IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No.: 356 of 2014

BETWEEN : **SAG LIMITED**

PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD**

DEFENDANT

Counsel : **Mr. P. Knight for the Plaintiff**
Ms. E. Raitamata for the Defendant

Date of Hearing : **15 May 2015**

Date of Judgment : **30 July 2015**

Catch words: Interpretation of Contracts-contextual meaning- Native Lease for Tourism Purpose- covenants included to build Tourism Resort and maintain it along with furniture, fittings, plants and equipments – "total consideration" for alienation or sale of lease-can the Tourist Resort and other fittings etc be separated from the land for the determination of total consideration, application of *contra proferentem* rule- non exclusion clause- no ambiguity.

JUDGMENT

INTRODUCTION

1. The Plaintiff filed the originating summons seeking determination of the sum payable by the Plaintiff to the Defendant on the sale by the Plaintiff of Native Lease 28118 entered on 23rd April, 2007, pursuant to the provision of Special Condition B1(i) of First Schedule to the Native Lease. The sum payable to the Defendant will depend on interpretation to phrase "total consideration" contained in the said clause. The Plaintiff contends that it was total consideration agreed between the Plaintiff and a third party for the land and for that they produce the 'book value' for the land and the same value is mentioned in the sale and purchase agreement between the Plaintiff and the purchaser

who is a third party. The Defendant's position is that once the tourist resort is built, according to the conditions of the Native Lease 28118, the sale or the alienation of lease cannot separate the land and resort built on it. According to the Defendant the total consideration is what paid for the alienation of Native Lease including the Tourist Resort built according to the conditions of the said lease including furniture, fitting, fixtures, plant and machinery and all other utensils used in the said Tourist Resort.

FACTS

2. The facts of this case are not disputed and Defendant did not file an affidavit in opposition and only objected to the interpretation of the Plaintiff. In fact there was no need to object as the summons sought proper determination of sum payable in terms of the said clause B1 (i) of Special Condition contained in the First Schedule to the Native Lease 28118. The Plaintiff entered in to a lease with Defendant. The said lease is annexed as MD1 to the affidavit in opposition.

3. The said lease was entered on 23rd April, 2007 for the purpose of tourism and the land consisted of an area of 4.8530 Hectares in the province of Ba.

4. The said lease contained inter alia following conditions

> *The Lessee covenant with the lessor among other things, as follows*
>
> *i. Not to use **the land** for any purpose other than for tourism purpose.*
>
> *ii. **To commence construction** within two years 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**.*
>
> *iii. **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 written consent of the Lessor.*

iv. ***To keep in good tenable report all buildings together with all fixtures and fittings*** *and all drains, sewers gullies, cesspits, septic tanks, soak aways, water supply piping, swimming pools, wells tanks reservoirs ponds fences walls hedges gates posts bridges culverts water courses, improvements existing or erected in or under or over the land to maintain in good order all boundary markers.*

v. *Not to* ***alienate or deal*** *with* ***the land or any part*** *thereof whether by sale transfer or sub lease or in any other manner whatsoever with the consent in writing of the lessor first had and obtained.*

vi. ***To keep the furniture, fittings, fixtures, plant, equipment, utensils and articles*** *use in the* ***Tourist Resort*** *in good repair and condition.*

vii. ***To keep all buildings, improvements, fixtures, fittings, equipment and furniture on the land insured to their full cost of reinstatement*** *against fire, tempest, earthquake, flood, lightning and storm provided that such insurance cover is available at reasonable cost and to produce to the lessor when required the policy for insurance and receipt for the last premium due and in the event of such buildings , improvements, fixtures, fittings, plant equipment and furniture being dismantled, demolished destroyed or damaged from any cause* ***to rebuild or repair the building within two years from such dismantling, demolition, destruction, or damage*** *in accordance with* ***plans approved in writing by lessor*** *and in accordance with the provisions of the Public Health Regulations, the Town Planning Regulations and any other relevant legislation for the time being in force.*

5. The said Native Lease No 28118 also contained 3 schedules and under First Schedule (B) – Special Conditions- Other benefits stated;

i. *If the Lessee decided to* ***alianate the said lease*** *whether by sale or transfer within the (10) years from the commencing date of this lease then the* ***Lessee shall pay to the Lessor a sum equivalent to fifteen percent (15%) of the total consideration***.

6. The Plaintiff set up a Tourist Resort named "Viwa Island Resort" presumably in accordance with the said Native Lease No 28118 and before the expiration of 10 years from the commencement of the said lease , a sale and purchase agreement was entered with a third party for the sale of the same for a sum of AUS $1.5 million and it was sold.

7. The said sale and purchase agreement contained condition precedent to the effect that prior written consent of the Defendant.

