cannot be liable for penalty if the person has been convicted of an offence for the same act or omission.*
(3) *If a penalty has been paid under this Subdivision and the CEO institutes a prosecution under Subdivision 2 of this Part in respect of the same act or omission, the CEO must refund the amount of the penalty paid, and no penalty is payable unless the prosecution is withdrawn.*
(4) *A person is liable for penalty only if the CEO –*
  (a) *makes an assessment of penalty imposed under this Subdivision; and*
  (b) *Serves notice of the assessment on the person subject to the penalty stating the amount of penalty payable and the due date for payment.*
(5) *Subsection (4) applies also to penalty imposed under a tax law (other than this Act).*
(6) *A person liable to pay a penalty may apply in writing to the CEO for remission of the penalty payable and such application must include the reasons for the remission.*
(7) *The CEO may, upon application under subsection (6) or on the CEO's own motion, remit, in whole or in part, any penalty payable by a person other than that imposed under section 46.*
(8) *Nothing in this Subdivision precludes the imposition of penalty under a tax law (other than this Act), although the same act or omission cannot be subject to –*
  (a) *The imposition of penalty under more than one provision; or*
  (b) *Both the imposition of penalty and prosecution for an offence."*

[40] The plaintiffs applied in writing, in terms of s. 48 (6), for the remission of the penalties (see Neil Shivam's letter of 8 July 2010-Exb.6 Annexure MN5). The letter reads:

"Dear Sir
Re: Income Tax: General Machinery Hire Limited – 50-06705-0-7

Prausila Devi Singh – 19-11899-1-7
Alvin Kumar Singh – 19-35774-0-6
Ajnil Kumar – 19-39428-0-8
Departure Prohibiting Order/Account Garnishee

We act for the above mentioned clients.

We refer to your assessment of tax, various garnishees and the Departure Prohibiting Order.

Our client proposes the following as settlement of tax liability till to date.

1. *That the assessment in total for the above for tax payers be raised to the sum of $1,729,952-00.*
2. *That our clients shall pays a sum of $500,000-00 immediately.*
3. *Thereafter, our client will pay a sum of $50,000-00 per month until 31st October 2010.*
4. *Both parties will conduct a meeting on or before 29th October 2010 and review the payment schedule.*
5. *That FIRCA will upon receipt of $500,000-00 (1st payment) discharge/cancel the Departure Prohibiting Order and lift all garnishees in respect of this assessment.*
6. *That FIRCA will not impose any other methods of tax collection as long as our client complies with the proposed arrangement.*
7. *That FIRCA will maintain the waiver of penalty as long as our client complies with the proposed arrangement.*
8. *That the outstanding vat will be discussed and settled separately after 15th November 2010.*

We hope the above is satisfactory and will be accepted by FRICA.

Please advise your position."

[41] As a result of the Deed of Settlement, the plaintiffs agreed to withdraw their objection of the amended assessments and to make an immediate payment of $500,000.00 towards their tax liability and the defendant agreed to give the plaintiffs time to pay the balance of their tax liability by instalments and agreed to waive all the penalties other than $101,872.30.

[42] It will be noted that no tax was waived by this arrangement or the Deed, only penalties were remitted.

[43] The defendant had the discretion, in terms of s.48 (7) TAA, to remit, in whole or in part, any penalty payable by the plaintiffs other than that imposed under s.46. Section 46 penalty (penalty for making a false or misleading statement) was not involved here.

[44] The defendant had power to allow a tax payer to pay the tax due in instalments (s.25 (2)) and to remit the penalty in whole or in part (s.48 (7). By the Deed of Settlement, the defendant agreed to give the plaintiffs the time to pay their tax liability in instalments and agreed to remit the penalty. I agree with the plaintiffs' submission that the defendant had the powers to enter into the Deed and the defendant lawfully executed the Deed on 9 July 2010.

[45] In regards to s. 25 TAA, Mr Hanif counsel for the defendant submits: First, there was no decision made by the defendant on the plaintiffs' request for an extension of time to pay beyond 15 December 2010. The words "I will meet and review all arrangements on 24/2/2011" as relied on by the plaintiffs' is not a decision whether to extend the time to pay tax in terms of section 25(2)(a)(b). It is not a decision to grant the taxpayer – the plaintiffs' – an extension of time for payment of the tax due. Even the plaintiffs accept that no decision on extending the time for payment under the Deed of Settlement had been made when Mr Nata met with Mr Ajnil Singh on 25 November 2010: (see paragraph 55 of the plaintiff's submissions). In fact, Mr Nata was not disposed to grant time to extend the payment as requested by the plaintiffs. In his evidence, Mr Nata said he "flat rejected" the plaintiffs' request to extend the time for payment of the settlement to 30 June 2011. Secondly, if a decision was made under 25(2) (a) (b), the defendant was required to serve a written notice of the decision. There is no written decision of the defendant to extend the payment under the Deed of Settlement beyond 15 December 2010. Mr Nata was not disposed to granting the extension of final payment date to 30 June 2011, as requested by the plaintiffs.

