IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 136 of 2013

BETWEEN : **MICHAEL PRASAD** of 401 EllersliePanmure Highway, Mt Wellington, Auckland, New Zealand, Businessman.

PLAINTIFF

A N D : **MANOJ SHARMA** of Varadoli, Ba, Radio Presenter.

1ST DEFENDANT

A N D : **RADIO PASCHIM** a radio station having its registered office in Ba.

2ND DEFENDANT

Appearances	:	Mrs J. Naidu for the Plaintiff
		First Defendant in Person
		Non-appearance for the 2nd Defendant
Date of Trial	:	3 October 2016
Date of Submissions	:	7 November 2016 & 25 November 2016
Date of Judgment	:	12 April 2017

J U D G M E N T

INTRODUCTION

[01] The plaintiff issues writ of summons with the statement of claim endorsed against the defendants and claims, among other things, damages for fraudulent misrepresentation and/or unjust enrichment or alternatively, an order for the delivery up of the radio equipment. The claim arises out of an oral agreement allegedly entered intobetween the plaintiff and the 1st defendant.

THE BACKGROUND

The plaintiff's case

[02] On the Statement of Claim, the plaintiff states:

First Cause of Action- Fraudulent Misrepresentation

1. The Plaintiff is and was at all material time a New Zealand businessman.

2. On or about March 2006, the Plaintiff and 1st Defendant agreed to enter into a joint venture to establish a radio station called Radio Paschim in Ba whereby the Plaintiff would hold majority shares and the 1st Defendant would be Manager/Administrator of the 2nd Defendant for certain consideration. The Plaintiff was to provide the 1st Defendant with fund and radio equipment to establish the radio station, the 2nd Defendant.

3. Between March 2006 and April 2007, the Plaintiff paid the sum of $54,078.15 and provided radioequipment valued at $36,540.40 to the 1st Defendant for the establishment of 2nd Defendant.

4. In order to induce the Plaintiff to enter into the agreement, the 1st Defendant made the following two misrepresentations.

Particulars of false misrepresentation

The 1st Defendant misrepresented to the Plaintiff that:

(a) He would register 2nd Defendant as a company and obtain approval from FTIB (now Investment Fiji) and Reserve Bank of Fiji with the Plaintiff as a foreign investor and holding majority shareholder in it.

(b) He would obtain a radio licence under the 2nd Defendant Company's name with Plaintiff as majority shareholder.

5. The said representations were false and in that the 1st Defendant:

5.1 Registered 2nd Defendant as his own company and did not obtain approval from FTIB (nowInvestment Fiji) and Reserve Bank of Fiji to have the Plaintiff as a foreign investor and held majority shares in the 2nd Defendant.

5.2 Obtained the Radio Licence as the owner of the 2nd Defendant.

6. At the time he made the said representations, the 1st Defendant knew but for his reckless indifference, ought to have known that they were false.

7. The 1st Defendant made those representations without caring whether they were true or false.

Second Cause of Action- Detinue and Conversion

8. Further and in the alternative, the Plaintiff demanded the return of radio equipment and funds.

9. The 1st Defendant refused to deliver up those radio equipment and funds to the Plaintiff thereby detaining and converting those items to his own use and depriving the Plaintiff of his use.

Third Cause of Action – Unjust Enrichment

10. Further or in the alternative, the 1st Defendant has denied liability to pay and return all radio equipment provided for and invested by the Plaintiff in the 2nd Defendant Company.

11. The 1st Defendant nevertheless accepted the benefits of the Plaintiff's money and radio equipment in that he accepted delivery of the radio equipment and money and used them to establish and operate radio station namely Radio Paschim, the 2nd Defendant.

12. The 1st Defendant benefitted accepted or acquiesced of the Plaintiff's fund and the radio equipment knowing that they were not being rendered gratuitously.

13. The Plaintiff's fund and radio equipment conferred incontrovertible benefit on the 1st Defendant and it would be unconscionable for the 1st Defendant to keep the benefit thereof without paying a reasonable sum in return to the plaintiff.

14. As a consequence, the Plaintiff has suffered loss and damages.

The Defendant's case

[03] The defendant's case is that:There was no representation and/or agreement mutual, verbal and/or written ever made and/or discussed by either party as claimed by the plaintiff.The plaintiff was fully aware of the 1st defendant's intention of setting up a radio station (Radio Paschim) and willfully agreed to help.The plaintiff further suggested to the 1st defendant that he was willing to gift radio equipment without any conditionsand reservations.

