HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION No. 52 OF 2021

BETWEEN : **PRADIP SINGH aka PARDIP SINGH** of Delailabasa, Labasa, Fiji, Businessman.

PLAINTIFF

AND : **IQBAL HUSSEIN** of Nasekula, Labasa, Fiji, Businessman.

DEFENDANT

Representation : **Mr. A. Bale** (Lal Patel & Bale) for the Plaintiff.
Mr. S. Raramasi (Raramasi Law) for the Defendant.

Date of Hearing : 6th July 2023.

Date of Judgment: 13th October 2023 (Via Skype from Suva)

Judgment

Introduction

[1] The Plaintiff was the registered proprietor of Crown Lease No. 4409 (Converted to iTLTB ref No. 4/9/15767) known as Lot 2 on Plan M 2427, Nasea comprising an area of 1 Rood 32 perches together with all improvements thereon (the "**Property**"). On 16th September 2013 the Plaintiff and the Defendant entered into a Sale and Purchase Agreement ("**Agreement**") for the sale of the Property.

[2] The property was transferred to the Defendant in November 2013. Upon settlement the Defendant paid the Plaintiff the sum of $550,000.00. The Defendant did not pay Value Added Tax (VAT) on the sale. On 22nd July 2016, pursuant to Section 15 (1) of the Value Added Tax Act 1991, the Fiji Revenue and Customs Authority ("**FRCA**") assessed VAT as being payable on the sale of the property. The Plaintiff paid VAT to FRCA which was assessed to be $98,499.29.

[3] The Plaintiff claimed from the Defendant the sum he paid to FRCA. The Defendant refused to pay that sum. The Plaintiff then filed a writ of summons claiming the sum he paid to FRCA with interest at a rate of 13.5% on the sum paid as damages for loss of opportunity and $5000.00 as cost of the action.

[4] The Defendant's Lawyers filed a Statement of Defence in which they claim that he is not obligated to pay VAT nor any interest. The position of the Defendant is that according to the Agreement he was to pay $550,000.00 to the Plaintiff and no VAT was payable. The Defendant also pleaded that the claim is barred under the Limitation Act.

The Issues to be Determined

[5] At a Pretrial Conference (PTC) the lawyers for the parties identified a number of issues for the Court to determine, as follows:

(i) Whether the Defendant was liable to pay VAT in addition to the purchase price.
(ii) Whether pursuant to the Sale Agreement or the VAT Act 1991, VAT was payable by the Defendant on the sale.
(iii) Is the Defendant liable as per Section 15 (1) of the VAT Act 1991 for the non-payment of VAT or breach of contract?
(iv) Can the Defendant rely on a discussion held between his solicitors and the Plaintiffs solicitors with respect to the settlement of the Agreement and the consideration required to be paid?
(v) Did the Plaintiff specifically represent to the Defendant that VAT was applicable and on such basis the agreement was performed?

(a) Whether such representation was partly written as contained in the agreement and implied arising from words used by the Plaintiff to give commercial sense and efficacy.
(b) If the Plaintiff made the said representations, did he act contrary on the representation as made concerning the utilization of the contract as an engine of oppression to claim VAT?

(vi) Has the Defendant refused to make payment of the VAT to the Plaintiff?
(vii) Whether the Plaintiff can claim VAT paid in the sum of $98,499.29 from the Defendant?
(viii) Can the Plaintiff claim interest at a rate of 13.5% on the sum of $98.499.29 paid by him to FRCA as damages for loss of opportunity?
(ix) Is the Plaintiff entitled to Judgment in the sum of $98.499.29, damages in the sum of $13297.40 and $5000.00 as costs for this action?

I note that the issue of the claim being barred under the Limitation Act was not included in the issues at the PTC.

Hearing

[6] On 20th March 2023 the matter was set for 2 days trial on 6th and 7th July 2023 by Master Ratuvili (as he then was). On 6th July 2023 when the matter was called for trial, no witnesses were called by either party. Both lawyers submitted that they were ready for

hearing. Both lawyers made brief oral submissions and sought time to file written submission. Both lawyers consented to the bundle of documents numbered from **1** to **37** be tendered and be considered by the Court. The lawyers were given 14 days to file written submissions. The submissions of the parties have been filed. It has been read and considered.

Determination

[7] In determining the issues between the parties, this Court will need to analyse and interpret a number of documents. The law about the interpretation of contracts is summarised in five principles. Lord Hoffmann in the often-cited **Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 W.L.R 896**, said *"I do not think that the fundamental change which has overtaken this branch of law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R 1381 at 1384-1386 and Reardon Smith Line Ltd v. Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 1 W.L.R 989, is sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded...."*. The principles which Lord Hoffman then went to summarise are as follows:

> (i) ***Interpretation is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> (ii) ***the background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*** Later, in ***BCCI v. Ali [2002] 1 A.C 251. at 269***, Lord Hoffman qualified this, he said:
>
> > "When ... I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of law (as in cases in which one takes into account that parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: '... we do not easily accept that people have made linguistic mistakes, particularly in formal

documents.' I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage".

