

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 320 of 2016

BETWEEN: **CONSORT SHIPPING LINE LIMITED** a limited liability company of Lot 4 Matua Street,
Walu Bay, Suva, Fiji Islands.

PLAINTIFF

AND: **ADRIAL RAJEEV PRASAD** and **iMOVE LOGISTICS LIMITED** both of Lot 1-2 Matua
Street, Walu Bay, Suva, Fiji Islands, Businessman and limited liability company respectively.

FIRST DEFENDANT

RONALD AVINASH PRASAD present address and occupation unknown to the Plaintiff.

SECOND DEFENDANT

BEFORE: **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Filipe B** for the Plaintiff
Mr. Chand A for the Defendants

DATE OF DECISION: **Monday 31st October 2022 @ 9.30am**

JUDGMENT

[Breach of Asset Sale Agreement]

Introduction

1. On the onset, this Court notes that the Plaintiff filed a Summons seeking for an order for Summary Judgment on 27th February 2018. The court found that the Defendants did not deny the fact that in terms of the Asset Sale Agreement a balance sum of \$48,750 remained unpaid to the Plaintiff for which summary judgment was then sought. The Defendants were of the contention that the Plaintiff has failed to deliver all the Assets to the Defendants in terms of the Agreement in time and therefore the balance amount of \$48,750 was held up by the Defendants. The Defendants raised both legal and triable issues. However, the summons for Summary Judgment was refused and accordingly dismissed.
2. Thus, the reason that the substantive action is before this court for hearing and determination now, accordingly.
3. **The Plaintiff filed the Writ of Summons together with a Statement of Claim and sought for the following orders:-**
 - (i) **Judgment in the sum of \$52,769.20;**
 - (ii) **Interest at 12% per annum on the sum of \$52,789.26 calculated monthly beginning 17th January 2017 and every month 17th day of the month thereafter until the amount owing is paid in full.**
 - (iii) **Costs**
 - (iv) **Such further or other relief as the Court may deem just.**
4. **On 26th January 2017, the First and Second Defendants filed a Statement of Defence and Counter-claim and stated:-**
 - (i) The 1st Defendant admits that by Asset Sale Agreement dated 6th May 2015, the 1st Defendant agreed to purchase various assets from the Plaintiff for the sum of \$373,750.00.
 - (ii) It was a term of the Agreement that the 1st Defendant would pay the Plaintiff the purchase price as follows:-
 - (a) \$325,000 by bank cheque on or before 17th May 2015
 - (b) The balance purchase price of \$48,750 (consisting of VAT portion of the transaction) on or before 16th May 2016.
 - (iii) That all assets had now been delivered to the 1st Defendant, 15 out of 26 vehicles were not transferred to the 1st Defendant which are still registered under the Plaintiff's name due to the said vehicles/trucks were not in a transferrable condition.
 - (iv) The full settlement was to be finalised and wholly settled when all the assets which the Plaintiff had sold pursuant to Sale Agreement was road worthy and in transferrable condition as per the requirement of the Land Transport Authority. Upon receipt of \$325,000 and the balance payment

of \$48,750 were to be paid as per the prescribed date upon a proper completion of settlement by the Plaintiff.

- (v) The 1st Defendant admits that the sum of \$325,000 has been paid to the Plaintiff and puts the Plaintiff to strict prove to the worth of the items delivered in exchange of for the sum of \$325,000.
- (vi) The Plaintiff itself had breached the Sale Agreement by not delivering the full assets and not have all vehicles in a road worthy and transferrable condition.
- (vii) All vehicles have not been transferred to the 1st Defendant.
- (viii) The 1st Defendant agrees that an interest of 12% per annum was agreed upon. However, this interest shall not be applicable at this stage since the delivery of the items is incomplete.
- (ix) The Plaintiff is not entitled to any Judgment, interest and costs and the Statement of Claim should be struck off.

Counter-claim

- (x) The Defendants also filed a Counter-claim and sought for:-
 - (a) Judgment in the sum of \$5,000, 000
 - (b) Judgment as per Counter-claim particularly stated from paragraphs 28 to 35 inclusive.
 - (c) General Damages
 - (d) Damages on loss of Income
 - (e) Costs
 - (f) Any other such ruling as the Court may deem fit.
- (xi) The Plaintiff in his Reply to the Defence and counter-claim, the Plaintiff denied each and every allegation of facts in the counter-claim as if the same were set out in the document and specifically traversed.