8. On 6th June, 2014 the solicitors for the Plaintiff wrote a letter to the General Manager of the Defendant, annexing the duly completed 'Application for Consent to Assign Native Lease 28118", together with application fee. The said letter also sought payment in terms of First Schedule, Special Condition B1 (i) since the transaction was prior to 10 years and produced the book value assigned to the land in sale and purchase agreement, as the basis of calculation of 15%. This value was AUS $75,000.

9. The Defendant replied to the solicitors that according to their interpretation of the said clause contained in the Native Lease 28118, 15% has to be calculated from the total consideration and in this instance the sale price of AUS $1.5million should be considered as 'total consideration'.

10. The Plaintiff paid the requested amount under protest and also stated that an action would be instituted seeking legal interpretation to the said clause and this action was instituted seeking an order from court for determination of proper amount. Hence, there was no estoppel created by the payment of the Plaintiff regarding the calculation of the said sum.

11. The Plaintiff at the hearing said it would be unfair to consider all the items sold in the calculation of total consideration. In the written submissions filed it is argued that it was illogical and unreasonable to suggest that the Plaintiff was obliged to pay to Defendant 15% of the sale price of the boats and motors or the plant and equipment which are totally separate from the lease.

12. The Defendant neither filed an affidavit in opposition nor any written submission. They contended that the only way the 'total consideration' could be interpreted is the natural way and that the total sum paid for transfer of all the assets relating to the Tourist Resort situated in the said land .

ANALYSIS

13. The Plaintiff in the written submissions tried to rely on *contra proferentem* rule without resorting to general rules of interpretation of contracts. The only case law mentioned in the written submission by the Plaintiff confined to this rule only.

14. Fiji Court of Appeal in the case of *Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd* [2008] FJCA 101; ABU0090.2004S (decided on 16 April 2008)(unreported) held,

> '*The contra preferentum rule only has application when a clause or provision in a document is truly ambiguous, in which case the interpretation which is against the interests of the party who proffered the document. In other words, against the interest of the party who drafted or presented the document to the other party, the other party having no input into the drafting or revising of the provision.*
>
> *[59]* ***It is a rule of construction by which an exclusion clause is construed against the party for whose benefit it is intended to operate:*** *McRae v Commonwealth Disposals Commission [1951] HCA 79; [1951] 84 CLR 377.*
>
> *[60] The rule, as Kirby J says in McCann v Switzerland Insurance Australia Ltd & Ors [2000] HCA 65; [2000] 203 CLR 579,* ***is now generally regarded as one of last resort.****(emphasis is mine)*

15. The Chief Justice Gates, in Fiji Supreme Court in ***Kumar v National Insurance Company of Fiji Ltd*** (decided on 9 May 2012 (2) FLR9 also held that the rule need not be resorted if interpretation can be given without resorting to *contra perferentem*.

16. Firstly, it is wrong to resort to this principal without considering other rules of interpretation of contracts, since it is a rule that can be applied as last resort. Secondly, it

should also be noted that there is no interpretation of exclusion clause in the Native Lease 28118 as the general application of *contra proferentem* is for such clauses when there is an ambiguity. To me there is no ambiguity in word "Total Consideration" for sale or alienation of the said lease in the context it was used considering the said lease as a whole, which I would discuss later in this judgment.

17. Fiji Supreme Court in ***Kumar v National Insurance Company of Fiji Ltd*** (decided on 9 May 2012(2) FLR9 at p 13 held (Judgment of Marshall J, concurred by Gates P). 'It is unnecessary to give an opinion on the modern scope of the *contra proferentem* rule. However there is authority that its importance has declined in modern times. Much depend on the context of the commercial document being construed.

18. The abovementioned case ***Kumar v National Insurance Company of Fiji Ltd*** (supra) was relating to an insurance contract and the interpretation was relating to an exclusion clause. In contrast, the Plaintiff's application of the said rule is not to an exclusion clause and it relates to lease. In my judgment said rule cannot be applied to interpretation of the word "total consideration" in the Native Lease.

19. In ***Bank of Credit and Commerce International SA (in liquidation) v Ali and others*** [2001] 1 All ER 961 at 982 (House of Lords) Lord Hoffmann (dissenting judgment) held,

> *'The disappearance of artificial rules for the construction of exemption clauses seems to me in accordance with the general trend in matters of construction, which has been to try to assimilate judicial techniques of construction to those which would be used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life. In Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912, I said with the concurrence of three other members of the House: 'Almost all the old intellectual baggage of "legal" interpretation has been discarded.'*

20. From the above quote it can be safely deduced that even in exclusion clauses the relevancy of the 'artificial rule for construction' has lost its vigor in UK, according to

Lord Hoffmann and the modern trend is to apply the rules of interpretation as stated in House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98. It is also noteworthy that in UK there is legislative intervention by Unfair Contract Terms Act 1977. So, it is safe to conclude *contra porferentem* rule can be a refuge of last resort in the interpretation of exclusion clauses in order to prevent injustice to a party but this has no relevance to interpretation of "total consideration" in the Native Lease 28118.