(iii) **The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.**

(iv) **The meaning which a document (or other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax** (see *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] A.C. 191 at 201.*)

(v) **The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense propositions that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.** Lord Diplock made this point more vigorously when he said ***Antaios Cia Naviera SA v Salen Rederierna AB, (The Antaios) [1985] A.C. 191 at 201***:

> *". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

Although the five principles deal with different aspects of the techniques of interpretation, they must be read as a whole. In **HSBC Bank Plc v Liberty Mutual Insurances [2001] All E.R (D) 61 (Affirmed on appeal [2002] EWCA, Civ 691).** Patten J said:

> "It seems to me important to read this passage as a whole and to avoid giving to anyone of Lord Hoffman's stated principles a meaning and importance unqualified by the other rules he has set out..."

[8] The parties entered into an **Agreement** on 16th September 2013. I have perused the whole Agreement. The Agreement sets out the terms and conditions (general and special)

between the parties. The relevant provisions of the **Agreement** between the parties which relate to VAT are:

> "...
>
> Price: $550,000.00 (FIVE HUNDRED FIFTY THOUSAND DOLLARS)
>
> (No Value Added Tax Payable) ...
>
> "Value Added Tax or "VAT" means the tax payable under the relevant legislation in Fiji Islands...
>
> 12. **Value Added Tax (VAT)** [*in the event VAT applies to this transaction*]
>
> 12.1 In the event the parties are contracting on the basis that the sale is zero-rated pursuant to Section 15 (2) of the Value Added Tax Decree 1991, then VAT is payable at 0%.
>
> 12.2 If this agreement provides for the Purchaser to pay any VAT (in addition to the purchase price) then:
>
> a) The Purchaser shall pay the VAT to the Vendor on the Date of Settlement or such other date as the Vendor shall nominate to the Purchasers in writing:
>
> b) Where the VAT is not so paid to the Vendor, the Purchaser shall pay to the Vendor:
>
> i) Interest at the appropriate rate payable for late payment of VAT calculated from the date the VAT was payable until payment; and
>
> ii) any default VAT.
>
> c) It shall not be a defence to a claim against the Purchaser for payment to the Vendor of any default VAT that the Vendor has failed to mitigate the Vendor's damages by paying an amount of VAT when it fell due under the Value Added Tax Decree;
>
> 12.3 The Vendor will deliver a tax invoice to the Purchaser on or before the date of Settlement setting out the supply and the VAT component.
>
> 12.4 "Default VAT" means any additional VAT, penalty or other sum levied against the Vendor under the Value Added Tax Decree by reason of non-payment of the VAT payable in respect of the supply made under this agreement but does not include any such sum levied against the Vendor by reason of a default by the Vendor after payment of the VAT to the Vendor by the Purchaser."

[9] Lord Hoffman's five principles are the routine starting point for consideration of the principles of interpretation. Applying those principles in this matter this court finds that the Agreement between the parties for the sale of the property was for a sum of $550,000.00 and that no value added tax (VAT) was payable. The Agreement (Clause 12

.2 (a)) further provided that "***if this agreement provides for the purchaser to pay any VAT (in addition to the purchase price) then the purchaser shall pay VAT to the Vendor on the date of settlement or such other date as the Vendor shall nominate to the Purchasers in writing;***". (My underlining) The agreement between the parties did not provide for the payment of VAT in addition to the purchase price. The Purchaser therefore was not liable to pay VAT to the Vendor under the agreement. Additionally, clause 12.3 provided that "**the vendor will deliver a tax invoice to the Purchaser on or before the Date of Settlement setting out the supply and the VAT component.**" Clause 12.3 provided that vendor will deliver a Tax Invoice to the Purchaser on or before the date of settlement setting out the VAT payable. This did not eventuate. The Vendor did not deliver a Tax invoice for any VAT component on or before settlement to be paid by the Purchaser. The natural and ordinary meaning of "such other date" in clause 12.2 (a) of the Agreement refers to a date before settlement. That date cannot be 2 to 3 years after settlement and transfer of the property. Clause 12. 2 (a) needs to be read together with Clause 12.3 of the Agreement.

[10] The Agreement entered into between the parties did not specify the tax registration status of the parties. It did not show if either party was VAT registered. Even in the statement of claim the Plaintiff does not state his tax status. The FRCA in their letter dated 28th August 2015 (Number **27** in bundle) addressed to the Plaintiff state that "the vendor was registered for VAT on the 30th of May 1996 and the purchaser was registered for VAT on the 27th of March 2015; however, the Sale and Purchase Agreement was executed on the 16th of September 2013." The letter from the FRCA states that the Vendor (Plaintiff) was VAT registered when the Agreement was entered into between the parties. This fact is something which the Vendor (Plaintiff) himself should be well aware of. The FRCA in their letter dated 22nd July 2016 (Number **29** in bundle) to the Plaintiff (Vendor) clearly state that "both the vendor and the purchaser did not request for a VAT opinion from the Authority." No evidence was put before this Court by any party to refute this statement by the FRCA.

