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**IN THE COURT OF APPEAL, FIJI ISLANDS**
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU 0048 OF 2008**
**(High Court Civil Appeal HBA 21 of 2007)**

**BETWEEN** : **AGHA KHAN (father's name Akram Khan) trading as SHELL BRIDGE SERVICE STATION**

**First Appellant**

**A N D**: **de VITI INVESTMENTS CORPORATION LIMITED**

**Second Appellant**

**A N D**: **SHELL FIJI LIMITED**

**Second Respondent**

**Coram**: **Byrne, AP**
**Calanchini, JA**
**Wati, JA**

**Date of Hearing** : **13 November 2009**

**Counsel** : **Dr M S D Sahu Khan for Appellants**
**Ms A Neelta for Respondent**

**Date of Judgment**: **27th January 2010**

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## JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Phillips J) handed down on 23 July 2008. The Court dismissed an appeal against a decision of the Ba Magistrates' Court in civil action No. 104 of 2003.

[2] The relevant facts were conveniently stated in the judgment of the High Court as follows. On 1 October 1999 the parties "entered into a Shell Retail Agreement for 'Sis Sites' (the agreement) wherein the respondent appointed the appellants a dealer for the Ba Bridge Service Station. Pursuant to the agreement the appellants operated the respondent's premises and conducted business under the Shell Retail System.

[3] The initial term of the agreement was for five years from 1 October 1999. Under clause 63 the respondent reserved the right to terminate the agreement by giving not less than 30 days notice to the appellants on any of the grounds contained in clause 63. The respondent by letter dated 26 August 2003 (the termination letter) gave notice to terminate the agreement pursuant to clause 63 (e) and (m). The grounds relied on were that the appellants had knowingly and deliberately provided the respondent with false and misleading information and forged insurance cover notes i.e. misrepresentation and breach of contract as provided for under clause 63 (e) and (m). On receipt of the termination notice the appellants brought a claim in the Ba Magistrate's Court. Some time later the appellants purported to assign their rights under the agreement to Western Builders Limited. The respondent rejected the purported assignment. The appellants claimed the sum of $235,000 in special damages being the alleged loss in respect of the purported assignment agreement."

[4] In a written decision delivered on 30 November 2006 the Resident Magistrate found on the balance of probabilities that:

> "• ***The Defendant was entitled at law to terminate the Agreement for breach of either the insurance clause or misrepresentation clause;***
>
> • ***As a matter of fact the Plaintiff breached both the insurance clause and misrepresentation clause;***
>
> • ***The notice to terminate was effective; and***

- ***The contract was effectively terminated on 27 September 2003."***

He concluded:

> ***"The claim is therefore dismissed and I award nominal damages to the Defendants in the sum of $250.00 and costs which I fix at $800.00 to be paid jointly and severally by the Plaintiffs."***

[5] The Appellants filed a Notice of Intention to Appeal dated 5 December 2006 in the Magistrate's Court and subsequently filed the following grounds of appeal in the High Court by way of Notice dated 29 December 2006:

> ***"1. The Learned Trial Magistrate erred in law and in fact in not making decision on the issues involved according to the pleadings and the submissions made by the parties and determining the action on matters outside the Pleadings.***
>
> ***2. The Learned Trial Magistrate erred in law and in fact in not appreciating the fundamental issues in the action having regard to the Pleading and the submissions of the parties.***
>
> ***3. The Learned Trial Magistrate erred in law and in fact in not taking relevant matters into account and taking irrelevant matters into account in coming to his decision.***
>
> ***4. The Learned Trial Magistrate erred in law and in fact in not adequately and/or properly appreciating its application of the Contra Preferentem rule and accordingly misapplied the rule in coming to his decision.***
>
> ***5. The Learned Trial Magistrate erred in law and in fact in introducing the question of mistake in the notice terminating the Agreement when that issue was not pleaded nor made subject to an issue in the proceedings.***

6. ***The Learned Trial Magistrate erred in law and in fact in not holding that the Tenancy and/or Agreement of the Appellant with the Respondent was not properly terminated.***
7. ***The Learned Trial Magistrate erred in law and in fact in not holding that the Respondent was bound to pay the Appellant the sum of $175,000.00 as damages when not approving the assignment of the Agreement to Western Builders Co Ltd having regard to all the relevant circumstances.***

8. ***The Learned Trial Magistrate erred in law and in fact in dismissing the action of the appellant and/or awarding damages and/or costs against the appellants.***

9. ***The decision and findings of the Learned Trial Magistrate are unreasonable having regard to all the relevant circumstances."***

[6] When the Appeal came on for hearing before the High Court Counsel for the Appellants indicated in his opening that the central issue was the validity of the Notice to terminate the agreement (Record page 162). The record also shows that the same issue was raised by Counsel for the Appellants during his cross-examination of the Respondent's witness (Mr W Herman) in the proceedings before the Resident Magistrate (see pages 134 & 135).

