

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 242 of 2021

BETWEEN : **UMA INVESTMENTS PTE LIMITED** a company incorporated
in the Fiji Islands and having its registered office at Suva.

Plaintiff

AND : **GRACE ROAD RESTAURANT PTE LIMIED** a company
incorporated in the Fiji Islands and having its registered office at
Navua.

Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Mr. S. Singh for the Plaintiff
Mr. R. Gordon for the Defendant

Date of Ruling : 18 July 2024

RULING

01. The plaintiff is the registered proprietor of the Retail Shop Unit S 9 A in the Unit Plan comprising an area of 14 square metres and contained in a Sub Lease in respect of Lot 4 on SO 3705 on State Lease No. 13734 and situated at Port Denarau Complex, Nadi (the premises). The plaintiff entered into a Lease Agreement with the defendant to lease the premises to the defendant for a term of 5 years commencing from 01 March 2017 and ending on 28 February 2022. The monthly rent was \$ 2,800.00 and VAT.
02. On 14 December 2020, the defendant repudiated the said Agreement and vacated the premises. The defendant returned the keys of the premises to the plaintiff's solicitors. The plaintiff accepted repudiation. However, the plaintiff commenced this proceedings to recover the damages caused to it due to repudiation. The plaintiff claimed special damages in sum of \$ 71,554.77 being the unpaid rent and all other moneys due under the Agreement, general damages for breach of contract, interest and cost.

03. The defendant acknowledged the Writ and thereafter filed the current summons pursuant to section 5 of the Arbitration Act 1965. The defendant's summons is based on the ground that, the parties agreed, by a written lease agreement, to submit the dispute or difference or question arises between them concerning the lease.
04. The long-standing approach of the legal profession and of the courts is that, where it is appropriate, the parties involved in civil disputes should be encouraged to explore whether their dispute can be resolved by agreement, either directly or with the help of a third party mediator or conciliator or arbitrator, rather than by proceeding to a formal 'winner v loser' decision by a court. In order to achieve this approach, the courts have the power to stay the proceedings in matters where the parties submitted them to arbitration by a written agreement.
05. The section 5 of the Arbitration Act No 18 of 1965 confers this power to stay the proceedings of the matters submitted to Arbitration. The section reads:

Power to stay proceedings where there is a submission

5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any other person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.
06. The court is given discretion to stay the proceedings for this purpose. However, for the court to exercise its discretion, the applicant should, before delivering any pleadings or taking any other steps in the proceedings, apply to the court and discharge its burden under the above section. The onus on the applicant is to satisfy the court that, the matter is subject to arbitration and the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.
 07. There is no dispute that, the applicant/defendant applied to the court for stay before taking any other step in this matter. The next question is whether dispute in question is the matter for arbitration.

08. The counsel for the applicant/defendant submitted that, parties by their written agreement submitted the matter that was brought by the plaintiff in this case, to arbitration. In support of his argument, the counsel for the applicant/defendant referred to paragraph 5 (e) of the Lease Agreement entered into by the parties on 24 July 2018. It read:

5. PROVIDED always and it is hereby agreed and declared that:-

(a)....

(b)....

(c)....

(d)....

(e) if during the continuance of this Agreement or at any time afterwards any dispute, difference or question shall arise between the parties or either of their representatives hereunder or otherwise in relation to the premises then such dispute difference or question shall be referred to two (2) arbitrators, one (1) to be appointed by each party or their umpire pursuant to the Arbitration Act Cap 38 or any statutory modification or re-enactment thereof for the time being in force.

09. On the other hand, the counsel for the plaintiff citing the same paragraph of the lease agreement argued that, the parties intended to arbitrate only the issues that are related to the premises. The sole question to be determined in this summons is whether the above arbitration clause in their Lease Agreement covers entire disputes or differences or questions arise out the their Lease Agreement or the only disputes or differences or questions in relation to the premises?

10. The question as to whether the parties agreed to submit any particular matter to arbitration depends on the facts of the case and the nature of the matter. The courts in many jurisdictions set out the guidelines for the courts to determine a dispute or difference is a matter for arbitration. The UK Supreme Court considered the decisions from many jurisdictions in Republic of Mozambique v Prinvest Shipbuilding SAL (Holding) and others [2023] UKSC 32 and set the guidelines for the courts to determine “the matter” that should be referred to arbitration.

11. The Supreme Court held that, it is two-stage process. First is identifying the matters parties have raised or foreseeably will raise in court proceedings. Second is determining whether they fall within the scope of arbitration agreement. The Supreme Court also noted that it was not tied to the pleadings but should look at the substance of the claims and likely defences. A “matter” need not encompass the whole of the dispute between the parties. A “matter” is a substantial issue that is legally relevant to a claim or a defence in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute.

According to the Supreme Court, the exercise involving a judicial evaluation of the substance and relevance of the “matter” entails a question of judgment and the application of common sense rather than a mechanistic exercise.

12. The Lease Agreement is marked as “MT 1” and annexed with the affidavit that supports the summons. The Agreement contains several conditions like other lease agreements. This includes the conditions relating to payment of rents and other fees and maintenance, repairing of the premises and other matters connected therewith such as prohibition for subletting of the premises, liability of the defendant for damages caused to the premises, usage of premises for the approved trading purposes, carrying out any alteration and renovation to the premises with the consent of the plaintiff, prohibition to remove the alteration or dismantle the renovation, complying with the Denarau Commercial Centre Constitution and Regulations and indemnifying the plaintiff in respect of the loss or damages to the premises etc.
13. The main issue raised by the plaintiff is failure to pay the rent. Since the plaintiff claimed rents for the period even after termination of the agreement by the defendant, parties may raise the other issues regarding lawfulness of early termination and liability of the parties for breach or termination of the agreement. The question is whether all these issues will be covered with the arbitration clause in the agreement between the parties.
14. The construction of an arbitration clause should start from the presumption that the parties, as rational businessmen, are likely to have intended that their disputes decided by the same tribunal. Lord Hoffman in **Premium Nafta Products Limited and others v. Fili Shipping Company Limited (14th Claimant) and others** [2007] UKHL 40, held at paragraph 13 that,

The construction of an arbitration clause should start from the assumption that the parties, as rationale businessmen, likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause be construed in accordance this presumption unless the language makes it clear that certain question were intended to be excluded from arbitrator’s jurisdiction.

15. Construction of the arbitration clause contained in the Lease Agreement too, must start with the above presumption. There is no dispute that, the arbitration clause covers the disputes during the continuance of their Agreement and any time afterwards. A careful examination of the arbitration clause in their agreement reveals that, the said clause classifies the disputes or differences of the parties into two categories and covers both of them. The relevant portion of the arbitration clause is as follows:

“....any dispute, difference or question shall arise between the parties or either of their representatives hereunder or otherwise in relation to the premises.....” (Emphasis added).

16. Accordingly, the first category is any dispute arising between the parties under the agreement. The second is any dispute otherwise in relation to the premises. Accordingly, the parties in this case as the rational businessmen intended to solve all their disputes by the arbitration as they agreed. This includes the current dispute placed before the court by the plaintiff, because it falls under the first category. For the above reasons, I uphold the argument of the counsel for the defendant-applicant. Since the parties differed in interpreting the above clause, I decide that, it is not fair to impose cost for this proceeding.
17. In result, I make following final orders:
- a. The proceedings of this matter is stayed,
 - b. The parties should refer their dispute to the Arbitration as per their submission in clause 5 (e) of the Lease Agreement they entered into on 24 July 2018, and
 - c. The parties to bear the costs.



At Lautoka
18.07.2024


U. L. Mohamed Azhar
Master of the High Court