

Between

TRENNOLME ALIAN EDWARDS

1st Plaintiff

- and -

WILLIAM STAUDERING

2nd Plaintiff

- and -

MAGANTAL GAUDHI

Defendant

Dr. Sahu Khan

Counsel for the 1st Plaintiff

Mr. B. C. Patel

Counsel for the defendant

J U D G M E N T

The two plaintiffs purchased the Melanesian hotel at Nadi from the defendant for \$200,000. A dispute has arisen as to whether the purchasers (plaintiffs) or the vendor (defendant) is liable to pay the stamp duty of \$4,000 arising on that transaction.

The first plaintiff is a Canadian barrister, in the state of Alberta and the defendant's lawyer is a practising Queen's Counsel, in the state of Ontario. Negotiations for the sale of the hotel took place in Canada where the defendant also resides. Neither lawyer is versed in the laws of Fiji and the agreement intends to identify the party liable for statutory taxes and other fees accompanying such a transaction. Being unable to itemise the various fees and taxes by reference to their statutory nomenclature counsel had to use general terms. They disagree as to whether the purchaser or vendor is liable under the agreement for the stamp duty payable on the transaction. It having been agreed that any dispute should be resolved according to Fijian law the plaintiff applies to this court for a declaration that the defendant is liable to pay the stamp duty.

His application filed on 20th October 1980 is supported by an affidavit which concisely sets out the relevant facts.

The defendant had prepared a draft agreement dated 9th April, 1980, to which the plaintiff added a new clause, clause 6, which comprises sub-clauses (a) to (h) and he amended clause 9. His amendments were included in an executed agreement dated 15th May, 1980, in which the amended clause (9) appears as clause 10. Photostats of the draft and concluded agreements are annexed to the plaintiff's affidavit and marked 'B' and 'A' respectively.

The defendant filed an affidavit in reply on 17th February, 1981.

Paragraphs 6 to 11 of the plaintiff's affidavit read as follows:-

- "6. That it was agreed between the plaintiffs and the defendant, inter alia, that the plaintiffs would not pay for any stamp duty on the transfer of the said premises but the plaintiffs would pay for any sums payable either as stamp duty or otherwise on the transfer of any licences in respect of the hotel.
7. That accordingly the Plaintiffs rejected Clause 9 of the First Agreement as submitted and made amendments thereto.
8. That the defendant had accepted the contents of paragraph 6 herein.
9. That it was clear that no registration of a transfer of land can take place without the transfer document being properly stamped and stamp duty paid.
10. That in pursuance of paragraphs 6 to 9 both inclusive herein and to remove any doubt the Final Agreement provided inter alia,
 - (a) In Clause 6(h) it was provided that "the Vendor to be responsible for all costs in providing the purchasers with registerable documents and any costs which may be incurred in clearing title."
 - (b) In Clause 10 it was provided that "If there be any assessment or dues payable to governmental authorities in respect of the transfer of any licences and without limiting the generality of the foregoing to include the Fijian Stamp Tax the same shall be borne by the Purchasers".
11. That to give effect to the contents of paragraphs 6 to 9 herein Clause 9 of the First Agreement was expressly amended by deleting "or other authorities" in lines 2 and 3".

In order to understand paragraph 11 (supra) of the purchaser's affidavit it is necessary to set out Clause 9 of the draft agreement "annex B" which reads :-

"9. If there be any assessment or dues payable to governmental authorities in respect of the transfer of any licence or other authorities and without limiting the generality of the foregoing to include the Fijian Stamp Tax the same shall be borne by the Purchasers."

In his affidavit the vendor declares that Clause 10 of the executed agreement was intended to impose upon the purchaser the liability for stamp duty. He alleges therein that clause 6(h) simply refers to the discharge of prior encumbrances.

Mr. Edwards, the first plaintiff, gave evidence as P.W.2. He stated that he deleted the words "or other authorities" - from Clause 9 in the draft agreement because he thought they were ambiguous.

Where, as in this case, the parties do not agree as to the meaning of an agreement executed by them one has to examine the agreement as a whole and ascribe to it if possible an interpretation which is consistent with its wording.

Does clause 6(h) make it apparent that the obligation to pay stamp duty rests on the vendor?

Liability for stamp duty does not arise under any statute governing the mode of sale, transfer and registration of real and personal property. It is imposed by the Stamp Duties Act, Cap. 205.

Section 3 thereof enacts that duty shall be levied in respect of the instruments specified in the schedule and shall be as set out in the schedule. Section 5(1) states that stamp duty is a debt due to Her Majesty.

Section 5(2) and (3) state that the person liable to pay stamp duty is the person described in the schedule as the "person primarily liable," and nothing shall exonerate him from that liability.

The schedule states that on an instrument recording the transfer on sale of any property the duty shall be \$2.00 for every \$100.00 of consideration and the person primarily liable is the transferee. In the instant case the plaintiffs are the transferees. A sale and purchase agreement is not an instrument recording the transfer of property. The transfer takes place on execution of the conveyance and one would not expect the stamp duty to be payable until the conveyance is executed. However, under section 90(1) -

"Any agreement for the sale of any estate or interest in any property shall be charged with the same ad valorem duty to be paid by the purchaser as if it were an actual transfer on the sale of the estate."

Accordingly the sale and purchase agreement executed by the parties was chargeable under section 98(1) with stamp duty as if it were the actual conveyance. It was paid by the purchaser pending the outcome of these proceedings and the \$4,000.00 duty is stamped on the agreement for sale.

Section 98(2) reads as follows :-

"(2) Where duty has been paid in conformity with the foregoing provisions, the transfer made to the purchaser shall not be chargeable with any duty, and the Commissioner, upon application, shall denote the payment of the ad valorem upon the transfer, or shall transfer the ad valorem duty thereto upon production of the contract or agreement - duly stamped."