THE ISSUES

[04] The issue before the court is whether the plaintiff sent the money and the radio equipment to the 1st defendant from New Zealand as a result of the oral agreement and whether the plaintiff and the1st defendant covenanted that the 2nd defendant (Radio Paschim) will be registered under the plaintiff's name and the plaintiff will be the Director of the 2nd defendant or the money and the equipment were given as a gift to help the 1st defendant develop and promote the Radio Station (the 2nd defendant).

THE EVIDENCE

The plaintiff's evidence:

[05] At the trial, the plaintiff (Michael Prasad) gave evidence. In his evidence-in-chief, he states:

1. His father introduced the 1st defendant (Manoj Sharma) to him. Manoj is a pundit (Guru). He was introduced like a priest, somebody we can trust and rely on. Manoj wanted to start a radio station and to register a company. We discussed helping people of Fiji.

2. He said, 'There was an oral agreement that I will finance the project and he will operate. I sent money after many calls from them. I have sent about $54,000.00 for Radio Paschim. It was started in my name but registered under his (Manoj) name. I also sent radio equipment worth over $50,000.00 to promote Radio Paschim. The operation started in 2007. I am the owner of the company. He assured that he can get SBI. From 2006 to 2012, I did not get anything from Manoj. I wanted to salvage the radio station.' He wants his money back with interest.

[06] Under cross-examination, the plaintiff states that the initial discussions were in Suva. He initiated the project. He is not sure when the 2nd defendant was registered. He (Manoj) registered under his name. He (the plaintiff) admitted that he is not the registered owner of Radio Paschim, but the initial financier. He said the defendant asked for the equipment.

Defendant's evidence

[07] The defendant, in examination-in-chief, states that:

"In 2005, I decided to start a radio station and talked with my good friend Satendra Singh and decided to have the business. I registered the business in 2006. Discussion with Michael Prasad was in Suva. After meeting my friend and knowing the discussion, he would help me set up business. Prior to this, I had done a ritual for him. We had the relationship of Guru and follower. I accepted his offer for getting

something. I took it as a gift because there was no agreement for discussion about the things he hadbeen supplying from New Zealand. The radio station was going on well under my management as a sole trader. Things came to an end when there was a fire in 2012. (He produces a Fire Authority letter as D/E1. That was the time the radio station was closed down. The plaintiff made his claim."

[08] In cross-examination, he admitted that the plaintiff sent equipment and money of about $55,000.00 and that that was a gift. He said there was no agreement. He offered to help us. He denied that the plaintiff was a shareholder.

THE DECISION

[09] The plaintiff claims the return of the money and the radio equipment he sent to the 1st defendant over a period of nearly two years from 2006 to April 2007 for the use of Radio Paschim (the 2nd defendant), formed by the 1st defendant. According to the plaintiff, he sent the money and the equipment because there was an oral agreement between the 1st defendant and the plaintiff that the 1st defendant will register the 2nd defendant under the plaintiff's name and the plaintiff will be the Director of the 2nd defendant.

Limitation issue

[10] The 1st defendant has raised the limitation issue in his written submission where he alternatively submits that if the court holds that there is a valid contract between the parties, the plaintiff's claim is

statute barred in view of section 4 of the Limitation Act, which so far as relevant states that:

"4.-(1)-The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

Actions founded on simple contract or on tort; ..."

[11] In order to determine the limitation issue, I would assume for a moment that there was a valid contract between the parties and that the plaintiff's claim is founded on that contract.

[12] In the statement of claim filed on 1 August 2013, the plaintiff states that on or about March 2006, the plaintiff entered into the joint venture to establish a radio station called "Radio Paschim" in Ba wherein the plaintiff would hold majority shares and the 1st defendant would be the Manager/Administrator of the 2nd defendant for certain consideration. The statement of claim further states that between March 2006 and April 2007 the plaintiff paid the sum of $54,078.15 and provided radio equipment valued at $36,540.40 to the 1st defendant for the establishment of the 2nd defendant.

[13] According to the plaintiff, the cause of action arose on or about April 2007, the last date which the plaintiff paid the sum to the 1st defendant. There is no evidence before the court to suggest the plaintiff ever demanded the repayment of the money or return of the equipment before filing the writ of summons. In the absence of any demand for payment, it seems that the cause of action for the plaintiff arose in April 2007, the last date the plaintiff sent money to the 1st defendant. If the cause of action arose in April 2007, the limitation period of 6 years expires in

April 2013, whereas the plaintiff brought his action in August 2013, which is 4 months outside the limitation period.