[46] Mr Hanif referred to me the decision of the Court of Appeal in Judicial Review Case between the same parties (*General Machinery Hire Limited & Ors v CEO of Fiji Revenue & Customs Authority* (Civil Appeal No. ABU 20 of 2012)), where the full Court of Appeal said at paragraph 11 and 12 of its decision referring to S25 of the TAA:

> *"[11] The Appellants do not rely on statutory provision for the alleged variation of Deed of Settlement hence the 'variation' is based on the said contract (Deed of Settlement) and facts surrounding the circumstances and judicial review should necessarily fail, as the alleged variation was outside the realms of public law.*
>
> *[12] The statutory provision quoted above is clear enough that any decision under the said provision needs to be served on the taxpayer with*

written notice of the decision allowing the taxpayer to pay the tax due in such installments. If so, any variation to such a decision needs to be in writing and also served to the taxpayer. To hold otherwise would create a nonsensical situation, where after the initial decision, if the parties are allowed to vary such a written decision by any other manner. I could not agree with the finding of learned trial judge on this issue without the benefit of considering such evidence..."

[47] Undoubtedly, section 25 TAA spells out as to how a request for an extension of time to pay the tax due under a tax law is to be dealt with.

[48] There was no evidence that a decision on the extension of time to pay was ever made by FRCA. If there were a decision to extend the time to pay beyond 15 December 2010, the date given in the Deed, it ought to have been notified in writing to the plaintiffs as required by section 25 (2) TAA. In the absence of such written notification, the court may infer that there was no decision made by FRCA on the request of the plaintiffs to extend time to pay beyond 15 December 2010.

[49] I would, therefore, agree with the defendant that there was no variation of the Deed of Settlement to extend the payment due under the Deed of Settlement beyond 15 December 2010. Accordingly, I find that there was no variation to the Deed to extend the payment due under the Deed beyond 15 December 2010.

[50] However, for the sake of convenience, I would consider other evidence documentary or otherwise that suggests the variation to the Deed to extend time to pay the tax due under the Deed to beyond 15 December 2010.

Pleadings and evidence on variation

[51] Of the variation, the plaintiffs plead, at paras 18 & 19 of their statement of claim, that:

> [18] On 25 November 2010, the Deed of Settlement was mutually varied by the plaintiffs and the defendant following discussion between the fourth named plaintiff and the Acting General Manager Taxation and the plaintiffs letter dated 24 November 2010.

Particulars of Variation

In consideration of the plaintiffs paying $350,000.00 to the defendant on 25 November 2010 (including November payment of $50,000.00) and agreeing to continue paying $50,000.00 a month from December 2010, the defendant agreed to extend the time to pay the balance from 15 December 2010 to 24 February 2011 and also agreed for the Acting General manager taxation to meet the plaintiffs on 24 February 2011 and review all arrangements.

[19] The variation of the Deed of Settlement was in writing, in that, the Acting General Manager Taxation endorsed the agreed variation on the plaintiffs' letter dated 24 November 2010 as follows:

> "NMOMU/LEU/ACCU.D *LaI.*
> *Accept the payments as it is ok.*
> *Apportion the $50,000 amongst the directors equally.*
> *I will meet and review all arrangements on 24/2/2011*
> *MN 25/11/10"*

[52] At para 55 of their submissions, the plaintiffs submit that:

> [55] *In the exercise of powers under s.25, Nata granted the extension to 24 February 2011 and agreed: "**I will meet and review all arrangements on 24/2/2011**". It is important to recall the surrounding circumstances of how these words came to be written. The Plaintiffs had requested for time until 30 June 2011 (Annexure 15, Ajnil's first affidavit dated 12 August 2011) and Nata, at that time, was not disposed to grant the request and so he agreed to meet and review all arrangements on 24 February 2011. This was clearly done to accommodate the Plaintiffs and was for the Plaintiffs' benefit. **The parties (Ajnil & Nata) intended to meet and review on the stated date** but there was always a possibility that they may not be able to meet on that date. The parties did not turn their minds to it but it was implied in their arrangement that each will use his best endeavour to meet on the stated date. It was also implied that if the meeting did not take place due to the fault of the Plaintiffs then the arrangement would lapse on 24 February 2011.*

[53] In the statement of claim, the plaintiffs state that the variation of the Deed of Settlement was in writing. They rely on Mr Nata writing 'I will meet and review all arrangements on 24/2/2011 (see para 19 of the statement of claim).

[54] Despite their pleading, the plaintiffs submit that 'the plaintiffs had requested for time until 30 June 2011 (Annexure 15, Ajnil's first affidavit dated 12 August 2011) and Nata, at that time, was not disposed to grant the request and so he agreed to meet and review all arrangements on 24 February 2011 (para 55 of the plaintiffs' submission).' The

defendant contends that 'this is not the plaintiffs' pleaded position in the statement of claim. The plaintiffs have simply not come up with proof on their pleaded allegation at para 19 of the statement of claim.' The defendant continues to contend that 'on the pleading point, the plaintiffs' submitted position confirms that there was no variation of the Deed of Settlement to extend the payment date in the Deed of Settlement beyond 15 December 2010.

[55] I was referred to the case authority of *Carpenters (Fiji) Ltd v Karan* [1997] FJHC 262; Hbc0247j.95 (10 December 1997), where Justice Pathik said:

> *"At the outset I must say that the Court is bound by pleadings and it cannot go outside it in considering the issues before it."*

[56] The plaintiff had attempted to rely on parol evidence to establish a fact that the plaintiffs had requested for time until 30 June 2011 and Nata, at that time, was not disposed to grant the request and so he agreed to meet and review all arrangements on 24 February 2011, i.e. a fact that is not pleaded. The court cannot go outside the pleading when considering the issues that do not arise from the pleadings.

Review by 31 October 2010 in view of Full Settlement

[57] I now turn to ascertain the meaning of *'review by 31 October 2010 in view of full settlement'* contained in Clause B (ii) of the Deed.