Evidence

Plaintiff's Case

5. The Plaintiff only called [PW1] - Justice Brad Smith who gave evidence in his capacity as the Director of the Plaintiff Company, Consort Shipping Line Limited.
6. PW1 in examination in chief told Court that the Plaintiff in 2014 - 2015 was closing down and was in the process of disposing its' assets. This was when it decided to sell of its Assets as per the Agreement. PW1 stated that the Agreement was initially offered to one Hector Smith who declined to accept it.
7. PW1 stated -that Adrial requested if the same Agreement with the same terms could be offered to him. He also stated that Adrial had been an employee of the Plaintiff for more than 10 years before the date

of the Agreement. Adrial was the finance manager for the Plaintiff for some time. Adrial had just started his new business - iMove Logistics and was operating it from the Plaintiff's yard. At Adrial's request, iMove Logistics was allowed to operate its business from the Plaintiff's premises rent-free for 12 months provided Adrial did some work for the Plaintiff within that period.

8. PW 1 further stated that Adrial had requested for a 12-month holiday on the payment of the VAT portion of the agreement, which was agreed to. This was incorporated into the Agreement.
9. PW1 also stated that Adrial was well aware of the conditions of the Assets as he was the person who had prepared the schedule of Assets and was with the Company for more than 10 years before the date of the Agreement.
10. PW1 confirmed that the sale was on an "as is where is basis". Reference is made to clause 7.1 (a) on page 40 of Plaintiff Exhibit 2. He also stated that the "risk" had passed to the First Defendants on the Sale date. Refer to Clause 4 on page 39 of Plaintiff Exhibit 2. Justice also referred to the inspection clause in the Agreement. Refer to Clause 5 on page 39 of Plaintiff Exhibit 2.
11. PW1 further stated that the First Defendants had taken possession of the Assets except for the socket set which was going to be handed over once the payment of the balance purchase price is paid. Reference is made to page 141 of Plaintiff Exhibit 4 which is an email from Haniff Tuitoga to Adrial.
12. PW1 stated that the First Defendants were responsible for the transfers of the vehicle as per Clause 5 of the Agreement.
13. In cross-examination, PW1 denied that the Assets were undelivered. He stated that the First Defendant operated at the Plaintiff's premises, which is the sale referred to in the Agreement. He stated that the First Defendant had access to the Assets. PW1 confirmed that only one item remained with him, was the sockets.
14. PW1 further stated that the freeze were put on the vehicles to protect the interest of the Plaintiff as the First Defendant had not honoured the Agreement and there was information that Adrial was disposing of the Assets - vehicles. The freeze was just to prevent sale of the vehicles until transferred to the First Defendant. The words of the letter dated 6 November 2015 is exactly to that effect. [Page 100 of the Plaintiff's Exhibits is referred to].
15. PW1 in his evidence stated that he knew nothing about such claims and that the Plaintiff did not breach the Agreement.

Defence case

16. The First-named First Defendant Adrial Rajeev Prasad [DW1] only gave evidence for the Defence.
17. He was also the Director of the Second-named First Defendant, iMove Logistics Limited.

18. In examination in chief, DW1 told Court that in his evidence in chief that he was the Director for iMove, a trucking business that handled all aspects of logistics. He stated that iMove logistics started in 2015. He had been working for the Plaintiff for about 11 years and confirmed that the Agreement was submitted initially to Hector and that Hector wanted the two of them to do a joint venture but he pulled out. DW1 stated that the vehicles were in "very good state" and he admitted that the VAT portion of the Agreement is yet to be paid.
19. **In terms of his counter-claim**, DW1 told court in his evidence in chief that iMove had suffered loss as the result of the Plaintiff's breach. He stated that iMove had to hire other vehicles in order to operate. He further stated that iMove had lost some of its customers. *He tendered Defendant's Exhibits 3 - 5 to support iMove's claims.*
20. DW1 in his evidence in chief told court that iMove had suffered loss as the result of the Plaintiff's breach. He stated that iMove had to hire other vehicles in order to operate. He further stated that iMove had lost some of its customers. *[He tendered Defendant's Exhibits 3 - 5 to support iMove's claims].*
21. DW1 admitted that he still did some work for the Plaintiff one year after the Agreement and that iMove operated its business from the Plaintiff's premises, rent-free, for a year after the date of the Agreement. He agreed that there was no rent arrangement in the Agreement.
22. DW1 accepted that he had prepared the schedules/list of assets of the Agreement and that the Agreement was the first offered to Hector Smith and that Adrial jumped in when Hector refused to accept the Agreement.
23. He accepted that the Agreement was an asset purchase agreement and that the Assets were purchased on an 'as is where is basis'. He accepted that he had stayed and operated his business on the Site one year after the Agreement. He accepted that he did not complain/raise an issue about the whereabouts and or delivery of the Assets particularly the vehicles in any of the correspondences. *[He was referred to pages 114, 139, 93 and 91 of the Plaintiff's Exhibits].* However, he told court that he did not receive the possession of vehicles registration numbers: CJ 328, CN 156, Cr 085, DL 965, DL 966, DZ 304, DW 278 and E 8338 or E 8836.
24. DW1 accepted that the only issues were in relation to LTA transfers. He agreed that under the Agreement he was responsible for the transfers, getting vehicles in road worthy conditions and that he was satisfied of the condition of the vehicles. He also accepted that he had never disputed any of the clauses in the Agreement.
25. DW1 accepted that on 5th June 2016, he was arranging payment of the balance purchase price. *[Reference is made to page 119 of the Plaintiffs Exhibit 4].* He also accepted that in that correspondence he did not complain about any breach.
26. He further accepted that there was no evidence after November 2015 requesting the freeze to be uplifted. *He was referred to pages 139 and 145 of the Plaintiff Exhibits and accepted that he did*