21. There is no averment in the affidavit in support that states this Native Lease was drafted entirely by the Plaintiff and that parties were negotiated on unequal terms or the Defendant was a dominating party. Even if am wrong on that, it seems that solely relying on a principle, that is applicable in exclusion clauses as a last resort of interpretation to prevent unfair or unjust result cannot be applied to the facts of this case. The Plaintiff and the Defendant knew what they covenanted, in clear language and it cannot be stated as inherently improbable result considering the lease in its entirely.

22. The Plaintiff tried to rely on a meaning that is financially beneficial to them. The argument for the Plaintiff is obviously a strained meaning but the counsel tried to justify it by resorting to *contra proferentem* rule.

23. The argument of the Plaintiff that "total consideration" should mean only the total consideration paid for the lease of "the land" has some relevance to following analogy contained in the Lord Hoffmann's (dissenting) judgment in ***Bank of Credit and Commerce International SA (in liquidation) v Ali and others*** [2001] 1 All ER 961 at 983

> '*The following conversation may be imagined. A motorist is stopped by a park warden driving down a road which is signposted 'No cars allowed'. He says, 'But I am driving a green car'. The warden points out that it is nevertheless a car. The motorist says, 'But the words cannot be read literally. Do you suggest that they forbid children's toy cars?' The warden concedes that the context suggests a prohibition for the protection of pedestrians frequenting the park and that it does not apply to toy cars. 'And what about police cars going to an emergency? Surely there is an implied exception for emergency vehicles?' 'Yes, perhaps there is.' 'Well*

then', says the motorist, 'if it cannot be read literally, why should it apply to green cars'?

24. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98 at 114, (House of Lords) Lord Hoffmann formulated the modern principles of interpretation of contracts and summarized and held as follows,

> ‘*Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.*
>
> *(1)* ***Interpretation is the ascertainment of the meaning which the document 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.***
>
> *(2) 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.*
>
> *(3) 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 [1998] 1 All ER 98 at 115 this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any 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] 3 All ER 352, [1997] 2 WLR 945.*

> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition 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 in* ***Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios*** *[1984] 3 All ER 229 at 233, [1985] AC 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 common sense, it must be made to yield to business common sense.'*(emphasis added)

25. The above UK decision was applied in Fiji Supreme Court in ***Kumar v National Insurance Company of Fiji Ltd*** (decided on 9 May 2012) 2012(2) FLR9 for interpretation of a contract.

26. The Plaintiff has filed Originating Summons seeking declaration as to the sum payable to the Defendant when it dealt with the Native Lease 28118 including the sale of Tourist Resort. The rule 1 in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98 is applicable to the Native Lease 28118.

27. The Plaintiff obtained the Native Lease 28118 which contained clauses as to the construction of the Tourist Resort, according to the plans approved by the Defendant and also contained clauses that dealt with maintenance of the said Tourist Resort. Though the Native Lease 28118 was a land, it did not deal exclusively about the land. It was given for special purpose and that purpose was also contained in the heading of the document, the clauses in the Native Lease 28118 dealt with the entire Tourist Resort including all the items used for the purpose of tourism.

28. Though the document was named as 'Native Lease No 28118' and also "LEASE FOR TOURISM PURPOSE" it contained covenants relating to entire Tourist Resort and in fact it was a contract between the Plaintiff and Defendant for the purpose of tourism. The Defendant leased the land comprising 4.853 hectares, for the tourism purpose and required to build a Tourist Resort in accordance with the said lease agreement between

the parties within a stipulated time and also maintain the Tourist Resort and all the items used for it for tourism purpose on the said land. So the Plaintiff as a prudent investor covenanted to perform its obligation in commercial sense and accepted its terms and conditions without any reservation.

29. I have quoted some of the important covenants in the said lease previously (see the Facts), and also highlighted important aspects. The Plaintiff was required to build Tourist Resort within a stipulated time and also maintain it properly and even in a case of natural disaster the Plaintiff was required to rebuild it and also to insure the entire Tourist Resort against natural disasters. So the existence of Tourist Resort on the land was a paramount consideration of the Defendant and also the essence of the said Native Lease 2118.

30. The Native Lease 28118 not only covenanted the Defendant regarding the land but also required to maintain in good condition all 'furniture and fittings, fittings, fixtures, plant, equipment, **utensils and articles use in the Tourist Resort'**. As I have stated previously even insurance against natural disaster extended to Tourist Resort as a whole and these were covenants the Plaintiff was bound under said Native Lease 28118.