[14] The 1st defendant was appearing and defending the action in person. He did not engage the service of a legal practitioner. He has raised the limitation issue in his written submission for the first time.

[15] As a matter of fact, the limitation issue derives from a statutory provision. Therefore, it is a legal issue.

[16] In ***Denarau Corporation Ltd v Deo*** [2015] FJHC 112; HBC 32.2013 (24 February 2015), the Court [I] held that preliminary objection on point of law could be taken at any stage of the proceedings before judgment or order is given.

[17] I find that the plaintiff's claim is statute barred in view of section 4 of the Limitation Act and could be dismissed on this ground alone.

Whether there was a contract between the parties

[18] The plaintiff claims that there was a verbal contract between the plaintiff and the 1st defendant that the plaintiff will fund and provide equipment to establish the 2nd defendant and in return the 1st defendant will register the 2nd defendant under the plaintiff's name and he (the plaintiff) will be the Director of the 2nd defendant and that the 1st defendant will be the Manager/Administrator of the 2nd defendant for certain consideration. In order to establish this verbal agreement, the plaintiff relies on an unsigned letter he sent to the plaintiff wherein the plaintiff concludes the email with his name and below his name within bracket he states "(Director)" (see P/E-12). It is not clear whether or not this letter was sent to the first defendant.

[19] It is noted that in that email the plaintiff only states "Director", whereas he fails to state which company he is the director for. If he is the director or intended director for the 2nd defendant, he could have stated so.

[20] According to the 1st defendant, he and the plaintiff had a relationship of Guru and disciple. In Suva, there was a discussion on the development of the 2nd defendant when he (1st defendant), his best friend Satendra Singh and the plaintiff were present. At that time the plaintiff volunteered to help develop the 2nd defendant and sent money and equipment from New Zealand. The 1st defendant denied any agreement with the plaintiff that the 2nd defendant will be registered under the plaintiff's name and the plaintiff will be the Director of the 2nd defendant.

[21] If in fact, there was an oral agreement between the plaintiff and the 1st defendant as asserted by the plaintiff at the discussion held in Suva, Satendra Singh would have been the best witness for the plaintiff. However, the plaintiff did not call him (Satendra) or attempt to call him as a witness.

[22] The plaintiff said the 1st defendant will be the Manager of the 2nd defendant for certain consideration. The consideration should have been definite in the agreement, whether it is in writing or verbal. In the absence of any definite term concerning the consideration, the agreement is uncertain and therefore, could not be enforced.

[23] The plaintiff merely asserted that there was an oral agreement with the 1st defendant. The plaintiff was sending the money and the equipment over a period of two years without any reference that he is sending the money and the equipment to the 1st defendant as result of the oral agreement. The plaintiff was sending these till March 2007. He issued the writ of summons against the defendants on 1 August 2013. There is no single evidence between the period-March 2007, the date the plaintiff

sent the money and the equipment and August 2013, the date on which the plaintiff filed the writ-to suggest that the plaintiff was sending the money and the equipment on condition. There is no sufficient evidence to prove on the balance of probability that there was an oral agreement between the plaintiff and the 1st defendant. It appears to me that the plaintiff sent the money and the equipment to the 1st defendant without any condition because they had Guru-disciple relationship.

Frustration

[24] Even if there was an agreement, the plaintiff will not be able to enforce it due to the frustrating situation. The building the plaintiff was occupying with Radio Paschim was completely destroyed as a result of fire outbreak. The defendant produced a letter issued by National Fire Authority of Fiji (NFA)-(D/E-1). The letter describes the destruction as follows:

"29 November 2012

TO WHOM IT MAY CONCERN

This is to confirm that a ***fire had completely destroyed the structure and contents of a commercial building*** *on 12th November 2012in Ba. The Fiji Police Force confirmed with their attached letter dated 14 November 2012 that the property belongings to Mr Ashwani Sharma Building on Main Street, Ba.*

The tenant Mr Manoj Kumar was occupying the first floor residential level with radio Paschim Studio at the time of the incident.

NFA Ba responded to a free call no 124/12 ***but nothing could be saved*** *respectively. Any assistance provided to Mr Kumar will be appreciated.*

Should you require any further information or assistance please do not hesitate to contact Mr Petero Nodrakoro at the Structural Fire Safety Department on 3312877. (Emphasis provided)

(Sgd)

QionilauMoceitai

Acting Chief Fire Officer"

[25] The principle of frustration was extensively discussed in *Emperor Gold Mining Company Ltd v Fiji Industries Ltd* [2000] FJCA 46; [2000] 1 FLR 311 (1 December 2000). I quote from that case:

"There was nothing in the agreement to cover the possibility and effect of Ranger's withdrawal. The appellant's contention that it then ceased to have effect, raises the question of whether there was an implied condition along those lines. The law on this topic (and on the allied one of frustration was extensively discussed in Codelfa Construction Pty Ltd v State Railway Authority of NSW [1982] 149 CLR 337. For the purposes of this appeal it is sufficient to ask whether the parties, assuming them to be reasonable business-people, would necessarily have agreed on such a condition as appropriate to put into their contract if the point had been raised with them at the time it was made. In other words, is the term to be implied (i e that the agreement would cease to have effect if Ranger withdrew) so obvious that it "goes without saying?" Having regard to the resources FIL was committing to ensure full production, it is impossible to answer this in the affirmative. Accordingly there was no implied condition.

This leaves the issue of frustration which was forcefully put to us by Dr Sahu

Khan. As good a definition as any from the mass of reported decisions on the topic is that of Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at 727 to 729 quoted by Aickin J at p 377 of Codelfa:

"..... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.... "It was not this that I promised to do"

..... special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

However, ".... the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains" per Lord Roskill in Pioneer Shipping Ltd v B.T.P. Tioxide Ltd [1982] AC 724 at 751-752.

Discharge of a contract occurs automatically on the happening of the frustrating event, regardless of the intention, opinions or even the knowledge of the parties - see HirjiMulji v Cheong Yue SS Co [1926] AC 497 at 510. It should not be due to the act or election of the party relying on it and proof of such "fault" is on the party alleging it (Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154).

In British Movietone News Ltd v London and District Cinemas Ltd [1952] AC 166 at 185 Lord Simon said

"The parties to an executory contract are often faced in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle in execution, or the like. Yet this does not affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing at the time it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point ..."

This passage brings out the important point that at the outset, the Court must consider the terms of the contract in the light of the surrounding circumstances known to the parties at the time it was made. Emperor was putting itself forward as being solely responsible for buying the estimated quantity of quicklime for use in the joint venture conducted with its associate and, in the absence of any provision for earlier dissolution in the sale agreement, the inference is that it was intended to last for the stipulated two years, whatever might be the success or failure of the joint venture or the stability of that relationship, which was of its own choosing. After all, those risks were similar to those run by any businessman with associates entering into a long-term contract with a third person. Furthermore, the resources FIL was putting into new plant made a stable commitment by Emperor essential, a factor strengthening the inference that the parties intended their agreement should take effect according to its tenor, with each assuming the risks of unexpected events affecting its own performance, and arising out of its own business activities and relationships."

[26] The frustrating event occurred on 12 November 2012. The plaintiff filed the writ of summons and the statement of claim on 1 August 2013. The defendant appeared in person throughout the proceedings. He did not raise the issue of frustrating event to repudiate the contract if any. There is nothing in the court to show that the fire occurred due to the fault of the 1st defendant or that he intentionally set fire to the building with a view to frustrate the contract and thereby to seek discharge of the

contract. In the absence of any evidence that the frustrating event was caused due to the fault of the 1st defendant, the frustrating event that occurred on 12 November 2012 will discharge the contract, if he had one with the plaintiff.

CONCLUSION

[27] For the foregoing reasons, I find that the plaintiff voluntarily sent the money and the equipment to the 1st defendant without any condition over a period of two years, for the plaintiff considered the 1st defendant as his Guru. Presumably, even if it is found that there was a valid contract, the plaintiff's claim is time-barred pursuant to section 4 of the Limitation Act or if not, the 1st defendant is entitled to discharge the contract on account of the frustrating event that completely destroyed the building and Radio Paschim (2nd defendant). I would, therefore, dismiss the plaintiff's claim. Considering the circumstances of the case, I would make no order as to costs.

Final outcome

1. Action dismissed.
2. No order as to costs.

.....12/4/17.....

M H Mohamed Ajmeer

JUDGE

At Lautoka

12 April 2017

HIGH COURT OF FIJI
LAUTOKA