not complain about delivery, LTA freezes and or clarifications of LTA issues. He further admitted that there was no evidence to prove which vehicles were still on freeze with LTA.

27. DW 1 admitted that there were no supporting documents produced in Court to support the entries in Defendant's Exhibits 3, 4 and 5. He accepted that he had not produced in Court agreements/contracts with customers/clients to prove who his customers/clients were and if they were lost as a result of the alleged breach by the Plaintiff. He also accepted that there were no invoices, orders and or receipts produced in Court to support the entries in Defendant's Exhibits 3, 4 and 5.
28. Furthermore, there was no proof of these documents (*Defendant's Exhibits 3, 4 and 5*) being lodged with the Fiji Revenue and Customs Services as he claimed in his evidence. He stated that the documents were submitted to his lawyers one day before the trial."

Exhibits Tendered into court

29. The Plaintiff exhibited 15 Exhibits which are contained in its bundle of documents.
30. The Defendants exhibited 5 Exhibits.

Analysis and Determination

31. The issues to be determined by the Court are the following:-

- [1] **Did the First Defendant breach of the Agreement when they failed to pay the Plaintiff the balance purchase price of \$48,750.00 (consisting of the VAT portion of the transaction) on or before 16 May 2016?**
- [2] **In terms of the Agreement, was the Plaintiff required to ensure that all the Vehicles were road worthy and in transferable state as per the requirements of the Land Transport Authority?**
- [3] **In terms of the Agreement was the First Defendant responsible for the registration of the Vehicles?**
- [4] **Was Adrial aware of the conditions of the Vehicles (some immobile and/or deregistered) and their whereabouts?**
- [5] **Were there any warranties and/or guarantees as toe the Vehicles' merchantability and/or fitness under the Agreement?**
- [6] **Was the Plaintiff required to physically deliver the Vehicles to the First Defendant? If so, where?**

- [7] From the date of the Agreement to the date of settlement did the conditions of the Vehicles change. If so, which ones?
- [8] As at 17 December 2016, and in terms of the Agreement, did the First Defendant owe the Plaintiff the sum of \$52,789.26? - Particulars of which are as follows:-

Month (2016)	Amount	12% per Annum
17 May	\$48,750.00	\$487.50
17 June	\$49,237.50	\$492.38
17 July	\$49,729.88	\$497.30
17 August	\$50,227.17	\$502.27
17 September	\$50,729.45	\$507.29
17 October	\$51,236.74	\$512.37
17 November	\$51,749.11	\$517.49
17 December	\$52,266.60	\$522.67
	\$52,789.26	

- [9] Are the Defendants bound to pay the Plaintiff in terms of the Agreement the sum of \$52,789.26 together with interest of 12% per annum on the sum of \$52,789.26 calculated monthly beginning 17 January 2017 and every other 17th day of the month thereafter until the amount owing is paid in full?
- [10] Did the First Defendant (between early May 2015 until 30 June 2016) unlawfully and without any colour of right remove the Plaintiff's Whiteboard from the Training Room, the TV flat screen, the lower office blinds and 7 x 1100 x 20 rethreaded tyres?
- [11] Is the Plaintiff liable to pay the Defendants loss of income of \$5,000,000.00 as per the Counterclaim?
- [12] Is the Plaintiff entitled to pre and post judgment interest of 12% per annum pursuant to Agreement and/or the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 27?
- [13] Is the Plaintiff entitled to costs? If so, how much?"