[58] Clause B (ii) provides for a review date of 31 October 2010 **in view of the full settlement.** According to the plaintiffs, this clause means that the plaintiffs and the defendant were to meet on 31 October 2010.

[59] The defendant submits that: Clause B (ii) says no such thing. The Deed does not contemplate any meeting at all. If the intention was to meet on 31 October 2010, the Deed would have expressly said so. 31 October 2010, was a Sunday in any event. The parties could not have intended to meet on a Sunday. The plaintiffs are clearly reading words into Clause B (ii) that are not there. The defendant continues to submit that: **The Deed of Settlement was very clear that the full settlement sum of $1,729,952.00 was to be paid by 15 December 2010.** What would a meeting between the parties on 31 October 2010 achieve? The terms of the Deed of Settlement was clear at least on one thing: the full settlement sum of $1,729,952.00 was to be paid by 15 December 2010. There is no dispute about this date from the plaintiffs themselves. The only sensible interpretation to the reference of "review by 31 October 2010 in view of **full settlement**" in Clause B (ii) of the Deed was to

monitor payments to ensure that the full amount due under the Deed was made by 15 December 2010. The full settlement reference in Clause B (ii) was again referred to in Clause B (iii): the **full settlement** to be cleared by 15 December 2010, for the Company and its directors. It could only mean that the Deed contemplated that the full amount of $1,729,952.00 must be paid by 15 December 2010. The Deed of Settlement left no room for variations on account of the plaintiff's not able to pay in full by 15 December 2010.

[60] Agreeing with the defendant, I find the words *'review by 31 October 2010 in view of full settlement'* in Clause B (ii) of the Deed do not contemplate a meeting between the parties but it means to check on the compliance with the full settlement by 15 December 2010. If it was the intention of the parties to meet on 31 October 2010, the Deed would have said so.

Plaintiffs' Letter of 24 November 2010

[61] By their letter dated 24 November 2010 (Ex-1), the plaintiffs seek to extend the payment of the full sum beyond 15 December 2010. The letter reads:

> *"We are in no situation to pay this large sum by 15th of December because our sale always goes slow from November mid till March. Our Major Contract with F.S.C. has also taken a wrong turn, where we are not able to get the volume for cartage thus cannot meet with the Bank repayments as well. Also, generally, imports and Exports have also dropped on which our General Cartage depends upon.*
>
> *Sir, it is difficult time for General Machinery today to even meet bank repayments on timely manner but we assure you that with your approval for extension, it will benefit our Company and all the 300 employees that we employ currently.*
>
> ***We propose that we will pay $350,000.00 with $300,000 via Bank cheque and $50,000.00 with company Cheque. The balance to be at $50,000.00 every month from December** to fulfil the requirements and **pay fully before end of June 2011**. Sir, I think that this would be reasonable and we will both benefit from this new settlement."* (Emphasis added)

[62] Without referring to the review on 31 October 2010 and their attempt to contact Mr Nata on 31 October 2010, the plaintiffs had sought to extend the payment of the full sum beyond 15 December 2010 and before the end of June 2011. By this, the plaintiffs had proposed a variation of the Deed particularly the deadline for

the final payment stated in the Deed. This is because they were not in a position to pay this large sum by 15 December 2010.

Mr Nata's Handwritten Note

[63] The plaintiffs rely on Mr Nata's handwritten note on the copy of the letter of 24 November 2010, in support of their position that the Deed was varied to extend the full payment under the Deed beyond 15 December 2010. Mr Nata's handwritten note reads:

> *"NMOMU/LEU/ACCU.D Lal.*
>
> *Accept the payment as it is ok.*
> *Apportion the $50,000 amongst the directors equally*
> *I will meet and review all arrangements on 24/2/2011 MN*
> *25/11/10"*

[64] The question is whether or not Mr Nata's note constitutes a variation of the Deed granting an extension of time for the full payment to beyond 15 December 2010, the initial deadline given in the Deed.

Law on Variations to a Contract

[65] The Deed does say how variation (alteration) to the Deed could be effected. In the absence of specific provision in the Deed as to variation, the principles applicable to the formation of a new contract would apply to the variation of the Deed.

[66] In *Audrey Investments Limited v McKillen* [2015] NZHC 2225 (15 September 2015), Justice Faire J said:

> *"[46] The requirements for variation of a contract derive from the law governing contract formation. The variation must be a valid and subsisting contract, there must be a consensus on the terms of the variation, and it must be supported by consideration. The same contractual principles of offer and acceptance, intention and certainty apply to variations of contract."*

[67] Likewise, in *Westpac New Zealand Limited v Nicol* [2016] NZHC 172 (15 February 2016), Justice Bell said:

> *"[24] As I have already indicated, for a period it appeared that the bank may have been prepared not to insist on complete timely performance by Mr Nicol,*

> *and it may have tolerated some payments being made late under the deed. The non-waiver clause (cl 6.1) does not prevent the bank, in light of further non-payment, from enforcing the deed against Mr Nicol including its remedies on default. Nor does that amount to a variation of the deed. I* ***accept Mr Wiseman's submission that the criteria for a variation of contract are the same as the criteria for making a contract. He submitted that there needs to be valid and subsisting the existing contract and that the parties must then vary it in the same way as they would enter into a contract originally. There needs to be offer and acceptance. There needs to be consensus ad idem. There needs to be consideration. There needs to be certainty as to the terms. There needs to be an intention to vary the contract.*** *None of those matters are arguable in this case. I see nothing to suggest that by accepting payments late from Mr Nicol the bank was entering into any variation of the contract."* (Emphasis provided)

[68] Variation of the term of a contract presents greater difficulty. Variation intended to be advantageous to both sides is automatically supported by consideration since there is a mutual exchange of benefits. Where, however, a variation benefits only one of the parties, some consideration additional to that of original contract has traditionally been regarded as necessary for the variation to be binding. The Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 confirmed the need for consideration to support an alteration (variation) promise, albeit making it easier to identify that consideration in some circumstances.

Evidence of variation

[69] Mr Nata in his evidence states that he did not agree to vary the Deed of Settlement.

[70] The defendant says that there was no extension of time to pay the full settlement amount of the Deed beyond 15 December 2010.

[71] Mr Ajnil's evidence is that:

> *"Mr Nata read the proposal and said that he would accept it and would also agree to meet again on 24 February 2011 to review the arrangements"*
>
> *I was happy with this and asked him to give it to me in writing. He did that by writing on my copy of the proposal."*

[72] Mr Ajnil in evidence says Mr Nata would accept the proposal that he brought with him but in their submission (para 55) the plaintiffs submit that Nata at that time, was not disposed to grant the request and so he agreed to meet and review all arrangements on 24 February 2011.

[73] Mr Nata's evidence of the meeting is contained as paragraphs 36-40 of his affidavit of 28 March 2013 (Exb- 6):

> *"[36] The background to the meeting is that Mr Singh came unannounced to FRCA's offices on 25 November 2010. Mr Singh first went to see Mr Dhansukh Lal. Mr Lal at the time was the National Manager Debt Management Unit. I am informed by Mr Lal and believe that Mr Singh wanted to present a proposal to Mr Lal. Mr Lal was aware at the time that to pay agreement been reached with the Appellants. Mr Lal called me for directions and in time to say that he would prefer that I met with Mr Singh. I agreed to Mr Lal's request and told him to send Mr Singh to my office. This is how the meeting of 25 November 2010 eventuated.*
>
> *[37] Mr Singh came to my office and we met. He gave me the letter dated 24 November 2010. This letter is to be found at Vol.1, page 100 of the Court of Appeal Record. The general tenor of Mr Singh's submissions to me was that there was downturn in business and they would have difficulty in making repayment to their banks. Mr Singh requested that the final payment date of 15 December 2010 be extended to the end of June 2011.* ***I flat rejected Mr Singh's proposal and told him at the meeting that the repayment schedule in the Deed of Settlement must be adhered to.*** *I recall that Mr Singh did not take too kindly to my refusal to extend the full payment to the end of June 2011. He persisted with seeking the extension to the end of June 2011 and* ***I was again adamant that there would be no extensions of the final payment date of 15 December 2010.*** (Emphasis provided)
>
> *[38] What I did tell Mr Singh was that I would postpone any recovery measures for any outstanding monies for three months if payment was not made in full by 15 December 2010. Mr Singh was not happy with this either.*
>
> *[39] I confirm that I wrote the handwritten note on Annexure "AKS 15" – Vol. 1, page 100 of the Court of Appeal Record. However that written note has been misconstrued by Mr Singh. The note was an internal written directive to Mr Lal, first, for him to accept the payment of $50,000.00. It will recall that Mr Lal saw Mr Singh earlier in the day on 25 November*

2010 with the cheque and the proposal. The note was a directive from me to him to now accept the payment.

[40] *Secondly, my handwritten note said that I would review the arrangements on 24 February 2011 with the Debt Management Unit team and not with Mr Singh. How Mr Singh construed the note to mean that I would meet him is beyond me. I certainly made no representation to Mr Singh that I would meet him on 24 February 2011. There was simply no discussion with Mr Singh about a further meeting on 24 February 2011. My reference to "I will meet and review all arrangements on 24 February 2011 again was a standard operational instruction to the operational manager of the Debt Management Unit to refrain from taking any recovery measures until 24 February 2011."*

[74] Mr Nata was consistent and adamant in his cross-examination that he did not extend the payment of the full amount due under the Deed of Settlement to beyond 15 December 2010. Mr Nata started the recovery measures exactly three months after meeting with Ajnil.

[75] Thereafter, after obtaining legal advice, Mr Asif Hanif wrote the letter of 24 February 2010 (Exb-7 at page 69) informing the plaintiffs of the breach of the Deed of Settlement. The letter reads:

"Dear Sir

Breach Deed of Settlement

This is to inform your company and its Directors that the Deed of Settlement that was engaged by Authority with your Company and Directors on 9th July 2010 has been breached by the Company.

We will no longer comply with the Deed since it is null and void of any legality soon after the company breached Clause B (iii).

Therefore the audit of your company and directors for the years from 2000-2007 and thereafter will continue from now.

Attached are a number of issues pertaining from audit to the Directors and issues in regards to the Company will be sent in due course.

Please do contact the undersigned for any clarification".

Plaintiffs' response to the letter of 25 February 2011

[76] By their letter of 9 March 2011 (Exb-1, page 116), the plaintiffs explain their inability to pay in full the balance payable under the Deed of Settlement. Their letter reads:

> *"Re: Review of Deed of Settlement Dated 9th July 2010.*
>
> *Dear Sir,*
>
> *Our company and Directors would like to thank you for your support in providing us time and working with the company in order to fulfil the payment to FIRCA as per deed of settlement. We would like to thank you for extension and to review this Deed in February.*
>
> *Sir, we are very committed in paying FIRCA the full amount as agreed and till to date we have paid FIRCA as follows:*
>
> - *DEED REQUIREMENT : $1,729.852.00*
> - *PAYMENT TILL TODATE: $1,461,248.93*
> - ***OUTSTANDING: $268,703.07 – which is equivalent to 15.5% of the Deed Amount.***
>
> *Sir, as per above figures we have really committed to the payment and have done 84.5% of the full amount. We would humbly request if we are only given time till end of June 2011, as we will fully pay FIRCA by this date. Our company has not done very well for the last 4 months and we also have a lot of outstanding creditors as well. Sir, with your approval for extension, it will not only be good for the company but for FIRCA and our employees as well. Your support in this is very essential at the moment.*
>
> *We are not able to meet out Bank payment as well as penalties are rising. We assure you that his extension will be FINAL for full settlement...*
>
> *Please do take all factors into consideration and looking forward to your favourable reply."*

[77] The defendant submitted that the correspondences do not take matters any further for the plaintiff because the plaintiffs accept that Mr Nata was not disposed to grant any extension beyond 15 December 2010. There was no variation of the Deed of Settlement on 25 November 2010, when Mr Singh (Ajnil) met with Mr Nata.

[78] The evidence adduced by the plaintiffs does not establish that there was a variation of the Deed of Settlement extending the time for the balance amount payable under the Deed of Settlement beyond 15 December 2015 or till 30 June 2011.

[79] The criteria for a variation of the contract are the same as the criteria for making a contract. There must be offer and acceptance of variation. The plaintiffs brought their proposal seeking an extension of time for the balance payment due under the existing Deed of Settlement. Mr Nata did not accept the proposal. Instead, he wrote on the copy of the proposal (letter) brought by the plaintiffs and directed his subordinate to accept the payment of $50,000.00 and that he will meet and review all arrangements on 24 February 2011. In my opinion, Mr Nata's handwriting on the copy of the variation proposal is not sufficient to constitute a variation of the Deed. The variation was one-sided. It only benefits the plaintiffs. There is no consideration for the variation to be binding. I see nothing to suggest that by accepting payment of $50,000.00 late from the plaintiffs Mr Nata was entering into any variation of the Deed of Settlement.

Estoppel

[80] Plaintiffs submit that estoppel operates against the defendant in other circumstances like the present, where the plaintiffs had relied and acted upon the defendant's representation that the date for payment was extended to 24 February 2011 and that the plaintiffs and defendant would meet and review all arrangements on that date.

[81] The defendant did not extend payment to 24 February 2011. The plaintiffs' cause of action is based on a written variation of the Deed of Settlement. Estoppel has not been pleaded. Estoppel must be pleaded before a party is able to rely on it.

[82] In *Krishna v Smith* [2014] FJHC 365; HBC64.2005 (23 May 2014), Justice Kotigalage said:

> *"[3] The Defendants made submissions with regard to the issue of Res – judicata and estoppel. The issue of res judicata and estoppel was not*

pleaded nor was an issue for the consideration of this court in the Pre Trial Conference. As such, there is no merit to consider the submissions made by the Defendants and I hold with the Plaintiffs."

[83] Estoppel is not pleaded. Therefore, the plaintiffs cannot rely on the principle of estoppel.

Implied Terms

[84] The plaintiffs' submission on the implied terms is that: in the circumstances, a term should be implied to give these words ***"I will meet and review all arrangements on 24/2/2011"*** business efficacy that if the meeting did not take place on 24 February 2011 due to the fault of the defendant then the arrangement would continue until the parties were able to meet and review. Such construction would be fair and reasonable to both parties and would accord with purposive and sensible interpretation. **It would also make good business sense and avoid an unreasonable result.**

[85] In *Delma Corporation South Pacific Ltd v Orica Coatings (Fiji) Ltd* [2008] FJHC 36; HBC32.2007 (7 March 2008), Justice Singh said:

> "There is nothing in that agreement itself to say that paint is to be supplied within so many days and failure to supply within fixed number of days shall be treated as termination. The plaintiff has not pleaded any implied terms in its pleadings.
>
> Accordingly, I hold that the defendant did not terminate the Distributorship Agreement."

[86] The plaintiffs had not pleaded any implied terms in their pleadings. They cannot, therefore, rely on implied terms.

Termination by the defendant

[87] The plaintiffs were unable to pay the balance due under the Deed of Settlement by 15 December 2010. As a result, Mr Asif Hanif who wrote the letter of 25 February 2011 informing the plaintiffs of the termination of the Deed of Settlement. He

wrote that: *'we will no longer comply with the Deed since it is null and void of any legality soon after the company breached Clause B (iii).'*

[88] Again, on 16 March 2011, Mr Hanif wrote a letter (Exb-7 annexure MH4) to Mr Singh following the meeting of 10 March 2011 reaffirming the defendant's position on the Deed of Settlement. Mr Hanif concludes his letter saying:

> *"As mentioned in the above meeting and we are reaffirming it formally now that the Deed of Settlement that was engaged by the Authority with your Company and Directors on 9th July 2010 is now null and void of any legality therefore the audit of your company and directors tax affairs for the years 2000-2007 and thereafter will continue".*

[89] I have already found that there was no variation of the Deed of Settlement extending the time for payment beyond 15 December 2010. I reject the plaintiffs' contention that the defendant kept on extending the time for payment beyond 15 December 2010.

