IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLATE (CIVIL) JURISDICTION

CIVIL APPEAL NO. HBC 67 OF 2015

(On appeal from the High Court of Fiji at Lautoka (a decision of the Master) in the matter of Civil Action No. HBC 67 of 2015)

BETWEEN : **ANANTH AVIRAM REDDY** of Lautoka, Engineer/Law Graduate and Businessman.

APPELLANT
(ORIGINAL DEFENDANT)

AND : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** a duly registered limited liability company having its registered office at Lot 11, Industrial Sub Division, Denarau Island, Nadi.

RESPONDENT
(ORIGINAL PLAINTIFF)

Appearances : Mr R. Singh for the appellant
Mr A.K Narayan (Jnr) for the respondent
Date of Hearing : 20 June 2019
Date of Judgment : 19 August 2019

JUDGMENT

Introduction

[01] I have three applications before me for determination. With the consent of the parties, I will deal with all three applications collectively.

[02] All three applications are filed by the appellant. They include:

1. *An application seeking leave to file an appeal out of time against the ruling of the Master delivered on 18 March 2016, filed by way of summons on 12 December 2017 supported by an affidavit of the Appellant.*

2. *An application for stay of execution and/enforcement of the Master's ruling delivered on 12 December 2016 until determination of the leave application and the appeal, also filed on 18 March 2016 supported by an affidavit of the appellant.*

3. *An application seeking leave to adduce further evidence filed on 6 September 2018 supported by an affidavit of the appellant.*

[03] The parties have agreed that the applications could be determined by written submissions. Both parties accordingly filed their written submissions. I am grateful for both counsel and their team for filing such comprehensive submissions, by which I was greatly assisted.

Background

[04] Deo Construction Development Company Limited, the Plaintiff ("*the respondent*" in these proceedings") instituted an action by way of writ of summons with statement of claim endorsed seeking judgment against Ananth Aviram Reddy, the Defendant ("*the appellant*" in these proceedings) for Value Added Tax ("*VAT*") alleging that the appellant is liable to pay on a sale and purchase agreement between the parties.

[05] The appellant filed his statement of defence and disputed the claim stating that the respondent advised the appellant that VAT will not be applicable to the dealing. The relevant defence appears at paragraph 5 of the statement of defence:

> "5.1 *That the Plaintiff, its Directors and/or agent's at all material times advised the Defendant that Value Added Tax (VAT) will not be applicable to the dealing, which advice the Defendant took to be true.*

5.2 *The Defendant was informed by the Defendant [sic] its Director and agents that the subject land was being sold as a 'going concern", and therefore the sale would not attract any VAT.*

5.3 *At all material times the Defendant was advised by the Defendant [sic], its Directors and agents that the dealing for the sale of the subject Land is " zero rated" under the VAT Decree and as such no VAT is payable.*

5.4 *That the Defendant at all material times relied on the representations as to VAT made by the Plaintiff, its Directors and agents and thereby entered into the agreement to purchase the subject land.*

5.5 *The sale was not VAT exclusive and not payable by the Defendant".*

[06] The Respondent by its claim seeks the refund of VAT and penalties levied by the Fiji Revenue and Customs Authority ("*FRCA*") in the sum of $130,434.78.

[07] By the sale and purchase agreement ("*the agreement*'), the respondent agreed to sell and the appellant agreed to purchase the property in the sum of $1,000,000.00. The dealing between the parties is now settled and performed the property was transferred to the appellant in 2012. At the time of settlement, no tax invoice was raised for the payment of VAT by the respondent.

[08] The respondent made an application to the Learned Master ('*the Master*") for summary judgment on 9 July 2015. The appellant filed his affidavit in opposition. Upon hearing, the Master by his ruling dated 18 March 2016 granted summary judgment in favour of the respondent in the sum of $130,434.78 (VAT sum claimed). The appellant seeks leave to appeal that order out of time.

Leave to appeal out of time

[09] First, let me deal with the application for leave to appeal out of time.

[10] This is the second application by the appellant for leave to appeal out of time.

[11] Initially, I granted leave to appeal out of time. The appellant filed a notice of appeal. However, that appeal was withdrawn as it was not served on the respondent within the prescribed time.

[12] Mr Narayan on behalf of the respondent submits that: *'we do not see any issues with arguing the summons for enlargement of time to file the appeal.'*

[13] Previously, when I grant leave to appeal the Master's ruling of 18 March 2016, I said [at para 22]:

> *'[22] I have carefully considered the defence raised by the Applicant and his proposed grounds of appeal. The Applicant has raised defence that the Respondent had represented that the sale was a going concern and VAT would not be applicable. Whether VAT was applicable to the dealing when the parties entered into the sale and purchase agreement, in my view, is a triable issue.'*

[14] This court has the discretion to enlarge the time period for filing and serving a notice of appeal or cross appeal after expiration of that period (see O 59, R 10 (1).

[15] The Master's impugned ruling was made on the application for summary judgment. It is therefore an interlocutory judgment.

[16] An appeal from an interlocutory order or judgment is to be made within 7 days from the date of the granting of leave to appeal (see: O 59, R 9 (b)).

[17] The appellant provides reason for the delay in filing the appeal that: as the initial appeal was not served within the time specified and was served on 24 July 2017. The Appellant had filed the application for leave within time, obtained leave and filed the papers for appeal within time and however the service of the Appeal was delayed by 7 days. Thereafter the appellant had filed

an application (current application) seeking leave to file an appeal out of time on 12 December 2017, after withdrawing the initial appeal.

[18] Now, the respondent consents to the granting of leave to the appellant to appeal out of time. I would, therefore, having considered the application and having satisfied that the grounds of appeal raise some arguable issues, grant leave to appeal the Master's ruling of 18 March 2016, out of time.

Application to adduce further/fresh evidence

[19] I now turn to the application to adduced further/ fresh evidence.

[20] For one reason or the other, the proper sale and purchase agreement between the parties was not produced before the Master. What was produced before the Master was an undated sale and purchase agreement.

[21] The appellant seeks to adduce the proper sale and purchase agreement entered into between the parties on 15 August 2012 (Exhibited in the affidavit of Munil Singh filed on 13 September 2018-'*Exhibit B*').

[22] The agreement the appellant seeks leave to adduce on appeal is the proper agreement entered into between the parties. It is not a disputed document. The respondent consents to the application to adduce further evidence (the proper agreement). I accordingly grant leave to the appellant to adduce the proper sale and purchase agreement (*Ex-B*) to be adduced as further evidence on appeal.

The appeal

[23] This is an appeal, upon leave being granted to appeal out of time, against the Master's summary judgment delivered in favour of the respondent on 18 March

2016, thereby he granted among other things summary judgment against the appellant in the sum of FJ$130,434.78 (VAT sum claimed) (*'the judgment'*).

Decision in court below

[24] Having satisfied with the summary judgment application filed by the respondent and having satisfied that the appellant (defendant) has no real substantial question to be tried, the Master granted summary judgment for the sum claimed as VAT. The judgment runs:

> *(1) I grant Judgment for the Plaintiff against the Defendant in the sum of FJ$130,434.78 (Vat sum claimed).*
>
> *(2) I grant interest on the judgment sum at the rate of 8% per annum, from 14th October 2014 to the date of judgment pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27.*
>
> *(3) I grant post Judgment interest of 4% per annum from the date of final judgment to the date of final satisfaction of the judgment sum.*
>
> *(4) I decline to grant order on the tax penalty.*
>
> *(5) The Plaintiff's application for indemnity costs is allowed.*
>
> *(6) The Plaintiff is directed to file and serve its detailed costs for the assessment of the indemnity costs within 14 days from the date hereof.*

Grounds of Appeal

[25] The appellant appeals the Master's judgment on the following grounds:

> *1) The Learned Master of the High Court erred in law and in fact in allowing the Affidavit of Krishneel Patel sworn on the 2nd of July 2015 to be read in evidence in support of the application for Summary Judgment when the contents of the affidavit amounted to Legal Submissions.*

2) *The Learned Master of the High Court erred in law and in fact in deciding that the Honourable Court could not consider the Statement of Defence filed by the Appellant whilst the Master of the High Court considered the application for Summary Judgment filed by the Respondent.*

3) *The Learned Master of the High Court erred in law and in fact in holding that the Appellant in defence and opposition to an application for Summary Judgment had to show a real or a genuine or an arguable defence.*

4) *The Learned Master of the High Court erred in law and in fact in not considering that there were triable issues when Fiji Revenue and Customs Authority (FRCA) decided to levy Value Added Tax (VAT) on the basis that the Appellant was not VAT registered, when the Appellant was in fact registered for VAT which raised a question to be tried at trial whether VAT should be payable at all.*

