IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 217 of 1981

Between:

CASTAWAY RESORTS (FIJI) LIMITED Plaintiff

- and -

TRAVELODGE FIJI LIMITED Defendant

JUDGMENT

On 4th January, 1980, the plaintiff company and the defendant company executed a written agreement by which the defendant company granted to the plaintiff company an option to purchase a hotel in Taveuni.

Clause 10 of that agreement reads as follows :

> "10. Expenses of Sale - The Seller shall pay its own Solicitors' costs in connection with this Agreement and for perusal of the transfer of the said property and the release of the mortgage thereover together with all stamp duty, registration fees and filing fees thereon. The Buyer shall pay its own Solicitors' costs in connection with this Agreement and for preparation of the transfer."

In that clause, needless to say, it was the plaintiff company that was referred to as "the buyer" and the defendant company as "the seller".

It is common ground that, in due course, the option to purchase was exercised and a transfer from seller to buyer was registered of the land on which the hotel was situated.

It is also common ground that stamp duty on that transfer, a sum of $5,280, was paid by the plaintiff company after the defendant company had refused to pay it.

The plaintiff company now asserts that it was the defendant company that was bound by clause 10 to pay that $5,280 and the central issue in this case is whether a proper interpretation of the clause supports that assertion.

Only one witness, Mr. Brook, the plaintiff company's managing director, gave evidence. He told the court about a meeting which, it is common ground, took place some three months before the execution of the option agreement. That meeting was attended by Mr. Brook and the plaintiff company's solicitor, and by Mr. Carter, regional manager of the defendant company, and the defendant company's solicitor, Sir Robert Munro.

Now Mr. Brook, according to his sworn testimony, had developed the attitude, prior to the meeting, that, as the defendant company had been saved from paying a real estate agent's commission of $20,000 by dealing directly with him, it should pay all of the expenses of the sale.

The record of Mr. Brook's evidence concerning the meeting reads as follows :

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Examination-in-chief:

> "At that meeting I raised the question of which company would pay the expenses. I said that all expenses should be paid by the seller company. Sir Robert reacted by saying something like 'Surely you don't think the vendor should pay the purchaser's solicitor's costs as well as the stamp duty on the transfer.'
>
> I replied that I did think that.
>
> It was agreed at that meeting, according to my understanding, that the seller company, because it had saved that $20,000, would pay all costs of the sale, including the stamp duty on the transfer, except only the buyer company's solicitor's costs."

Cross-examination:

> "At that meeting in Sir Robert's office I raised the question of costs. Sir Robert reacted strongly against my suggestion that the seller company should pay all costs including the buyer company's solicitors costs. It was agreed each party would pay its own solicitors costs at that meeting. I don't agree that the meeting ended with no agreement at all as to who would pay stamp duty on the transfer. Not only was it agreed that the parties would pay their own solicitor's costs but it was also agreed that the seller would pay all costs, including all stamp duty, apart from the buyer's solicitors costs."

I have been urged to treat that as evidence of the meaning of clause 10. I find that I may not do so. In Prenn v. Simmonds (1971) 3 All E.R. 237 the House of Lords upheld the rule that a court may not, in order to interpret a written agreement, receive evidence of the negotiations between the parties or the purpose which either of them hoped to achieve: per Lord Diplock, page 245.

I have also been urged to take account of the conduct of the parties subsequent to the execution of the agreement. Although the case was not mentioned by either counsel, I have, with some anxiety, considered the extent to which I am bound by the judgment of the Judicial Committee of the Privy Council in Watcham v. Attorney-General of the East Africa Protectorate (1919) A.C. 533 and the view expressed by Lord Atkinson that in cases of ambiguity, whether patent or latent, evidence of user may be given, to show the sense in which the parties used the language of the instrument, and that this applies to modern as well as to ancient instruments.

In considering the effect of that judgment I have been guided by comment on it expressed in the House of Lords in Schuler A.G. v. Wickman Ltd. (1973) 2 All E.R. 39.

Lord Reid said, at page 45 :

> "It was decided in Watcham v. Attorney-General of East Africa Protectorate that in deciding the scope of an ambiguous title to land it was proper to have regard to subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning."

Lord Wilberforce said, at page 53 :

> "The arguments used in order to induce us

to depart from these settled rules and to admit evidence of subsequent conduct generally in aid of construction were fragile. They were based first on the Privy Council judgment in Watcham v. Attorney-General of East Africa Protectorate, not, it was pointed out, cited in Whitworth's case. But there was no negligence by counsel or incuria by their Lordships in omitting to refer to a precedent which I had thought had long been recognised to be nothing but the refuge of the desperate. Whether in its own field, namely, that of interpretation of deeds relating to real property by reference to acts of possession, it retains any credibility in the face of powerful judicial criticism is not before us. But in relation to the interpretation of contracts or written documents generally I must deprecate its future citation in English courts as an authority. It should be unnecessary to add that the well known words of Lord St. Leonards (Attorney-General v. Drummond) 'tell me what you have done under such a deed, and I will tell you what that deed means' relate to ancient instruments and it is an abuse of them to cite them in other applications."