[11] The VAT regime came into force on 1st July 1992. In **Punjas Limited v. Commissioner for Inland Revenue [2006] FLR 362**, the Fiji Court of Appeal at P.367, set out a summary of the general scheme of the VAT Act (previously referred to as VAT Decree) as follows:

> "[35] The key provision is s 15 which imposes a tax on the supply of goods and services by a registered person in the course or furtherance of a taxable activity carried out by that person. Section 15 (1) opens with the words: "Subject to provisions of the [Act], the tax shall be charged in accordance with the provisions of this [Act]..." ...
>
> The tax is imposed by reference to the value of goods and services supplied. Section 15 (2) provides that where certain goods and services are zero rated, they shall not attract any tax...
>
> [37] The [Act] lays down a system of registration. Under s 22 persons making taxable supplies must be registered.

[38] Section 3 sets out the meaning of the term "supply" while s 4 sets out the meaning of a "taxable activity".

[39] A supplier (except where otherwise provided by regulations to the contrary) being a registered person when making a taxable supply to a recipient is required to issue a tax invoice. The tax on a supply by a registered person is called an *output tax* while the tax on a supply to a registered person is called an *input tax*."

[12] The VAT position is determined by the VAT Act, not by an agreement. On the issue of 'going concern', this Court finds no mention of this in the Agreement. Schedule 2 of the VAT Act provides for the zero-rated supplies. Clause 8 provides for zero rating for "the supply of a taxable activity as a going concern or part of a taxable activity as a going concern where that part is capable of separate operation to a registered person". The Agreement did not refer to the sale as a going concern. FRCA in their letter dated 22nd July 2016 (Marked No. **9**) to the Plaintiff (Vendor) clarified that "...to qualify for the sale of a going concern:

(a) Both vendor and purchaser are registered for VAT at the time of sale;

(b) It must be the supply of whole or stand-alone part of a taxable activity from one registered person to another registered person;

(c) The taxable activity or part of the taxable activity being sold is capable of separate operation without any hindrance to its continuity."

The sale of a going concern was disqualified as the purchaser was not registered for VAT. A registered VAT taxpayer is required to charge VAT at the time of sale. The Agreement was entered into between the parties on the assumption that no VAT was payable.

[13] The full purchase price of the sale of the property was upon settlement. Section 18 (2) (f) of the VAT Act is relevant and it sets out the time of supply of the goods and services between the Parties (Vendor and Purchaser) which is the time of settlement. The Vendor (Plaintiff), a supplier being a registered person when making a taxable supply (on or before settlement) to the recipient (Purchaser/Defendant) was required to issue a tax invoice. He did not. There is no record of any tax invoice being issued to the Purchaser/Defendant on or before settlement. A Tax invoice is issued pursuant to section 41 of the VAT Act. Regulation 3 of the Value Added Tax Regulations 1991 sets out the particulars that are to be contained in the tax invoice. Section 41 of the VAT Act provides:

"*Except as otherwise provide by regulation, a supplier, being a registered person, making a taxably supply to a recipient,* ***shall issue a tax invoice containing such particulars as specified by regulation at the time that the supply takes place,*** *provided that –*

a. *It shall not be lawful to issue more than one tax invoice for each taxable supply.*

b. *If a registered person claims to have lost the original tax invoice, the supplier or the recipient, as the case may be, may provide a copy clearly marked "copy only.* (emphasis added)

VAT component is set out in the tax invoice. It was to have been provided by the Plaintiff/Vendor/Supplier to the Defendant/Purchaser/Recipient on or before settlement. The agreed bundle of documents does not contain any tax invoice issued by the Plaintiff/Vendor/Supplier pursuant to the Act and Regulations to the Purchaser/Defendant/Recipient.

[14] Lawyers made written and oral submissions. No witnesses were called by the parties to give evidence on any issues, let alone on the representations between parties. Similarly, there was no evidence before this court relating to discussions between solicitors of the parties with respect to settlement of the agreement and the consideration required to be paid.

[15] The Defendant in his statement of defence argued that the claim was statute barred pursuant to the Limitation Act 1971. No submission as made by them on this issue. Section 4 (1) of the Limitation Act 1971 sets out that actions of contract shall not be brought after the expiration of 6 years. This was a contractual agreement between the parties. The Plaintiff agrees that the period expired in 2019 as the agreement was entered on 13th September 2013. However, they argue that as the demand letter was issued on 15th December 2017, so the limitation period will expire on 15th December 2023. They filed the claim on 23rd December 2021. The Plaintiff's argument is untenable the parties had entered into a contract the time limit for the period to bring an action was within 6 years from the date the cause of action accrued. In this matter it would be the date of settlement. That would be within 6 years of November 2013. This period expired in November 2019. The Plaintiff is barred from bringing this action.

[16] For the reasons given here the claim is dismissed. The writ of summons is struck out. The Plaintiff is to pay the Defendant $2000.00 as summarily assessed costs within 30 days.

[17] **Court Orders**:

(i) The Claim is dismissed.

(ii) The Writ of Summons is struck out.

(iii) The Plaintiff is to pay the Defendant $2000.00 summarily assessed costs within 30 days.

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Chaitanya Lakshman

Acting Puisne Judge