5) *The Learned Master of the High Court erred in law and in fact when the Master of the High Court failed to consider that FRCA in its assessment of the dealing by way of its letter dated 14 October 2014 found that the sale was VAT inclusive and not exclusive which raised a question to be tried at trial.*

6) *The Learned Master of the High Court erred in law and in fact when the Master of the High Court failed to consider that an application was made by the Respondent for VAT exemption with FRCA and that the Respondent had not adduced the said application in evidence to support its application for summary judgment.*

7) *The Learned Master of the High Court erred in law and in fact in awarding indemnity costs against the Appellant.*

8) *The Learned Master of the High Court erred in law and in fact in holding that even if the issues raised by the Respondent goes to trial, the defence will not succeed.*

9) *The Learned Master of the High Court erred in law and in fact into considering that extrinsic evidence, that the Appellant's claim that it was represented to the Appellant*

that VAT will not be applicable to the dealing, could not be raised by the Appellant to establish what the Appellant understood at the time he entered into the Sale and Purchase Agreement.

10. *The Appellant reserves the right to include or amend the ground of appeal appearing hereinabove on the receipt of the records of the proceedings before the Learned Master of the High Court.*

Legal framework

[26] Dealing with summary judgment, Order 14 of the High Court Rules 1988 as amended ('*HCR*') provides, so far as relevant:

> *"**Application by plaintiff for summary judgment (O 14, R 1)***
>
> *1 (1) Where in an action to which this Rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, **on the ground that the defendant has no defence to a claim** included in a writ, or to a particular part of such a claim, or **has no defence to such a claim** or part **except as to the amount of any damages claimed,** apply to the Court for judgment against the Defendant. (Emphasis added)*
>
> ***Manner in which application under Rule 1 must be made (O 14, R 2)***
>
> *2 (1) An application under Rule 1 must be made by summons supported by **an affidavit** verifying the facts on which the claim, or part of a claim to which the application relates is based and **stating that in the deponent's belief there is no defence to that claim** or part, as the case may be, or no defence except as to the amount of any damages claimed. (Emphasis added)*
>
> ***Judgment for the plaintiff (O 14, R 3)***

3 (1) *Unless on the hearing of an application under Rule 1, either the Court dismisses the application or* ***the defendant satisfies the Court with respect to the claim,*** *or the part of a claim, to which the application relates* ***that there is an issue or question in dispute which ought to be tried*** *or* ***that there ought for some other reason to be a trial of that claim*** *or part,* ***the Court may give such judgment for the plaintiff against the defendant*** *on that claim or part as may be just having regard to the nature of the remedy or relief claimed. (Emphasis added)*

Right to proceed with residue of action or counterclaim (O 14, R 8)

8 (1) *Where on an application under Rule 1 the plaintiff obtains judgment on a claim or a part of a claim against any defendant, he or she may proceed with the action as respects any other claim or as respects the remainder of the claim or against any other defendant."*

Principles on summary judgment

[27] The principles or tests for entering a summary judgment against a defendant were illustrated by the Court of Appeal in *Maganlal Bros Ltd v LB Narayan & Company (Civil* Appeal No. 31 of 1984) as follows [at page 5]:

> *"The matter for consideration by the Judge on the determination of this matter are contained in Rules 3 and 4 of Order 14, the tenor and effect of which are conveniently summarised in Halsbry's Laws of England (4th Edn) Volume 37 paras 413-415. The relevant portions of which read:*
>
> > *"413. Where the plaintiff's application for summary judgment under Order 14 is presented in proper form and*

order, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just.....

The defendant may show causes by affidavit or otherwise to the satisfaction of the court. ***He must 'condescend upon particulars' and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence."***

And in a note (Note 4) to the paragraph it is stated that:

The normal everyday practise is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid showing cause by affidavit: see McLardy v Slateum (1890) 24 Q.B.D 504."