[7] It is therefore appropriate to consider at this stage the notice which was contained in a letter dated 26 August 2003 addressed to the First Appellant from the Respondent. The letter set out in detail the matters that the Respondent claimed had breached clause 63 and then stated in bold and upper case print:

> ***"I wish to inform you that you have knowingly and deliberately provided Shell Fiji Limited with false and misleading information and forged insurance cover notes.***

***In reference to the breach letter dated 5th August 2003 and to the breaches to the Shell Retail Agreement for non "SIS" sites documented above Shell Fiji Limited hereby gives you 30 days notice effective from receipt of this document that your Shell Retail Agreement dated 1 October 1999 between Shell Fiji Limited and Agha Khan is terminated pursuant to clause 63 (e) and 63 (m).***

***Termination date : Wednesday 24 September 2003."***

[8] It was not disputed that the letter was served on the appellants on 27 August 2003 and that the 30 days notice ran from that date. The clause required 30 days notice to be given effective from the date of receipt. It was accepted that the expiry date was 27 September 2003. The dispute has arisen because the notice then continued by actually stating a date being 24 September 2003 that was 3 days short of the required notice.

[9] The High Court upheld the Resident Magistrate's decision that notwithstanding the reference to 24 September 2003 as the effective termination date at the end of the notice, the statement in the termination letter that the Appellants were given 30 days notice effective from receipt was sufficiently clear to leave a reasonable recipient in no doubt as to how and when the notice was intended to operate. The High Court also agreed with the Resident Magistrate's conclusion that the reference to 24 September 2003 was an error.

[10] The High Court agreed with the Resident Magistrate's decision concerning the Appellant's claim for damages against the Respondent for refusing consent to the assignment of the dealership. The basis of the decision was that when the appellants sought consent by letter dated 28 September 2004 the agreement had been validly terminated some twelve months earlier.

[11] The Appellants appealed to this Court on the following grounds:

"1. ***That the Learned Judge erred in law in not holding that the Learned Trial Magistrate erred in law and in fact in not making decision on the issues involved according to the pleadings and the submissions made by the parties and determining the action on matters outside the Pleadings.***

2. ***That the Learned Judge erred in law in not holding that the Learned Trial Magistrate erred in law and in fact in not appreciating the fundamental issues in the action having regard to the Pleadings and the submissions of the parties.***

3. ***That the Learned Judge erred in law in not holding that the Learned Trial Magistrate erred in law and in fact in introducing the question of mistake in the notice terminating the Agreement when that issue was not pleaded nor made subject to an issue in the proceedings.***

4. ***That the Learned Judge erred in law in not holding that the Learned Trial Magistrate erred in law and in fact in not holding that the Tenancy and/or Agreement of the Appellants with the Respondent was not properly terminated.***

5. ***That the Learned Judge erred in law in not holding that the Learned Trial Magistrate erred in law and in fact in not holding that the Respondent was bound to pay (to) the Appellants the sum of $175,000 as damage when not approving the assignment of the Agreement to Western Builders Co. Ltd having regard to all the relevant circumstances.***

6. ***That the Learned Judge erred in law in not holding that the decision and findings of the Learned Trial Magistrate were unreasonable having regard to all the relevant circumstances."***

[12] As previously noted, in the proceedings before the High Court counsel for the Appellants opened his submissions with the observation that the central issue was the validity of the Notice to terminate. (Page 162 of the Record). When the Learned Judge asked Counsel "where in pleading before Magistrate Court does Plaintiff say that failure to comply with 30 day Notice invalidate Notice".

In response Counsel for the Appellants said "Para 16, 17, 18 Amended Claim". (P165 of the Record).

[13] Statement of Claim dated 27 June 2005. Paragraphs 16 – 18 stated:

> ***"16. By its letter dated 26 August 2003 and which was received by the First Plaintiff on the 27th August 2003 the Defendant terminated the said Agreement stating, inter alia, "Termination Date: Wednesday 24 September 2003."***
>
> ***17. The Defendant had no rights to terminate the said Agreement as has been done by its letter dated 26 August 2003 referred to in paragraph 16 herein.***
>
> ***18. The Defendant in its said letter dated 26 August 2003 had threatened to place its own security guard on the premises and the underground storage tanks will be padlocked closed from the receipt of the said letter dated 26 August "until termination of the" said Agreement.***

[14] In paragraph 21 of the Amended Claim Appellants again refer to the termination letter dated 26 August 2003 in the following terms:

> ***"21 The Plaintiffs say:***
>
> ***(a) That the Defendant has no rights to terminate the said Agreement as it has purportedly done by its letter dated 26 August 2003 and that the termination to be effective on 24 September 2003.***
>
> ***(b) The Plaintiffs have been discharged from the requirements of carrying out the insurance as referred to in paragraph 5 herein on the grounds of frustration and/or impossible of performance.***
>
> ***(c) In any event the Defendant has acted unreasonably and did not give reasonable times for the Plaintiff to meet the***

***Defendant's demand even if the Plaintiffs were in breach of the terms and conditions of the said agreement (which is denied) and/or the rights of occupancy and possession of the said premises by the plaintiff under the said Agreement."***

[15] It does appear to us that in none of the paragraphs of the Appellants claim that have been quoted above is there any express statement to the effect that the notice was not in compliance with clause 63 of the Agreement.