32. The onus is on the Plaintiff to prove that the First Defendant had in fact breached the Agreement which resulted in him owing monies to the Plaintiff as claimed by the Plaintiff herein.
33. It is noted that this case hinges on the Asset Sale Agreement dated 6th May 2015 executed by both parties and wherein its terms are uncontested accordingly.

34. **The Second Defendant, Ronald Avinesh Prasad is Adrial Rajeev Prasad's brother. He guaranteed inter alia in writing on 6th May 2015 the due and punctual payment of the First Defendant to the Plaintiff of all monies payable under the Asset Sale Agreement.**

Issue (1)

Did the First Defendant breach the Agreement when they failed to pay the Plaintiff the balance purchase price of \$48,750 on or before 16th May 2016?

35. There is no dispute that the parties to the proceedings entered into an Asset Sale Agreement on 6th May 2015.
36. Clause 3.1(a) of the Asset Sale Agreement required the First Defendant to pay the Plaintiff \$325,000 by bank cheque on or before the sale date. The Balance purchase price of \$48,750 shall be paid in full on or before 16th May 2016.
37. According to PW1's evidence, he had given the 1st Defendant a 12 month holiday to pay the balance of \$48,750 on or before 16th May 2016.
38. A sum of \$325,000 was paid to the Plaintiff Company. However, PW1 confirmed to Court that the balance sum of \$48,750 was not paid. Therefore in terms of clause 3.1(c) of the Asset Sale Agreement the purchaser (First Defendant) agreed to pay the vendor (Plaintiff) interest at 12% per annum on the remaining outstanding calculated monthly beginning 17th May 2016 and every other 17th day of the month thereafter until the amount owing is paid in full.
39. In cross-examination PW1 told the Court that all assets were taken into possession by the First Defendant [DW1] and the balance of \$48,750 to be paid by DW1 by 16th May 2016. PW1 only held onto item No. 2 a 1 inch sock set until balance was paid. DW1 also told Court that it was the First Defendant's opinion to say that the Plaintiff by placing a 'freeze' with Land Transport Authority [LTA] on 6th November 2015 that the Plaintiff [PW1] has breached the Asset Sale Agreement. PW1 confirmed to Court this freeze was in place because balance was not forthcoming. PW1 has disagreed to defence question that the balance of \$52,789.26 remain unpaid because of the breach by the Plaintiff [PW1] to deliver or allow possession of all assets as per the Asset Sale Agreement. He added that there was a default by the Plaintiff.
40. In re-examination PW1 told Court that iMove Logistics Limited [2nd named 1st Defendant] was registered to take full possession from 17th May 2015 within a month's time in the month of May. However this still did not happen.
41. It remains a fact as can be ascertained from the evidence before the Court that the balance sum of \$48,750 which after non-payment has incurred the interest also after 16th May 2016 and to the current remains unpaid.

42. The parties to this proceedings would not have been in Court if the balance sum was paid on or before 16th May 2016.
43. Further, a valid explanation has not been tendered to Court as to why the First Defendant [DW1] would contend the non-payment of the balance purchase price [as agreed to be paid on or before 16th May 2016] does not amount to breach of the Asset Sale Agreement.
44. The First Defendant [DW1] has never denied the non-payment of the balance sum. Further, it is evident before the Court that the balance sum still remains unpaid. It was required by the First Defendant [DW1] to be paid by 16th May 2016 and the non-compliance on DW1's part is a non-compliance of the term of the Asset Sale Agreement at clause 3.1(a) (ii) accordingly. Therefore this is considered a breach of the Asset Sale Agreement by the First Defendant [DW1].

Issue (2)

In terms of the Agreement, was the Plaintiff required to ensure that all the vehicles were road worthy and in transferrable state as per the requirements of the Land Transport Authority (LTA)?

45. Reference is made to **Clause 5 of the Asset Sale Agreement [Plaintiff's Exhibit P2]** which states:
 - "5. Inspection**
 - The purchaser hereby acknowledges that:**
 - (a) the Assets including the Vehicles are second hand**
 - (b) some of the Vehicles are not registered and that it will be his responsible to obtain roadworthy certificates for these vehicles and ultimate registration (if required)**
 - (c) he has inspected the Assets including the Vehicles and has satisfied himself as to their condition.**
46. PW1 in his evidence also stated that the First Defendant [DW1] Adrial, prepared Schedule 1 and 2 showing assets at pages 46 and 47 of the Plaintiff's Bundle of Documents. He was the finance administration manager for Consort Shipping Line Limited in terms of the Sale of the Assets on "as is where is basis". Some of the items were not worthy and/or operating. DW1 was in employment with the Plaintiff for 8 years prior to this time.
47. Now clause 5 hereinabove dealing with Inspection of the items and the acknowledgement and commitment made therein clearly demonstrates that the responsibility vested with the Purchaser [DW1] - the First Defendant. This fact has been admitted to by the First Defendant and further has accepted clause 5(c) regarding the Inspection and satisfaction of the conditions of the Assets.
48. Further, there was no requirement under the Asset Sale Agreement for the Plaintiff [PW1] to ensure that all vehicles were road worthy and in transferrable state in terms of the requirements of the Land