It is apparent from the above subsections (1) and (2) that if there is an executed written agreement for the sale and purchase of an interest in land it must bear the stamp duty; if a conveyance is executed without any prior written agreement then the conveyance will have to bear the stamp duty. If there is, as in this case, a duly stamped and executed agreement for sale the Commissioner for Stamp Duties must on request endorse the conveyance to show that stamp duty has been paid.

When must the Commissioner endorse on a conveyance that stamp duty has been paid? Is it before the conveyance has been registered under the Land Transfer Act Cap. 131 or is it after it has been registered? The answer, I think, is provided to a great extent by section 48 and section 100 which enact:-

"48. Every person whose office it is to enrol, register or enter in or upon any rolls, books or records any instrument chargeable with any duty who knowingly enrolls, registers or enters any such instrument not being duly stamped shall be guilty of an offence and liable to a fine not exceeding twenty dollars."

"100.(1) Any document which ought to bear a stamp under the provisions of this Part shall not be of any validity unless and until it is properly stamped nor shall any judge, magistrate or officer of any court allow such document to be used, although no exception be raised thereto, until such document has been first duly stamped.

(2) But if any such document is through mistake or inadvertence received, filed or used without being properly stamped, the court in which the same is so received, filed or used may, if it thinks fit, order that the same be stamped, and thereupon such document shall be as valid as if it had been properly stamped in the first instance."

It would appear that the Registrar of Titles under the Land Transfer Act cannot, by virtue of sections 48 and 100 (supra), receive a conveyance for registration unless it bears either the requisite stamp or an endorsement of the Commissioner that the stamp duty has been paid or he views the

stamped agreement for sale. It would appear that that conclusion is consistent with the provisions of the Land Transfer Act, Cap. 131 which prescribes the mode of preparing and registering a conveyance for the transfer of land. Section 44(1) and (2) which read as follows :-

"44.(1) The proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, may transfer the same by executing a transfer in the prescribed form, which transfer shall, for description of the land intended to be dealt with, refer to the instrument to the land, which such further description as may be necessary, and shall contain a precise statement of the estate or interest intended to be transferred.

(2) Transfers shall be registered in the prescribed manner and transferees shall have priority according to the date and time of registration."

The prescribed form appears as Form 7 in the First Schedule to the Regulations made under the Land Transfer Act, which provides that the transfer to be registered shall reveal the consideration paid by the purchaser. The statement as to the purchase price enables the stamp duty to be calculated if this has not been paid under a prior agreement for sale.

Counsel representing the parties did not draw my attention to section 98 of the Stamp Duties Act and I have not recalled counsel to ask for their views on it because this judgment has already been delayed due to a mishap which incapacitated me for about a month.

P.M.1 Suresh Chandra, Deputy Registrar of Titles in Land Registry states that the Registrar will not register any conveyance unless the stamp duty has been paid.

It appears to me that if land is sold and conveyed without a written agreement the document of transfer must bear stamps or the Commissioner's certificate showing payment of stamp duty otherwise the Registrar of Titles is barred by Sections 48 and 100 from registering it unless there is a duly stamped executed agreement for sale in which case it is the agreement and not the conveyance which must be stamped. It follows that payment of stamp duty is pre-requisite to the registration of a document of title and clause 6(h) of the agreement requires the vendor to provide a registrable document of title and he cannot do so without paying the stamp duty.

On the basis of clause 6(h) the plaintiff would be entitled to the declaration unless Clause 10 varies or negatives it.

In my view Clause 10 is framed in a peculiar fashion. The words "any assessment or dues payable to governmental authorities in respect of the

transfer of any licences" in Clause 10 clearly refer to the transfer to the purchasers of licences connected with the hotel business. How does one limit the meaning of those words? They cover a very narrow field viz. fees payable on the transfer of relevant licences. Nevertheless those words are followed by the expression "and without limiting the generality of the foregoing to include the Fijian Stamp Tax". In my view reference to stamp tax in clause 10 would not limit the meaning of "dues payable for transfer of licences" so as to exclusively restrict it to mean dues in the nature of stamp duty. To so construe any reference to stamp duty would change the meaning of "dues payable for licence transfers" to something quite different namely, "dues in the nature of stamp duty". The Stamp Duties Act makes no reference to licence or to fees payable on the transfer of licences.

The expression "and without limiting the generality of the foregoing to include the Fijian Stamp Tax" may have been intended to show that the purchaser was to pay stamp duty in addition to fees for transfer of licences, and that the expression was included to prevent the operation of the ejusdem generis rule. However, "fees for licence transfers" are so very different from "duties imposed under the Stamp Act" that neither expression could limit the meaning of the other under the ejusdem generis rule, i.e. within the bounds of clause 10.

The agreement was drafted by lawyers of considerable experience and they clearly intended to be bound by clause 10. However, the vendor says it was intended to show that the purchaser must pay the stamp duty as well as licence transfer fees and the purchaser says that it was so drafted so as to exclude his liability for stamp duty.

I have to construe the document as a whole and if clause 10 means that the purchaser shall pay stamp duty then it would contradict clause 6(h) which in my view places that liability on the vendor. There is nothing vague, confusing or ambiguous about clause 6(h) and therefore its meaning should not be limited by the somewhat confusing language of clause 10.

I conclude that the agreement places the liability for stamp duty on the vendor and that he is entitled to his request for a declaration to that effect.

There will therefore be judgment for the plaintiff for the declaration prayed and for his taxed costs.

LAUTOKA,
12th March, 1982

(J. W. Williams)
Judge

TO BE CIRCULATED