[16] There is a statement in paragraph 17 that the Defendant had no rights to terminate the Agreement as has been done by its letter dated 26 August 2003 ...." However when the preceding paragraphs are considered, particularly paragraphs 14 and 15, it can be readily inferred that the reference to the Defendant's not having the right to terminate that is pleaded in paragraph 17, is not a reference to a claim concerning the requirement of the 30 days notice.

[17] Paragraphs 14 and 15 pleaded that there were no outstanding or unremedied breaches as at 25 August 2003 other than the issue of insurance which was incapable of being remedied. It would appear that paragraph 21 is a summary of the Plaintiffs' position concerning the alleged breaches of the Agreement and the Defendant's right to terminate the agreement.

[18] Under the circumstances the facts pleaded in the amended statement of claim must, at the very least, be described as ambiguous and wide.

[19] It is also not surprising that the Respondent did not in its Statement of Defence to Amended Statement of Claim dated 2 August 2005 plead any material fact in relation to the termination of the agreement at the expiry of 30 days notice.

[20] Paragraphs 9 and 13 of the Defence deal with the Plaintiffs assertions concerning the issue of remedied breaches and the breach that could not be remedied.

[21] Paragraph 10 of the Defence admits paragraph 16 of the Statement of Claim. By doing so the respondent did no more than admit the contents of paragraph 16. The Respondent admitted that by letter dated 26 August 2003 that was received by the First Plaintiff, it terminated the agreement. The Respondents admitted that the letter stated, amongst other things (inter alia) the expression "Termination Date: Wednesday 24 September 2003" (emphasis added). The Respondent could hardly have done otherwise. However such an admission did not take the matter any further. It simply meant that the Appellants did not have to prove the letter, its receipt or its contents.

[22] The Respondent did not expressly plead to paragraphs 17 and 18 of the Statement of Claim and was as a result in breach of Order XVI Rule 3 of the Magistrate's Court Rules. However it could readily be concluded that the general denial to paragraph 17 was on the basis that the issue had been already expressly dealt with in other paragraphs of the Defence.

[23] Although not expressly raised by either party in the pleadings, questions were asked during the hearing and apparently submissions were made on the question of the termination of the agreement and the requirement for 30 days notice. Although we were not provided with a copy of the transcript of the submissions by Counsel, the Learned Trial Magistrate refers to this fact at page 145 of the Record.

[24] There is no indication in the Record that either party took any objection to this issue being canvassed during the course of the evidence or in the parties' submissions. Once the issue had been canvassed and "allowed in" as it were without objection, then it was reasonable that all aspects of the termination notice and the 30 day notice requirement under clause 63 of the

Agreement be both the subject of submissions to and determination by the Resident Magistrate.

[25] The purpose of pleadings is to define the issues and thereby to inform each party in advance of the case it has to meet. Although the Appellants have referred to the letter dated 26 August 2003 and the notice it contained, they have not pleaded the effect of that notice in relation to its validity and the requirement to give 30 days notice. It was therefore not put in issue by the Appellants and as a result did not require an answer from the respondent.

[26] Under the circumstances, we do not find any error on the part of the Resident Magistrate in respect of the issues raised in grounds 1, 2 and 3 of the Notice of Appeal.

[27] On the issue of the validity of the termination notice, the question that remains for this Court is to determine whether the Resident Magistrate was correct in his finding that the Notice did comply with clause 63 of the Agreement and was effective to determine the Agreement.

[28] Perhaps, as a starting point, we note that on page 8 of the Appellant's submission dated 10 February 2009 the following appears:

> ***"However, it is conceded that it was a mistake on the Respondents' part to terminate the tenancy and agreement by giving less than 30 days notice. Consequently, the purported notice terminating the tenancy was invalid in law."***

[29] The Appellants then refer to the leading authority of ***Mannai Investment Co. Ltd –v- Eagle Star Life Assurance Co Ltd.*** [1997] 3 All ER 352 which the Appellants submitted can be distinguished from the present case.