Transport Authority [LTA] and the Asset Sale Agreement on 'as is where is' basis and accepted by DW1, Adrial Rajeev Prasad.

Issue (3)

In terms of the Agreement, was the First Defendant responsible for the registration of the vehicles?

49. Clause 5(b) of the Asset Sale Agreement as discussed hereinabove which stated:-

"(b) some of the vehicles are not registered and that it will be the responsibility of the First Defendant [DW1] - Adrial to obtain the road worthiness certificate for these vehicles and ultimate registration (if required)."

50. Therefore, this issue can be answered in affirmative that, yes, it was the First Defendant's [DW1]'s responsibility to adhere to the and/or carry out the registration of the vehicles as per the acknowledgement within the Asset Sale Agreement at clause 5 under '**Inspection**' accordingly

Issue (4)

51. **Was Adrial aware of the conditions of the vehicles (some immobile and/or deregistered) and their whereabouts?**

52. I reiterate that PW1 confirmed in his evidence that Adrial (DW1) was the finance administration manager for Consort Shipping Line Limited and prepared *Schedule 1 and 2 which appears at page 46 and page 47 of the Plaintiff's Bundle of Documents.*

Issue (5)

53. **Were there any warranties and/or guarantees as to the vehicles merchantability and/or fitness under the Agreement?**

54. I refer to clause 7 of the Asset Sale Agreement [Exhibit P2] which deals with Warranties of each party.

55. Under sub-heading 'Defects' at clauses 7(a) it reads:-

(a) "Except for any guarantees or warranties specifically stated in this Agreement. The Assets are sold on an 'as is where is basis' and the Vendor shall not be liable for any defects in the Assets latent or otherwise."

At clause 7(b):

(b) "the purchaser hereby agrees that no warranties or representatives have been given or made as to the state, condition or fitness of the Assets which he takes with all fault and agrees to accept all risks of whatsoever nature."

At clause 7(c):-

"The vendor expressly disclaims any implied warranties of merchantability or of fitness for a particular purpose."

56. The execution of the Asset Sale Agreement of the First Defendant confirms his agreement without any dispute as to the conditions therein in particular that there was no warranty expressed or implied.
57. Therefore, the answer to the above question and/or issue is that there were no warranties and/or guarantors as to the vehicles merchantability and/or fitness under the Assets Sale Agreement.

Issue (6)

Was the Plaintiff required to physically deliver the vehicles to the First Defendant?

58. Reference is made to clause 6 of the Asset Sale Agreement within Plaintiff's Exhibit P2 which deals with 'Taking Possession of the Assets':-

"6. Within 14 days from the Sale date, the Vendor will allow the Purchaser to take possession and the Purchaser must take full and absolute power, possession and custody of the Assets and remove them from the site."
59. I have perused the Asset Sale Agreement on a number of times and find that there was no requirement of physical delivery of the vehicles on site to the First Defendant. The latter part of clause 6 of the Asset Sale Agreement is very clear i.e. "**...the purchaser must take full and absolute power, possession and custody of the Assets and remove them from the site."**
60. There is no question of the Plaintiff to physically deliver the vehicles to the First Defendant.

Issue (7)

From the date of the Agreement to the date of settlement, did the condition of the vehicle change?

61. The parties to the proceedings [Plaintiff and the 1st Defendant] execute the Asset Sale Agreement wherein the condition of sale was on as is where basis, and nothing further.
62. There is no evidence before this Court that at any time the conditions of the vehicles changed rights from the date of the Agreement to the settlement date.

63. The First named First Defendant was a long time employee of the Plaintiff and therefore was fully aware of the conditions of the vehicles and their whereabouts and further, the First named First Defendant was aware that some of the vehicles had been re-registered.

64. The Asset Sale Agreement at clause 4 deals with the risk factor and states as follows:-

"The risk in the vehicles shall at the sale date pass to the purchaser who shall pay the balance purchase price despite any damage to or depreciation, loss or destruction of the vehicles cause in any way whatsoever."