Lord Simon of Glaisdale said at page 60 :

"Watcham's case was already considerably weakened as a persuasive authority by what was said about it in Gaisberg v. Storr and Sussex Caravan Parks Ltd. v. Richardson. In the light of the Whitworth Street Estates case it can no longer be regarded as authority for the proposition" (that the court may have recourse to subsequent conduct of the parties to resolve an ambiguity in a written commercial contract) "for which it was cited in the Court of Appeal in the instant case."

Lord Kilbrandon said, at page 63 :

"The decision in Watcham v. Attorney-General of East Africa Protectorate, which was referred to by Lord Denning MR, does not, I believe, command universal confidence, though I would not question it so far as it merely lays down that, where the extent of a grant

> of land is stated in an ambiguous manner in a conveyance, it is legitimate to interpret the deed by the extent of the possession which proceeded on it."

In Schuler it was held that evidence of the conduct of the parties under a modern commercial contract cannot be admitted as a guide to their intention.

It seems to me that the judgment of the Judicial Committee in Watcham is authority only for saying, in Lord Kilbrandon's words in Schuler cited above, that "where the extent of a grant of land is stated in an ambiguous manner in a conveyance, it is legitimate to interpret the deed by the extent of the possession which proceeded on it."

The object of interpretation is to ascertain the intention of the parties to the instrument as expressed by the words they have used; and since the words are the sole guide to that intention, extrinsic evidence of it is, generally speaking, not admissible - see Halsbury, 4th Ed., Vol. 12, para. 1490.

Hence, subject to exceptions which do not apply to the present case, "no extrinsic evidence of the intention of the party to the deed from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written" : Hal. footnote 7, page 613. Nor, as I have already observed, may extrinsic evidence of the negotiations between the parties, the object either of them hoped to achieve or their subsequent conduct be admitted in order to ascertain that intention.

So I must look at clause 10 and do my best to ascertain its meaning, i.e. the intention of the parties in relation to the obligation to pay stamp duty on the transfer of the property, by reading the clause in the context of the agreement as a whole and taking the language used in its ordinary sense.

Clause 10 consists of two sentences. The first sentence says that the seller shall pay -

(1) its own solicitors' costs

(a) in connection with the agreement

(b) for perusal of the transfer of the property

(c) for the release of the mortgage over the property

(2) "all stamp duty, registration fees and filing fees thereon".

It is agreed that (2) applies to (c) i.e. that the seller, the defendant company, was obliged to pay all stamp duty, registration fees and filing fees on the release of mortgage.

Mr. Tikaram, for the plaintiff company, has submitted that (2) applies not only to (c) but also to (a) and (b) and that, therefore, stamp duty on the transfer mentioned in (b) was payable by the defendant company.

Mr. Sweetman, for the defendant company, has submitted that (2) applies only to (c) because it was only in relation to the release of the mortgage that all three of those disbursements, namely stamp duty, registration fees and filing fees, were payable. If one took the view

that the words "as shall be payable" should be understood to be appended to (2), that argument would hardly appeal. However, I do not consider it necessary to decide whether or not that view is correct.

Certainly, as it is agreed, (2) applies to (c); and it may well be, in my opinion, that (2) also applies, at least as far as stamp duty is concerned, to (a). The question is: could (2) have been intended to apply to (b)?

It seems to me that one should first appreciate that the true subjects of (a), (b) and (c) are, respectively, an agreement, a perusal (not a transfer) and a release.

It follows, to my mind, that the application of (2) to (b) would be absurd. There is no such thing as stamp duty, or a registration fee or a filing fee on the perusal by a solicitor of a document. So I take it that (2) was not intended to apply to (b) at all.

That view of the matter does not seem to be affected in the least by the second sentence of clause 10. Nor does it seem to be affected by clause 5 (d) which requires the seller to tender to the buyer a "registrable" transfer. Such a requirement is met by tendering a valid, duly executed, but unstamped transfer: Magan Lal Gandhi v. T.A. Edwards and Anor. F.C.A. Civil Appeal No. 23 of 1982.

What, then, did the parties intend in relation to the obligation to pay stamp duties?

The agreement itself is silent, it has nothing to say in answer to that question. However, provisions may be implied in written contracts on a variety of grounds, one

of which is that, in transactions such as the one governed by the contract, there is a usage which is reasonable, certain and lawful, and so well known that the parties will be presume to have intended to follow and be bound by it: Hal., para.1474 Of such a kind is the practice, when land is sold, of the purchaser paying the stamp duty on the transfer. That is a practice notoriously well known, followed every day in conveyancing transactions and, generally speaking, departed from only by express agreement. It is a practice which accord with the primary liability of the transferee to pay stamp duty on a transfer which is created by Section 5(2) of the Stamp Duties Act (Cap. 205). I can find nothing in clause 10 or the rest of the agreement which is inconsistent with the intention that that practice be followed.

So I hold that there was in the contract nothing that obliged the defendant company to pay stamp duty on the transfer but there was, on the contrary, a term implied by usage that obliged the plaintiff company to pay that stamp duty.

It follows that I must dismiss the plaintiff company's claim.

The plaintiff company is to pay the defendant company's costs, to be taxed if not agreed upon.

R. A. Kearsley

(R.A. Kearsley)
JUDGE

Suva,

May, 1984.