31. When the clauses only dealt with the land it was specifically mentioned as 'the land' and or 'the land or any part of it'. (see highlighted causes contained in Facts)

32. The Plaintiff in the submission said that it only owned the land and the agreement to sell the Tourist Resort was entered between 'Plaintiff or an entity under the control of the Plaintiff'. The Native Lease was entered between the Plaintiff and Defendant and the obligation under the said contract was to the parties to the said contract hence the building of Tourist Resort according to the plans approved by the Defendant and to maintain it in good condition including the fixtures plant equipment, utensils and articles use in the Tourist Resort were with the Plaintiff. There was even a condition to insure not only the building, but also entire Tourist Resort so, there was an obligation on the part of the Plaintiff to comply with the said covenants. It is needless to say that the Tourist Resort should be built and owned and maintained by the Plaintiff in terms of the Native

Lease. Any shareholding structure cannot be construed to defeat the purpose and intention of the parties to the said agreement.

33. The Native Lease 28118 was a legal document and presumably lawyers were involved in it. This was a commercial agreement for specific purpose. The conditions of the agreement included a lease of land, but it did not end there. The price for said Native Lease 28118 would have determined after due diligence exercised by the Plaintiff for its investment.

34. The Native Lease 28118 specifically used the word 'the land' when the covenant only dealt with land. The clause B1 (i) in the Special Condition in the First Schedule has not used the word 'the land' to describe the alienation or sale. The total consideration is for the alienation of the said lease and that consisted the land, Tourist Resort and even all the plant and equipment used for the resort for tourism. So the contextual meaning for "total consideration" is the total sum paid for the alienation or sale of the lease. Considering the clauses contained in the Native Lease 28118, the land cannot be isolated as it cannot be dealt separately as the clauses in the Native Lease 28118 dealt with the entire Tourist Resort. It is illogical to think otherwise, and consider the "total consideration" to mean only the consideration for the land

35. If the land was sold before the construction of Tourist Hotel, before the lapse of two years then it was only 15% of the total consideration of the land, but once a Tourist Resort is built it can no longer be separated from the land and the covenants in the said lease require the said Tourist Resort to be a permanent fixture to the land till the lapse of lease period and this is the reason to require insurance of the Tourist Resort including its furniture, plant and machinery etc.

36. If the parties intended to consider only 'the land' as opposed to 'the lease' it would be prudent to consider ascertainment the price for the land in some manner in the same document. It is highly improbable to leave such a matter without any clarification so as to deal with book value of the land in the calculation of 15%. Book values are often for

accounting purpose and to leave such an important aspect without clarification also supports that it was never the intended meaning to the parties to the contract. So, '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', it is safe to state that the interpretation sought by the Plaintiff in this application was never in the mind of the parties and this is an invention of necessity, by the Plaintiff to gain a financial advantage.

37. Before conclusion I would like to add this statement from Lord Hoffmann in ***Bank of Credit and Commerce International SA (in liquidation) v Ali and others*** [2001] 1 All ER 961 at 974-5

> '*The language of the document is very wide. The impression it conveys is that the draftsman meant business. He has gone to some trouble to avoid leaving anything out. He uses traditional style: pairs of words like 'full and final settlement', 'all or any claims', 'that exist or may exist' and phrases like 'whether under statute, Common law or in Equity' and 'of whatsoever nature'. Admittedly, he could have gone further. Tudor Grange Holdings Ltd v Citibank NA [1991] 4 All ER 1 at 5, [1992] Ch 53 at 57 contains an even more elaborate release and I have seen American documents in which the release covers an entire page. But most people in this country would regard this as overkill. The modern English tradition, while still erring on the side of caution, is to avoid the grosser excesses of verbiage and trust to the judges to use common sense to get the message. I think that this tendency should be encouraged. So I think that anyone who was simply reading the document without preconceptions would accept that the draftsman was not leaving deliberate gaps. It does not however follow that the language was to be read completely literally. There may be limitations in scope to be inferred from the background, limitations from context which the draftsman may have thought too obvious to mention. But that is a different matter from saying that he did not use enough words.*

CONCLUSION

38. The Plaintiff cannot separate the land and Tourist Resort from the land once it was built in any dealing with the Native Lease 28118 considering the conditions in the said agreement. The parties to the contract would not have ever imagined such a situation. If such a situation is thought the said clause would have stated alienation of 'the land' instead of 'the lease' and a method for determination of it. The only way the Plaintiff could deal was to deal with entire lease agreement and land cannot be separated from the

rest once built according to the said agreement. So the calculation of 15% was from the total consideration paid for the Native Lease and that was AUS $1.5 million. Considering the importance of the issues raised and the circumstances I will not award any costs.

FINAL ORDERS

a. The sum payable by the Plaintiff to the Defendant is 15% of the total consideration of the alienation of the Native Lease 28118, which is 15% of Australian Dollar 1.5 million.

b. No costs.

Dated at **Suva** this **30th** day of **July, 2015**.

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva