IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0057 of 2015
(High Court Case No. HBC 356 of 2014)

BETWEEN	:	**SAG LIMITED**
		Appellant
AND	:	**ITAUKEI LAND TRUST BOARD**
		Respondent
Coram		**Basnayake, JA** **Lecamwasam, JA** **Brito-Mutunayagam, JA**
Counsel	:	**Mr. P. I. Knight for the Appellant** **Ms. L. Komaitai for the Respondent**
Date of Hearing	:	**3 May 2017**
Date of Judgment	:	**26 May 2017**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Lecamwasam, JA.

Lecamwasam, JA

[2] This is an appeal against the judgment of the learned High Court Judge of 30th July, 2015.

[3] The appellant appeals on the following grounds of appeal:

1. *That the Learned Judge erred in law and in fact in his interpretation of the meaning and effect of Special Condition B) 1 (i) of Native Lease 28118.*

2. *That the Learned Judge erred in law and in fact in finding that the interpretation of Special Condition B)1(i) of Native Lease 28118 was not sufficiently ambiguous to enable the contra proferentum rule of interpretation to be applied to its interpretation.*

3. *That the Learned Judge erred in law and in fact in ignoring the fact that it was only the lease of the land that was owned by the Appellant, and that the buildings constructed on the land and other improvements, office equipment, furniture and fittings, plant and equipment and boats and motors were owned by Viwa Island Resort Limited which was not a party to Native Lease 28118 and which was not therefore liable to pay 15% of the purchase price paid for those items.*

[4] The primary facts are not disputed and are briefly as follows. On 23rd April, 2007, the appellant entered into a lease agreement with the respondent for lease of a land comprising an extent of 4.8530 hectares in the province of Ba, subject to several conditions, which included inter alia:

b) Not to use the land for any purpose other than for tourism purposes..

e) To commence construction within two(2) year from the commencement of the lease of the Tourist Resort in accordance with the plans as approved in writing by the lessor and to complete construction of the tourist resort on or before 31st day of December 2007.

f) Not to take any substantial alterations to the plans approved by the Lessor or to buildings, improvements or structures on the land or erect any further buildings, improvement or structures on the land without the prior consent of the Lessor...

n) To keep in good tenantable repair all buildings together with all fixtures and fittings...

Not to alienate or deal with the land or any part thereof whether by sale,transfer or sublease or in any other manner whatsoever without the consent in writing of the lessor first had and obtained. To keep the furniture, fittings, fixtures, plant, equipment, utensils and articles used in the Tourist Resort in good repair and condition.

i) To keep all buildings, improvements, fixtures fittings, plant, equipment and furniture on the land insured to their full cost of reinstatement against fire, tempest, earthquake, flood, lightning and storm ..

[5] On 27th May, 2014, the appellant, as vendor entered into a sale and purchase agreement with Skils Holdings (HK) Ltd, as purchaser to sell "*Viwa Island Resort*". "*Viwa Island*

Resort" was constructed on the land leased to the appellant by the respondent. The total sale price was AU$ 1,500,000(one million five hundred thousand Australian dollars).

[6] The lease agreement contains three schedules. The first schedule contains two parts, viz, A) and B). The dispute before Court relates to the interpretation of clause 1 (i) of Part B) titled "*Special Conditions – Other benefits*".

[7] The appellant interpreted clause 1(i) to mean payment of 15% of AU$75,000.00,(the value of the leased land) and not 15% of AU$1,500,000.00 million, the total sale price.

[8] The respondent refuted this position and informed the appellant that 15% will be computed on the total consideration, ie the sale price of AU$1.5 million, and not on AU$75,000.00, as contended by the appellant.

[9] The appellant filed action in the High Court seeking an interpretation of the relevant clause. The learned High Court Judge interpreted the clause to mean 15% of the total consideration of AU$ 1.5 million and not 15% of AU$75,000.00.

[10] Clause 1(i) of Part B) reads:

> ***If the Lessee decides to alienate the said lease whether by sale or transfer*** *within ten years from the commencing date of this lease then the Lessee shall pay to the Lessor a sum equivalent to* ***fifteen percent of the total consideration***.(emphasis added)

[11] The sole issue for determination before this court is the interpretation of the words "***total consideration***" in clause 1 (i).

[12] On a reading of the words "***total consideration***" in clause 1(i) with the governing words of that clause "*If the Lessee decides to alienate the said lease whether by sale or transfer*", it is patently clear that the words "***total consideration***" must necessarily refer to the total price for the "*sale or transfer*".

[13] The ***"total consideration"*** for the sale was AU $1,500,000.00 and includes, in addition to the value of the "*Leased land*" of AU$75,000, the buildings and improvements, office equipment, furniture and fittings, plant and equipment, boats and motors and goodwill, as stated in clause 2.3 of the Sale & Purchase Agreement and accepted by the solicitors for the appellant in their letter to the respondent of 6th June,2014.

[14] Counsel for the appellant strenuously argued that the figure of AU$1.5 million comprises movables owned by a third party and urged Court to exclude those items.

[15] The purpose of the lease, as set out in clause 1(e) of the covenants of the lease agreement was to "*commence construction within two years from the commencement of the lease on the Tourist Resort in accordance with the plans as approved in writing by the Lessor and to complete the construction of the Tourist Resort on or before 31st day of December 2007*".

[16] The sale and purchase agreement provides that the purchaser purchases the business and certain assets of the appellant,(the vendor). The word "*business*" is defined to mean "*the business trading as Viwa Island Resort using the Transferred assets, all owned and operated by the vendor or VIRL*". The purchase price for the "*Transferred Assets and the Business*" was AU$1,500,000.

[17] Clause 2.2 (a) of the Sale and Purchase Agreement states that it is understood that:

> *some or all of the Transferred Assets are owned by VIRL and under this Agreement the Vendor agrees to procure that VIRL will deliver such Transferred Assets to the Purchaser's nominees in the same manner as if they were owned by the Vendor.*

The clause when referring to ***"total consideration"*** does not distinguish between the land and movable assets. It follows that the "***total consideration***" comprises the total value of the leased land together with the movables and immovable assets.

[18] The contention that certain moveable items belonged to third parties is totally irrelevant. Clause 1 (i) provides that the appellant has to pay the respondent 15% of the value of the land as enhanced, as in a capital gains situation. Clause 1(i) does not contain any exclusions. It speaks of the total consideration.

[19] In my judgment, the words "***total consideration***" is the total price paid for the purchase of the amalgam of movable and immovable assets and the business, regardless of how it is comprised.

[20] Counsel for the appellant adverted the attention of court to a more recent lease agreement issued by the respondent to *"Lost Winds Resort and Spa Limited"*. Clause B -*Special Conditions – Other Benefits* of that agreement provides that in the event of a sale, the lessee shall pay to the lessor "*a sum equivalent to 20% of the total consideration received by lessee from such alienation of the said lease or transfer of share* ***less capital investment and renovation expenditure incurred by the lessee*** *at any time during the term of this lease.*"(emphasis added)

[21] In that instance, the TLTB had expressly excluded any capital investment and renovation expenditure from the total consideration. It follows that if not for the exclusion, capital investments and renovation expenditure would have formed part of the total consideration. The lease agreement relied on by the appellant fortifies the position taken up by the respondent and destroys the contention of the appellant. Strangely, learned counsel did not invite the attention of Court to the percentage of 20% given in that lease, in contrast to the percentage given in the lease agreement at hand.

[22] It is crystal clear that the total consideration consists of the value of the leased land, buildings and improvements, movables and goodwill as stated in clause 2.3 of the Sale & Purchase Agreement. The respondent is entitled to 15% of the total sale price.

[23] The learned High Court Judge has dealt with the principle of *contra proferentem* rule at length. The doctrine of *contra proferentem* should only be employed only in cases where the clauses in issue are susceptible to multiple interpretations due to ambiguity. I do not find any need to rely on the *contra proferentem* rule, as I do not see any ambiguity in the words "*total consideration*".

[24] Marshall J in ***Kumar v National Insurance Co.Ltd***, (2012) 2 FLR 9 stated that the importance of the *contra proferentem rule "has declined in modern times. Much depends on the context of the commercial document being construed."*

[25] Marshall J cited Kirby J in ***Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd,*** (2005) 13 ANZ Ins Cas 61-642 at paragraph 24:

> *For me, this is an interpretive tool of last resort, where analysis of a contested text does not otherwise yield a satisfying conclusion. Moreover, the contra proferentem rule obviously has less application in cases where, as here, both parties are corporations experienced in, and familiar with insurance policies of the kind the subject of these appeals, and where both parties have enjoyed legal advice and are of roughly equal bargaining power.*

[26] On a considered deliberation of the overall facts, the conditions of the lease and the sale and purchase agreement, it is abundantly clear that the words ***"total consideration"*** includes not only the value of the lease, but also the value of all movables forming part of the sale transaction. I conclude that 15% of the "*total consideration*" must necessarily be based on AUS$1.5 million and not on AU$75,000.00.

[27] I dismiss the appeal with costs of $ 3500 payable by the appellant to the respondent.

Brito-Mutunayagam, JA

[28] I agree with the reasoning and conclusions of Lecamwasam, JA.

The Orders of Court are:

1. *Appeal dismissed*
2. *The appellant shall pay the respondent costs in a sum of $3,500.00.*

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice A. Brito-Mutunayagam
JUSTICE OF APPEAL