[30] In the Mannai Investment case (supra) two 10-year fixed term leases "contained a break clause enabling the tenant to determine the lease 'by serving not less than six months notice in writing ... such notice to expire on the third anniversary of the term commencement date.' By letters dated 24 June 1994 the tenant purported to give notice to determine the leases on 12 January 1995, although the third anniversary of the commencement date was in fact 13 January 1995." The House of Lords (by majority) held that:

> ***"having regard to the fact that the leases commenced on 13 January and were determinable on the third anniversary of the term of commencement, it would have been obvious to a reasonable recipient that the notices purporting to determine the leases on 12 January contained a minor misdescription and that the tenant sought to determine the leases on "the third anniversary of the term commenced", i.e. 13 January. The notices were therefore effective to determine the leases."***

[31] In upholding the Resident Magistrate's decision, the High Court referred to and applied the decision in the Mannai Investment case (supra), with particular reference to the judgment delivered by Lord Steyn.

[32] The Appellants submitted that the distinction between the facts in the Mannai Investment case and the present appeal is that there is no ambiguity in the present matter. They say that the ambiguity in the Mannai Investment case was whether the third anniversary of the term of commencement occurred on 12 or 13 January. They say that there was no ambiguity as to termination of the Term, namely the Third Anniversary.

[33] However we do not agree that there is any substantive distinction as claimed by the Appellants. In the present case, there is no ambiguity under clause 63 as to when the Agreement may be terminated. It may be terminated by the Respondent giving to the Appellants not less than 30 days notice. What has happened in the present case, as in the Mannai Investment case, is that

the party seeking to terminate the agreement, has misdescribed the date on which that 30 day notice expired. The notice made it clear that the intention of the Respondent was to give 30 days notice. Instead of specifying the date as 27 September, the date of 24 September was specified. This misdescription of the date was not dissimilar to the misdescription of the date by the tenant in the Mannai Investment case.

[34] As Lord Steyn pointed out in the Mannai Investment case at page 369:

> ***"A notice simply expressed to determine the lease on the third anniversary of the commencement date would therefore have been effective."***

[36] Similarly, in the present case a notice served on the Appellants by the Respondent simply expressed to determine (terminate) the Agreement on the expiry of 30 days after receipt of the notice would also have been effective. The words "not less than 30 days notice" "do not have any customary meaning in the technical sense. .... The language of the clause must be given its ordinary meaning" (per Lord Steyn supra at page 369).

[37] In the Mannai Investment decision it was said that the construction of a notice such as the notice in the present case must be approached objectively. The issue is how a reasonable recipient would have understood the notice. In considering that matter, such a notice must be construed taking into account the relevant objective contextual scene. It cannot be ignored that a reasonable recipient of the notice would have had in the forefront of his mind the terms of the Agreement. Given that the reasonable recipient must be credited with knowledge of the requirement under clause 63 to give 30 days notice, the question is simply how the reasonable recipient would have understood such a notice. We consider that the observations made by Lord Steyn (at page 369 supra) are therefore relevant to the present case.

[38] In this context, it is important to remember that the one and only purpose of the notice under clause 63 is to inform the Appellants that the Respondent has decided to terminate the Agreement in accordance with the right that is given in that clause. It is not unreasonable to conclude that if the notice unambiguously conveyed a decision to terminate an Agreement, a court may ignore immaterial errors which would not have misled a reasonable recipient. If it can be concluded that the reasonable recipient is left in no doubt that the right reserved in clause 63 is being exercised, then the misdescription of the date will not prevent the notice effectively terminating the agreement.

[39] We note that this Court has taken a similar approach to the interpretation of clauses in Collective Agreements in the decision of ***Hassan Din and Another –v- Westpac Banking Corporation*** (unreported Civil Appeal No. 6 of 2003 delivered 26 November 2004).

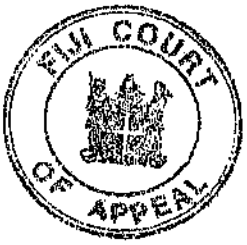
[40] In the present case we have no hesitation in concluding that the notice clearly conveyed to the Appellants the fact that the Respondent was exercising its right under clause 63 to terminate the agreement upon the expiry of 30 days notice effective from receipt of the notice upon the grounds stated in the Notice. The subsequent misdescription of the date would not have in any way affected the intent of the notice in the mind of a reasonable recipient.

[41] Therefore we have concluded that the Resident Magistrate was not in error when he found that the termination notice was effective. Ground of appeal number 4 is dismissed.

[42] It is therefore not necessary to consider the fifth ground of appeal. For the reasons already stated we find against the appellants on the sixth ground.

[43] Therefore the Appeal is dismissed and the Appellants are ordered to pay $4000.00 costs to the Respondent.

Byrne, AP




Calanchini, JA

Wati, JA

**Solicitors:**

Sahu Khan & Sahu Khan, Ba for the Appellant
Sherani, Suva for Second & Third Respondents