[90] The plaintiffs had failed to pay and settle their tax liability by 15 December 2010, in terms of the Deed of Settlement. The payment deadline was not extended beyond 15 December 2010. By their failure to make payment within the time limit granted by the Deed of Settlement, the plaintiffs had breached the terms of the Deed of Settlement. In the circumstances, the defendant was entitled to terminate the Deed of Settlement and treat it as null and void of any legality.

The tort of Misfeasance in Public Office

[91] The statement of claim contains pleading of the cause of action for the tort of misfeasance in public office (see paras 75-80 of the statement of claim). The plaintiffs in their submissions set out the evidence relevant to this cause of action (para 87 of their submission). Para 87 states:

(a) Despite the clear provision of clause B(ii) of the Deed Nata did not meet and review the arrangement with Ajnil;

(b) Ajnil and not Nata endeavoured to arrange the meeting and which was eventually held on 25 November 2010;

(c) Nata allowed the defendant to issue a demand on 11 February 2011 in breach of the agreement of 25 November 2010 and made no attempt to withdraw it;

(d) Nata did not meet and review all arrangements on 24 February 2011 even though he undertook to do so, as he confirmed in his first affidavit;

(e) Nata said he caused the 25/2/11 letter to be issued which letter was served on plaintiffs on the day before, 24/2/11. He did that despite his undertaking given on 25 November 2010 to meet and review all arrangements on 24 February 2011 and knowing that the plaintiffs were making monthly payments and were up to date with the payments;

(f) Ajnil had to run around to arrange a meeting with Nata and when the meeting was fixed for 2/3/11 Nata did not turn up. Mohammed Asif Hanif and Rajnesh Lal attended the short meeting;

(g) Ajnil arranged the next meeting on 10 March 2011 but Nata walked out saying he did not want to deal with the plaintiffs;

(h) Nata authorised the issue of 16 March 2011, letter knowing he had not honoured his undertaking to meet and review all arrangements and knowing that the plaintiffs had paid off very substantially under the deed and were up to date with payments;

(i) Nata caused the garnishees to be issued on 6 April 2011 against Bank of Baroda Suva and Westpac Suva (Ajnil's first affidavit para 46);

(j) Nata as the case officer did not respond to any of the 3 letters written by Vijay Naidu in April 2011 and would have known from these letters how concerned and anxious the plaintiffs were;

(k) Nata caused the Garnishees to issue against Bank of Baroda Lautoka on 18 May 2011 and had them executed at 5pm after banking hours without serving a copy of the Notices on the plaintiffs. Nata knew that on that date only $168,703.07 was owing under the Deed and yet he took $218,889.64 under the Garnishees;

(l) Nata caused the DPOs to be issued against the second, third and fourth plaintiffs on 24 May 2011 when all payments had been made under the Deed and severely restricted their freedom of movement;

(m) Nata said he drafted the letter dated 19/5/11 from the Commissioner to Vijay Naidu wherein is stated that the plaintiffs should continue to

discuss with Nata. Yet Nata made no attempt to meet and review as promised;

(n) Ajnil and not Nata arranged the meeting of 31 May 2011 when Nata refused to discuss the Deed;

(o) Nata caused the Garnishees against Denarau Investment Ltd to be issued on 1 June 2011 (Ajnil's first affidavit, para 59);

(p) Nata allowed the defendant to issue demands on 6 June 2011 and 15 June 2011 (Ajnil's first affidavit, para 60);

(q) The defendant deliberately did not issue the Exemption Certificate to the plaintiffs (Ajnil's first affidavit, para 63).

[92] The review date of 31 October 2010 was a Sunday. The parties could not have intended to meet on Sunday. Clause B (ii) of the Deed does not speak of a meeting between Mr Nata and the plaintiffs (Mr Singh). Mr Singh met with Nata on 25 November 2010, with the view to extending the payment of the settlement sum to 30 June 2010 which Mr Nata refused.

[93] On 25 November 2010, Mr Nata was not disposed to grant the plaintiffs' request to extend the time of payment to a date beyond 15 December 2010. The demands of 11 February 2011, were computer generated. Mr Nata said no action was taken over the demands. The plaintiffs did not raise any issue about the demands.

[94] Mr Nata was not obliged to meet with Mr Singh on 24 February 2011. The handwritten note was an internal directive to Mr Dhansukh Lal to accept payment of $50,000.00 and that he (Nata) would review the arrangements on 24 February 2011. The note 'review all arrangements on 24 February 2010' does not necessarily imply that Mr Nata would meet with Mr Singh or that he made representation to Mr Singh that he would meet him on 24 February 2011.

[95] There is no evidence that Mr Nata gave undertaking to meet with Mr Singh on 24 February 2011. Mr Nata appears to have given 3 months grace period before causing to recover the full sum due and owing under the amended assessment. The acceptance of payment outside the deadline did not amount to a variation of the Deed of Settlement.

[96] The defendant submits that Mr Singh did not arrange the meeting of 2 March 2011. There was no meeting to be held on 2 March 2011. Mr Singh came unannounced

to FRCA office on 2 March 2011. He came to see Mr Asif Hanif because it was Mr Hanif, who had written the letter of 25 February 2011, formally terminating the Deed of Settlement. Mr Hanif reiterated to Mr Singh of FRCA's position. Mr Lal was not at this meeting, neither was Mr Nata.

[97] I agree with the defendant that there was no meeting scheduled on 2 March 2011 for Mr Nata to meet Mr Singh.