Appeal by way of rehearing

[28] Mr Narayan submits that this appeal must be heard by way of rehearing. He cites *The White Book* (Supreme Court Practice 1976 Volume 1 at 58/1/2), which explains how an appeal from a Master to a Judge in Chambers must be dealt with as follows:

*"**An appeal from the Master** or Registrar to the Judge in **Chambers is dealt with by way of an actual rehearing of the application** which led to the order under appeal, and **the Judge treats the matter as though it came before him for the first time**, save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal.*

***The Judge "will of course give weight it deserves to the previous decision of the Master: but he is in no way bound by it"** (per Lord Atkin in Evans v Bart/am [1937] AC. at page 478. The Judge in Chambers is in no way fettered by the previous exercise of the Master's discretion, and on appeal from the Judge in Chambers, the Court of Appeal will treat the substantial discretion as that of the Judge, and not of the Master (Evans v Bart/am, supra; Cooper v Cooper, [1936] W.N. 205).*

*It is common practice for **the Judge** in Chambers, subject of course to the question of costs, **to admit further or additional evidence by affidavit to that which was before the Master** or Registrar, but if a party has taken his stand on the evidence as it stood before the Master or Registrar, the Judge in Chambers may in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence (see Krakauer v Katz, [1954] 1 W.L.R. 278; [1954] 1 All ER 244, C.A)." (Emphasis Added)*

The evidence

[29] The parties have filed the following documents:

[i] Writ of Summons and Statement of Claim filed on 24th April, 2015;

[ii] Acknowledgement of Service filed on 14 May, 2015;

[iii] Statement of Defence filed on 29 May, 2015;

[iv] Summons for Summary Judgment filed on 9 July, 2015;

[v] Affidavit in Support of Vimal Deo filed on 9 July, 2015;

[vi] Affidavit in Support of Krishnil Patel filed on 9 July, 2015;

[vii] Affidavit of Ananth Aviram Reddy in Reply filed on 18 August, 2015;
[viii] Affidavit in Response of Vimal Deo filed on 26 August, 2015 and;

[ix] Supplementary Affidavit in Support of Munil Singh filed on 13 September, 2018.

Discussion

[30] The appellant appeals the summary judgment entered by the Master against him on 18 March 2016.

[31] The respondent brought a writ action against the appellant claiming among other things a sum of $130,434.78 on the basis that the appellant was liable to pay VAT on $1,000,000.00, the consideration of transfer of a property to the appellant on 11 November 2012, as result of sale and purchase agreement entered into between the parties on 15 August 2012 (*'the proper agreement'*). According to the proper agreement, the consideration was $1m plus VAT (if applicable). The clause of that agreement reads:

> *"3. PURCHASE PRICE*
>
> *3.1 The full purchase price for the said property shall be the sum of FJS 1,000,000.00 [ONE MILLION DOLLARS] exclusive of VAT,* ***if applicable****.*
>
> *3.2* ***In the event that there shall be any VAT payable*** *in respect of the within transaction,* ***then it shall be the purchaser's obligation to pay*** *such VAT and* ***the purchaser agrees that it shall indemnify and hold harmless the vendor from any claim*** *that may be made against the vendor for the payment of any VAT which might be assessed in respect of the within transaction. (Emphasis Added)*

[32] The appellant filed his acknowledgement of service and thereafter his statement of defence on 29 May 2015.

[33] After the appellant filed his statement of defence, the respondent filed an application under O 14 seeking summary judgment for the sum claim, the Master granted.

[34] Under O 14, the plaintiff may apply for a summary judgment against the defendant on the ground that:

> a) ***the defendant has no defence to a claim, or***
>
> b) ***the defendant has no defence to such a claim except as to the amount of any damages claimed***

[35] In the UK, a different test is applied for entering a summary judgment. CPR (UK), r. 24.2, provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-
>
> *(a) it considered that-*
>
> *(i) the claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that the defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

[36] However, I do not intend to apply the UK test for entering summary judgment. I will apply O 14 and the principles relevant to that Order to this appeal.

Burden of proof

[37] An important issue on applications for summary judgment is whether the burden of proof is on the applicant to show the respondent has no defence to a claim or whether the burden to proof rests with the respondent to establish a defence that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim.

[38] Order 14, Rule 3 (1) says: *'Unless … the defendant satisfies the court … that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial …, the court may give such judgment for the plaintiff against the defendant.'*

[39] All the defendant needs to say is that he requires the plaintiff to prove his, and the law puts upon the plaintiff the onus of proving it (see: *Shantilal Brothers (Aust) Pty v Dewan Chand* Civil Action No. 344 of 20002).

[40] It is evident that the onus of proof is on the applicant on the summary judgment application.

[41] The test for making a summary judgment would be that the court considered or satisfied that a defendant had no defence to the claim. A party seeking to resist such a judgment would have to show or satisfy that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.