Issue (8)

Is the Plaintiff liable to pay the Defendants loss of \$5,000,000 as per his counterclaim?

65. There is no doubt the First Defendant in his evidence admitted that he had executed an Asset Sale Agreement wherein he agreed to purchase the Plaintiff's Company's Assets on as is where is basis.

66. The First Defendant at all the time Director of Second named First Defendant the First had agreed to purchase various assets of the Plaintiff and the First Defendant for the sum of \$373,759 pursuant to Asset Sale Agreement.

67. The First Defendant had set out its particulars of loss at paragraph 21(i) to (ix) and paragraph 25 (i) to (vi) inclusive in his Statement of Defence and counter-claim filed in Court on 26th January 2017.

68. **The First Defendant's contention in his counterclaim hinges on the following:-**

- **The Plaintiff failed to deliver full assets as per the Asset Sale Agreement dated 6th May 2015.**
- **The Plaintiff failed to keep and deliver valuables to the First Defendant on road worthy conditions resulting in Defendant unable to transfer the vehicle onto his name and is still under Plaintiff's name.**
- **Only 11 out of 26 vehicles could be transferred under the First Defendant.**
- **The trucks are yet to be transferred to the First Defendant and the6 wheeler and wheeler trucks which would have carried heavy goods and generate huge income for the First Defendant was not possible since he had to use big trucks.**

69. The First Defendant is unable to carry out or fulfil all the commercial contracts with its customers due to shortage of vehicles/trucks which causes loss to the First Defendant, thus can lose its contracts.

70. Currently 12 heavy goods vehicles are yet to be transferred to the First Defendant by the Plaintiff which would have generated more income, however these vehicles are not yet transferred to the First Defendant.

71. The First Defendant is therefore suffering tremendous losses because he is unable to expand its business and failure on the part of the Plaintiff to transfer these vehicles to the First Defendant accordingly. Thus seeking orders as part of his counterclaim.
72. The First named First Defendant, Adrial Rajeev Prasad was employed by the Plaintiff's Company for a period of up to 9 years or so.
73. Adrial [First Defendant] approached PW1 Justin Brad Smith and offered to purchase the Plaintiff Companies' assets at sale.
74. Parties agreed to the asset sale, entered and executed an Asset Sale Agreement on items to be sold on 'as is where is basis'. There were various other conditions of the Asset Sale Agreement as set out clearly therein to which the First named First Defendant, Adrial Rajeev Prasad agreed to.
75. Adrial also accepted the clauses under the Asset Sale Agreement relating to 'Inspection, risk and warranties'.
76. It was the terms of the Asset Sale Agreement dated 6th May 2015 that the First Defendant agreed to purchase various goods of the Plaintiff Company for the total sum of \$373,750 (VIP) and that the First Defendant [Adrial] would pay the Plaintiff the purchase price as follows:-
 - (i) \$325,000 by Bank Cheque on or before 17th May 2015.
 - (ii) The balance purchase price of \$48,650 on or before 16th May 2016.
77. He was given 12 months holiday to clear of the balance sum with no interest. Any interest to be charged or applicable was agreed upon by the First Defendant [Adrial] would be a 12% per annum on the remaining outstanding calculated monthly beginning 17th May 2016 and every other 17th day of month thereafter until the balance amount is paid in full.
78. The First Defendant failed to pay the balance sum of \$48,650 and interest commenced to be imposed as per the Asset Sale Agreement.
79. As at 17th December 2016, the First Defendant owed the Plaintiff a sum of \$52,789.26 particulars appears as at paragraph 10 of the Plaintiff's Statement of Claim.
80. The Second Defendant by Guarantee in writing, on 06th May 2015 guaranteed inter alia the due and punctual payment by the First Defendant to the Plaintiff of all monies payable under the Asset Sale Agreement.
81. Hence the Plaintiff sought for Judgment in the sum of \$52,789.26 together with 12% per annum interest on \$52,789.26 and costs.
82. PW1, Justice Brad Smith in his evidence told Court "that the First Defendant in his capacity as an employee of the Plaintiff's Company was aware and knew about the conditions of the vehicles. That Adrial

was responsible for the registration of the vehicles as he was already in possession of signed transfer documents by the Plaintiff. The Plaintiff Company was not supposed to deliver the purchased vehicles to iMove. To date the balance sum is still unpaid. 12% per annum interest is now imposed and claiming total of \$12,789.26 [from 17/5/16 - 17/12/16].'

83. When PW1 was questioned -that the First Defendant in its Defence has stated that few assets were not delivered to him, what did he have to say to that?