[98] On 10 March 2011, Mr Singh came to the defendant with the letter dated 9 March 2011, seeking the extension of the time for payment to 30 June 2011. The defendant did not allow the extension the plaintiffs had sought. Instead, he was informed that the defendant considered the Deed of Settlement to be null and void.

[99] The plaintiffs had breached the Deed of Settlement by failing to pay the amount in full by 15 December 2010. There was no variation of the Deed of Settlement to extend the payment of the settlement sum to a date beyond 15 December 2010. Therefore, Mr Nata correctly authorized the issue of 16 March 2011 letter terminating the Deed of Settlement as there was a breach by the plaintiffs.

[100] In my judgment, Mr Nata was acting reasonably towards the plaintiffs. I find that there is no sufficient evidence to show that Mr Nata had committed the tort of misfeasance in public office.

Departure Prohibition Orders (DPOs) [TAA 31]

[101] Section 31(a) of TAA provide as follows:

"31. – (1) Where

(a) a person is subject to a tax liability; and

(b) the CEO believes on reasonable grounds that it is desirable to do so for the purposes of ensuring that the person does not depart from Fiji for a foreign country without–

(i) wholly discharging the tax liability; or
(ii) making arrangement satisfactory to the CEO for the tax liability to be wholly discharged;

(c) a person whose tax liability written off as bad debts and the CEO has reasonable grounds to reinstate the bad debts,

The CEO may, by order in accordance with the prescribed form co-signed by a board member of the Fiji Revenue and Customs Authority, prohibit the taxpayer departing from Fiji for a foreign country."

[102] Paragraphs 83 and 84 of the statement of claim state:

83. The defendant exceeded his jurisdiction and acted ultra vires the provisions of s.27 and s.31 of the Tax Administration Decree 2009 in issuing the Notices of Garnishee in respect of the second, third and fourth named plaintiffs on 18 May 2011 and 1 June 2011 and in issuing the DPOs against the second, third and fourth named plaintiffs on 24 May 2011 and 27 June 2012.

84. As a result, the plaintiffs have suffered loss and damage.

Particulars

(a) Loss of liberty, privacy, and freedom of movement.
(b) Mental distress, humiliation, and feelings of outrage at the defendant's conduct.
(c) Loss of business and business opportunity, cost of additional borrowings and additional interest paid on such borrowing (to be quantified at trial).

[103] The defendant issued DPOs on 5 May 2010 and 26 May 2010 and revoked these on 9 July 2010 and issued again on 24 May 2011 and revoked on 25 October 2011.

[104] The plaintiffs' (Ajnil's) evidence on DPOs is that:

(a) None of second, third and fourth plaintiff had a permanent residency or citizenship of any country outside Fiji; None of them had any property or bank account outside Fiji; None of them intended to leave Fiji; Neither the Company nor any of them had sold any property or asset or was intending to sell; Each of the second, third and fourth plaintiffs had travelled outside Fiji regularly on business and for personal reasons but each came back to Fiji. **Exb. 9, 10 & 11** shows the history of their travels from 2001.
(b) The plaintiffs were committed to expand their business in Fiji and was doing so during this period.

(c) Nata admitted under cross examination that the defendant did not enquire about any of the matters stated in (a) before issuing the DPOs and the defendant had no information at all to support ***flight risk***.

(d) On 24 May 2011 the plaintiff was up to date with the payments of $50,000.00. In fact there was an overpayment of $50,187.57 under the Deed as at that date as a result of the Garnishees against Bank of Baroda on 18 May 2011 (para 53 & 55 Ajnil's first affidavit).

[105] The plaintiffs say that on 24 May 2011, the plaintiffs were not subject to tax liability and there was an overpayment of $100,186.57 (see Mr Singh – Exhibit 1). However, in their submission (para 111) they maintain that the overpayment was $50,187.57 and the DPOs were unlawful for non-compliance with s.31 (1) (b).

[106] On 24 May 2011, according to the defendant's reconciliations (see Exb-13 from pages 182 – 187), the plaintiffs had tax liabilities as follows:

(i) Second Plaintiff : $327,513.86
(ii) Third Plaintiff : $244,874.91
(iii) Fourth Plaintiff : $245,916.72

[107] The defendant submits that the DPOs were properly issued within the provisions of section 31 (1) of TAA. It was entirely the discretion of the defendant to issue the DPOs as a means of ensuring payment of tax liability. This was the intended policy of the TAA and it should not be curtailed by this court. The submission continues that: DPO's was absolutely necessary and vital to be issued by the defendant. There was a substantial amount of money owing to the defendant and the plaintiffs were undergoing further audits of their tax affairs because of the breach of the Deed of Settlement.

[108] The plaintiffs were subjected to a tax liability. The DPOs were issued for the purpose of enforcement of such liability. I cannot see that the DPOs were issued with a sinister intention.

Garnishees

[109] Para 36 of the statement of claim states:

36. On 18 May 2011, the total sum outstanding under the Deed of Settlement was $168,703.07 but the defendant unlawfully issued Notice of Garnishee to Bank of Baroda, Lautoka in respect of:

(a) The second named plaintiff, Praushila Devi Singh, for $846,435.00,

(b) The third named plaintiff, Alvin Kumr Singh, for $270,332.00 and

(c) The fourth named plaintiff, Ajnil Kumar Singh, for $273,945.00.

and in breach of the terms of the Notices of Garnishee the defendant deliberately in a high handed manner executed the Garnishees after 5pm on 18 May 2011 and forcefully obtained from Bank of Baroda $217,494.00 from Praushila Devi Singh's account; $457.00 from Alvin Kumar Singh's account and $938.64 from Ajnil Kumar Singh's account.