[42] Thus, a claimant applying for summary judgment had to adduce evidence establishing his claim (but not disproving any purported defence), and where the claimant establishes a prima facie case against the defendant, there is an evidential burden on the defendant to satisfy the court that he has a defence to the claim, i.e. there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.

The issue

[43] The issue on appeal turns out to be whether the appellant has a defence to the claim.

Re-hearing

[44] Mr Narayan invites me to consider the appeal as a rehearing, for it is the case on appeal from the Master's decision to a single judge of the High Court.

Prima facie case (for the respondent)

[45] The respondent brought a writ action against the appellant claiming refund of VAT and penalty paid by the respondent arising out of the sale of the property to the appellant (LOT 17).

[46] The proper agreement was not produced before the Master. It is now produced as new evidence on appeal. What was produced before the Master on application for summary judgment was an undated sale and purchase agreement.

[47] The parties now admit that the agreement produced on appeal as new evidence is the proper agreement.

[48] The full sale price, according to the proper agreement, Cl.3, was $1m exclusive of VAT, if applicable. It further states:

> *'In the event that there shall be any VAT payable in respect of the within transaction, then it shall be the purchaser's obligation to pay such VAT and the purchaser agrees that it shall indemnify and hold harmless the vendor from any claim that may be made against the vendor for the payment of any VAT which might be assessed in respect of the within transaction.'*

[49] It is evident from the proper agreement that the sale price was exclusive of VAT, if applicable and that in the event VAT becomes payable, the purchaser (appellant) must indemnify the vendor (respondent) from any payment of VAT on the transaction.

[50] Having read the proper agreement together with the affidavit filed by the respondent verifying the facts, I have no doubt that the plaintiff has shown a prima facie case.

Whether the appellant has a defence to the claim

[51] I now proceed to look at the defence raised by the appellant.

[52] It is noteworthy that the issue of VAT has come up some 3 years after the settlement and transfer of the property to the appellant. The issue of payment of VAT was not raised at the time of settlement.

[53] The respondent has made its application for summary judgment after the appellant had filed his statement of defence, albeit they could have filed such an application after the filing of the notice of intention to defend the action.

[54] Under Order 14, an application for summary judgment can be filed after a statement of claim has been served on a defendant and that the defendant has given notice of intention to defend the action.

[55] In this instance, the respondent has opted to file its summary judgment application until after the defendant file his statement of defence.

[56] According to the respondent, the defence has no merit. The agreement did not record the sale was a *'going concern'*, and the parties were bound by the terms of the proper agreement.

[57] The Master did not consider the defence filed by the appellant. In his ruling he said: *'... I wish to emphasize that I turn my attention only on the Affidavit in Opposition sworn by the Defendant. I do not turn my attention on the statement of defence filed.'* (See: p. 23 of the Master's ruling).

[58] It clear that the Master did not consider the statement of defence filed by the appellant although the application for summary judgment was filed after the filing of the statement of defence.

[59] The court has to look at the statement of defence in order to satisfy itself whether the defendant has a defence to the claim, especially where the

application for summary judgment was filed after the filing of the statement of defence. Where a party files such an application after the defendant has given the notice of intention to defend but before the filing of the statement of defence, then the court has to look at the affidavit in opposition filed by the defendant.

[60] The court is permitted to see the statement of defence even though no affidavit in opposition has been filed (see: *Takayanagi v SSS International Hotel (Fiji) Ltd* [2013] FJHC 548; HBC08.2013 (21 October 2013 (my judgment)).

[61] I would, therefore, consider the statement of defence and the affidavit in opposition filed by the appellant in order to satisfy myself whether the appellant has a defence to the claim to which the application for summary judgment relates.

[62] In essence, the appellant's defence was that at all material times the respondent, its agents and servants made representations to the appellant that the sale of the property will not attract any VAT as it was a '*going concern*'.

[63] It was contended on behalf of the respondent that there is no such terms in relation the representation, and the appellant cannot rely on the alleged representation. It was further contended that the appellant cannot attempt to lead or give substantive evidence of what he understood by the terms of a written agreement or what the parties' intention was.

[64] Mr Singh on behalf of the appellant submits that the respondent had induced the appellant into entering the agreement for the purpose of the property as no VAT will be charged as the subject property was being sold as a going concern. This is established by the evidence adduced by the respondent when it objected to the payment of VAT with the Fiji Revenue and Customs Services ('*FRCS*') on the basis the sale was a '*going concern*'. He further submits that the respondent made the demand after 3 years from the settlement of the dealing. Thus giving more credence to the defence raised by the appellant to the claim. He concludes his submission that there is a triable issue and the respondent also held the view that the sale will not attract VAT.

[65] It appears that the respondent has raised the VAT issue after the FRCS refused exemption on the sale. It is not clear that on what basis the respondent claimed exemption on the sale.

[66] The FRCS's letter ('*VD-7*') at page 3 states:

> ***"The purchaser for lot 17 a Mr Ananth Reddy is a non-registered person thus cannot be treated as a going concern."***

[67] The respondent had claimed exemption from VAT on the sale of the property on the ground that the sale was a '*going concern*'. The FRCS refused to grant the exemption sought by the respondent. It said the purchaser for LOT 17 a Mr Ananth Reddy (the appellant) is not registered for VAT, therefore cannot be treated as a '*going concern*'.

[68] The appellant's affidavit in opposition verifies the defence in the statement of defence.

[69] The defence basically, in my opinion, involves around a construction of the agreement in light of the prior negotiations that leading up to execution of the agreement.

[70] Where a clear-cut issue of law is raised by way of defence is an application for summary judgment, the court should decide it immediately. This is so even if the question is, at first flush, of some complexity and therefore will take some time to argue fully (see Lord Greene MR in *Cow v Casey* [1949] 1 KB 474).

[71] In *I-Way Ltd v World Online Telecom Ltd* [2002] EWCA Civ 413, LTL 8/3/2002, the claimant sued to recover the benefits it alleged were due to it under an oral variation of a written contract. The defendant resisted the claim relying on a clause of the written contract that was there to be no addition or amendment to the contract unless it was in writing and signed by both parties. An application by the defendant for summary judgment against the claimant was dismissed, because there was no direct authority on the issue whether the parties could prevent oral variations of a contract by use of such a clause, and an important point of principle such the one in issue needed to be tried rather than determined by summary judgment.

[72] In the case at hand, the respondent attempts to prevent oral variations of the clause of the agreement. The clause the respondent relies on reads:

> 3.2 *"In the event that there shall be any VAT payable in respect of the within transaction, then it shall be the purchaser's obligation to pay such VAT and the purchaser agrees that it shall indemnify and hold harmless the vendor from any claim that may be made against the vendor for the payment of any VAT which might be assessed in respect of the within transaction."*

[73] In ***Dick Bently Production and Anor v Harold Smith (Motors) Ltd [1965] 2 AllER 65, Lord Denning*** had stated;

> *"Looking at the cases once more, as we have done so often,* ***it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty****. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances of him to be bound by it." (Emphasis provided)*

[74] The appellant cites a passage from *Cheshire & Fifoot's Law of Contract, 1992, Butterworth's 6th Australian Edition, at page 198,* which states:

> ***"The Evidence was admitted. Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about."***

[75] The statement of defence discloses that the respondent represented and induced the transaction will not attract VAT as it is a *'going concern'*. VAT issue was not raised at the time of settlement but after 3 years of the settlement. That also after the FRCS refused the respondent's application seeking exemption from VAT on the sale of the property on the ground of *'going concern'*. All these fortify the appellant's defence to the claim that during the negotiations the respondent represented that the sale will not attract VAT.

[76] The Master held that the Appellant was required to establish (page 23 paragraph (7) ***"... a real, or genuine or an arguable defence. What the Attorney may say in his argument in Opposition is of no avail."***

[77] The requirement under O 14 for resisting an application for summary judgment is that the defendant must satisfy that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim.

Conclusion

[78] For the reasons I have given above, I am satisfied that there is an issue or question in dispute which ought to be tried. Therefore, summary judgment should not have been given against the appellant. I accordingly set aside the Master's decision of 18 March 2016 given summary judgment in favour of the respondent. I would dismiss the application for summary judgment with summarily assessed costs of $2,000.00 payable by the respondent to the appellant within 21 days of the date of this judgment.

The result

1. Appeal allowed.
2. Master's summary judgment dated 18 March 2016 be set aside.
3. Application for summary judgment dismissed.

4. Respondent will pay summarily assessed costs of $2,000.00 to the appellant.
5. The matter will take its normal course.

19/8/19

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M. H. Mohamed Ajmeer

JUDGE

At Lautoka

19 August 2019

Solicitors:

For appellant: Patel & Sharma, Barristers & Solicitors

For respondent: A K Lawyers, Barristers & Solicitors