The answer to that was, '1 only, 1" inch socket set was not handed over to First Defendant and he is holding onto it until the balance sum is paid off by him. However everything else [all items] were given to Adrial.'

84. When he was questioned about transfer of vehicles, he said Adrial was in direct communication with Haniff Tuitoga Lawyers and on 'freeze' of vehicles with Land Transport Authority, that the vehicles could not be transferred?

He relied that ample opportunity was given to Adrial.

85. In response to First & Second Defendant's counter-claim, he said he disagrees with the claim on damages as he was helping Adrial to set up his Company.

86. He gave further evidence that Adrial was dealing with Land Transport Authority [LTA] in his capacity as the manager of the Plaintiff Company and also did multiple roles. All items and assets within the Asset Sale Agreement was handed over to Adrial except item No. 2 - 1" inch socket set. He was not responsible for LTA Transfer Act was sold on 'as is where is' basis of vehicles [refer to clause 5 'Inspection']. He disagreed when asked that there was no default on the part of the First Defendant. He added there was a default on his part and not the Plaintiffs therefore the First Defendant (Adrial) was on breach of Asset Sale Agreement.

87. PW1 told court that placing a 'freeze' on vehicles with LTA was not a breach on Plaintiff's part since the balance sum remained unpaid. The balance was supposed to be paid by 16th May 2016 but the First Defendant (Adrial) failed to pay off.

88. The First Defendant [Adrial] in his evidence stated that if there was no 'freeze' on vehicles with LTA, then the vehicles would have been transferred.

89. In terms of clause 6 of the Asset Sale Agreement dealing with "Inspection" - he agreed he was responsible for the registration, inspected the vehicles and was satisfied.

90. Asked if ownership was of vehicles was transferred to him? The answer was, "yes but on paper only.'

91. However, this Court finds that there is no documentary evidence to confirm the question on 'freeze' with LTA.

92. DW1 also informed Court:-

- All vehicles were not on site, but all over the place in Suva, Lautoka and Labasa.
- Financially, all vehicles were in a very good condition but physical check-up revealed the vehicles were in a bad condition, needed fixing and not road worthiness.
- We agreed as per 'Sale Asset Agreement' that we will go ahead with the sale. However 'freeze' put in place with LTA.
- I was prepared to pay the balance but matter filed into Court and found that in reality Plaintiff - Consort Shipping was in breach.

93. The case before this Court hinges on the 'Asset Sale Agreement'.
94. PW1, Justin Brad Smith for the Plaintiff gave evidence and tendered into evidence documenting exhibits and did not call any further witnesses.
95. DW1, Adrial Rajeev Prasad gave evidence for the Defence and cited documentary evidence but did not call any further witnesses.
96. It is not disputed by DW1 [Adrial] that he entered into an Asset Sale Agreement to purchase the assets of the Plaintiff Company. The items to be purchased were on 'as is where is' basis.
97. DW1 [Adrial] did not dispute and/or challenge any of the clauses from 1 to 15.12 inclusive within the Asset Sale Agreement.
98. However, DW1's counterclaim was that the Plaintiff did not deliver full assets as per the Asset Sale Agreement. Only a total of 11 out of 20 vehicles were transferred to him. As a result to carry out his business was hindered. He told Court that the Plaintiff is in breach of the Asset Sale Agreement.
99. I also think appropriate to make reference to Annexure marked 'AP1' within the Affidavit in Support of Adrial Rajeev Prasad filed on 7th March 2017.
100. Am email from LTA to Adrial Rajeev Prasad dated 1st December 2015 stating:-

"First of all in order to uplift the 'freeze' we will need a letter from Haniff Tuitoga Lawyers with a fee of \$234 for all the 26 vehicles to uplift the 'freeze' ...only then we can proceed with the renewal of the 26 vehicles and the transfer."

101. On 18th June 2016, Haniff Tuitoga writes to LTA on above subject matter 'Sale of Motor Vehicles':-

"Our client vendor has sold the vehicle itemised in Schedule 2 to Adrial Rajeev Prasad's and iMove Logistics Limited. The signed transfers are with the purchasers. The transaction settled on 1st June 2015.'

'Number plates for several vehicles has been surrounded previously because they were not used.'

Could you please assist the purchaser and ensure that the transfers are properly registered to reflect the change in ownership.'

'Please contact as if you require any assistance.'

102. I draw my attention to clause ii of the Asset Sale Agreement' which deals with **transfer of ownership of assets and clause 11.1 and 11.2 clearly speaks for itself.**
103. The signed transfer forms of vehicles was already given to the Purchaser (Adrial) together with the above correspondent dated 18th June 2015 written to LTA , was sufficient compliance by the Vendor's Solicitors to be able to transfer all vehicles to the purchaser.
104. The Plaintiff held on to the 1 inch socket set since the First Defendant failed to honour the Asset Sale Agreement on the balance sum of \$48,750 on or before 16th May 2016.
105. With above in mind, I find that the First Defendant has failed to prove its counter-claim on the balance of probabilities.
106. It can now be concluded that the First Defendant was in breach of the Asset Sale Agreement for non-payment of balance sum of \$48,750 on or by 16 May 2016. It was not the Plaintiff who had breached the Asset Sale Agreement as was alleged by the First Defendant.
107. The fact of the matter is very plain and the First Defendant is very well aware of the same because Adrial had accepted that the "Asset Sale Agreement' was an Asset purchase agreement on an 'as is where is basis.'
108. Adrial also accepted the clauses within the Asset Sale Agreement relating very clearly to 'inspection, risk and warranties.'
109. I reiterate and find there is no basis for the First Defendant's allegations that the Plaintiff had breached the 'Asset Sale Agreement.'
110. Therefore, I find further that the Plaintiff cannot be held and found liable for the orders that the First Defendant now seeks within hi counter-claim.
111. The Defendant's counter-claim for aforesaid rational is hereby accordingly dismissed.
112. On the other hand, I find that the Plaintiff has proved his case on the balance of probabilities as was required of him to do so in terms of the relevant law and facts of this case.
113. That is, the Plaintiff sold his business Company together with the Assets therein and the parties to the proceedings had entered into and executed an 'Asset Sale Agreement' in the sum of \$373,750. The

purchase price of \$325,000 was paid by a bank cheque. The balance of \$48,750 still remains unpaid for which the Plaintiff issued a Demand Notice and upon the First Defendant's failure to act, the Plaintiff was prompted to commence these proceedings and seek for appropriate orders accordingly.

114. In the interim, because of the non-payment of the balance sum of \$48,750, the Plaintiff had no other alternative but to hold onto 1" inch socket set which the Plaintiff will hold onto until the First Defendant pays the balance overdue sum of \$48,750 with interest totalling to \$52,789.26 calculated from 17th January 2017 and every month thereafter on 17th day of the month until the amount owing is paid in full.

Costs

115. The matter proceeded to trial. The Action was commenced by the Plaintiff on 19 December 2016 and concluded on 15th May 2019.
116. Written submissions were furnished to Court by both parties accordingly. Costs and expenses have incurred in preparation for trial.
117. It is only fair and appropriate that I order a summarily assessed costs against the First named First Defendant [Adrial] in the sum of \$1,500 to be paid within 14 days timeframe.

In Conclusion

118. There will be Judgment entered for the Plaintiff in the sum of \$52,789 against the First named First Defendant.
119. Interest of 12% per annum is entered against the First named First Defendant on the sum of \$52,789 calculated monthly beginning 17th January 2017 and every other 17th day of the month thereafter until the amount owing is paid in full to the Plaintiff.
120. Pre and Post Judgment interest of 12% per annum from 17th May 2016 to the date of the Judgment is entered against the First named First Defendant pursuant to the Law Reform [Miscellaneous Provisions] [Death and Interest] Act 27.
121. The Defendant's counter claim is accordingly dismissed.
122. Once the Judgment sum is settled by the Defendant, then the Plaintiff is ordered to hand over the possession of 1" inch socket set to the Defendant.

ORDERS

- i. Judgment is entered against the First named First Defendant [Adrial] in the sum of \$52,789.

- ii. The First named First Defendant is ordered to pay the Plaintiff interest at the rate of 12% per annum to the Plaintiff on the Judgment sum of \$52,789 calculated monthly beginning 17th January 2017 and every other 17th day of the month thereafter until the amount owing is paid in full.
- iii. The First named First Defendant is ordered to pay the Plaintiff Pre and Post Judgment interest of 12% per annum from 17th May 2016 to the date of the Judgment pursuant to the Law Reform [Miscellaneous Provisions][Death and Interest] Act 27.
- iv. The First named First Defendant to pay the Plaintiff a sum of \$1,500 as summarily assessed costs within 14 days timeframe.
- v. The Defendant's counter claim stands dismissed.
- vi. Once judgment sum is settled by the Defendant, then the Plaintiff is ordered to hand over the 1" inch socket set to the Defendant accordingly.

Dated at Suva this 31st day of October, 2022.




.....
Vishwa Datt Sharma
JUDGE

cc: *Haniff Tuitoga, Suva.*
Amrit Chand Lawyers, Suva.