[110] Para 36 of the defence states:

It denies the allegations in paragraph 36. The defendant will say that by 18 May 2011, the defendant considered the Deed of Settlement to be breached by the plaintiff and therefore all penalties forgone from the settlement became immediately payable.

[111] Section 27 of the TAA in dealing with garnishee states so far as relevant:

Garnishee order

"(1) ...

(2) This section applies if a taxpayer is liable to pay tax and –

(a) the tax has not been paid by the taxpayer by the due date for payment; or

(b) the CEO has reasonable grounds to believe that the taxpayer will not pay assessed tax by the due date for payment.

(3) (a) If this section applies, the CEO may, by notice in writing, require a payer in respect of the taxpayer to pay the amount specified in the notice to the CEO, being an amount that does not exceed the amount of tax that has not been paid or the amount that the CEO believes will not be paid by the due date.

(b) the notice in subsection (3) (a) shall remain effective for a period of 12 months from the date of its issue.

(4) *A payer must pay the amount specified in a notice under subsection (3) by the date specified in the notice, being a date that is not before the date that the amount owed to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.*

(5) ...

(6) *If a payer served with a notice under subsection (3) is unable to comply with the notice, the person must notify the CEO, in writing within 14 consecutive days after receipt of the notice, setting out the reasons for the person's inability to comply.*

(7) ...

(8) ...

(9) *The CEO must, by notice in writing to the payer, revoke or amend a notice served under subsection (3) if the taxpayer has paid the whole or part of the tax due or has made an arrangement satisfactory to the CEO for payment of the tax.*

(10) *A copy of a notice served on a payer under this section **must** be served on the taxpayer."*

[112] The plaintiffs say Mr Nata caused the Garnishees to be issued on 6 April 2011, against Bank of Baroda, Suva and Westpac, Suva (Ajnil's first affidavit para 46) and he also caused the Garnishees to be issued against Bank of Baroda, Lautoka on 18 May 2011 and had them executed at 5pm, after banking hours without serving copy of the Notices on the plaintiffs. Nata knew that on that date only $168,703.07 was owing under the Deed and yet he took $218,889.64 under the Garnishees.

[113] In essence, the plaintiffs submit that the Garnishees were issued and executed in breach of s.27 and were therefore unlawful.

[114] The defendant submits that: Garnishees were issued by the defendant to recover the full amount due under the Amended Assessments because the Deed of Settlement was breached. The whole amount under the amended assessments was, therefore, owing by the plaintiffs. Section 27 of the TAA permits a Garnishee Order to be issued when the tax is owing to the defendant. In this instance, the plaintiffs were owing money to the defendant. Further that: What does it matter that the Garnishees were executed at 5pm? Mr Nata clearly said there was a risk

of dissipation of funds from the accounts of the plaintiffs. The defendant acted prudently to avoid dissipation of assets. Once the Deed of Settlement was breached the whole amount assessed under the Amended Notices became due and owing. It is, therefore, not correct to say that the total sum owing under the Deed of Settlement as at 18 May 2011 was $168,703.07.

[115] The defendant's position is that once the Deed of Settlement was breached all amounts under the amended assessment became payable on 15 December 2010.

[116] Having found that there was no variation to the payment date beyond 15 December 2010, I have held that the plaintiffs had breached the Deed of Settlement by not paying the sum in full by 15 December 2010.

[117] The plaintiffs submit that the 'Deed does not provide that upon its breach the remitted or waived penalties will become immediately payable.'

[118] The Deed of Settlement says:

> [E] *"Full waiver of penalties upon settlement of full tax liability of FJ$1, 729,952.00 as in clause (A) above by 15th December 2010."*

[119] I accept the defendant's submission that when payment of the settlement sum was not paid in full by 15 December 2010, the penalties that were waived as part of the settlement became immediately due and payable under the amended assessment. Accordingly, I find that the defendant lawfully issued Garnishees for the recovery of outstanding tax liability with penalties due and owing under the amended assessment.

Bad Faith

[120] Mr Nata had postponed any recovery measures for three months as he had undertaken to do. The evidence placed in court does not suggest that the defendant had acted in bad faith towards the plaintiffs. The plaintiffs' claim that the defendant had acted in bad faith in the exercise of his public powers fails.

Damages

[121] In light of my findings, the question of damages does not arise.

Answering the issues

[122] I would answer the issues raised in this case (see para 23 above) as follows: (a): yes, (b): no, (c): no, (d): valid, (e): lawful, (f): lawful, (g): no, (h): no and (i) no (under the amended assessment).

Conclusion

[123] For the reasons given above, I would dismiss the plaintiffs' claim with the costs of $2,000.00, which I have summarily assessed.

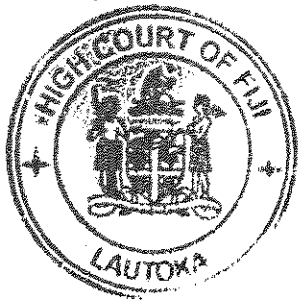
The Result

1. The plaintiffs' action is dismissed.
2. The plaintiffs will pay summarily assessed costs of $2,000.00 to the defendant.

9/3/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

9 March 2018

Solicitors:
For the plaintiffs: M/s. Young & Associates, Barristers & Solicitors
For the defendant: M/s. Haniff Tuitoga Lawyers, Solicitors