IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 0093 of 2018
[High Court Civil Case No. 141 of 2011]

BETWEEN : **CARPENTERS FIJI LIMITED**

Appellant

AND : **MEAT CUISINE FIJI LIMITED**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr. S. Staton with Mr. N. Narayan for the Appellant**
Mr. K. Siwan for the Respondent

Date of Hearing : **10 November, 2022**

Date of Judgment : **25 November, 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions arrived at by Dayaratne, JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusions arrived at by Dayaratne JA.

Dayaratne, JA

[3] In this appeal the Appellant seeks to set aside the judgment of the High Court of Suva dated 25 September 2019.

The case in the High Court

[4] The Respondent instituted action in the High Court against the Appellant for breach of contract and sought to recover a total sum of $ 129,223.74.

[5] The Appellant was a limited liability company which operated a supermarket chain and the Respondent which too was a limited liability company had agreed to supply goods on credit to the Appellant and for this purpose, had entered into two written agreements. The first agreement has been entered into on 23 March 2010 (2010 agreement) whilst the second agreement was entered into on 03 February 2011(2011 agreement).

[6] The sum claimed by the Respondent comprised of two components. The first was to recover a sum of $40,750.72 on the basis that the Appellant had wrongfully deducted a sum equivalent to 3% of the total value of goods supplied during the year 2010 (identified as 'loss of income in the year 2010' in the amended statement of claim). The second claim was for a sum of $88,473.02. This was on the basis that the Appellant has wrongfully deducted a sum of $2,452.86 being 3% of the payments due for the month of February 2011 and sums of $47,016.53 and $38,051.04 being payment due for supplies made during the months of March and April 2011 respectively (identified as 'loss of income in the year 2011' in the amended statement of claim).

[7] The Appellant admitted the two written agreements but claimed the terms contained in the two agreements were varied partly in writing and partly by conduct of parties. The Appellant took up the position that the Respondent knew well that processing of payments and the subsequent release of cheques would take time and has during the course of dealing, demonstrated its acceptance of such terms pertaining to the manner of making claims and payment *'without in any way dissenting from or objecting or demurring'* (para 2 of the statement of defence).

[8] The Appellant contends the position that it was entitled to a rebate in the manner morefully stated in the two agreements. The Appellant claimed that in terms of the 2010 agreement it was entitled to a rebate of 6% if the total value of goods supplied during the year was less than $ one million but if it exceeded $ one million, the rebate would be 10%. According to the 2011 agreement, the rebate was a flat rate of 5%, irrespective of the total value of goods supplied during the year.

[9] Relying on this entitlement, the Appellant claimed that it deducted 3% from the monthly payments (in the expectation of deducting up to 6% or 10% depending on the value of the total purchases made under the 2010 agreement and 5% under the 2011 agreement). For the year 2010, the total purchases made by the Appellant was $1,358,357.48. On the basis that it was in excess of $ one million, the Appellant states it was entitled to a rebate of 10% of that sum which works out to $135,835.75. Of this, a sum of $40,750.23 had already been recovered through the 3% deductions made from the monthly payments and as such it was entitled to receive the balance 7% in order to avail of the 10% rebate. The total sum to be recovered as 7% was therefore $95,085.03 (thus making up the sum of $135,835.75 which amounts to 10%). It must be noted that the Appellant corrected these amounts during the trial and it was common ground that the total purchases for the year 2010 was $1,358,357.48 (the amounts stated in the statement of defence were slightly different).

[10] The Appellant states further that as far as the year 2011 was concerned, it had to pay the Respondent a sum of $ 85,067.57 for the supplies made during the months of March ($47,016.53) and April ($38.051.04) respectively. However, since the Appellant was entitled to a total sum of $95,085.03 as balance rebate for the year 2010, it decided not to make the payments in respect of March and April 2011 as a set off. Yet there was a shortfall

of $10,0000.00. Evidence was to that effect and that position has also been articulated in the written submissions filed in the High Court.

[11] On that basis, the Appellant made a counter claim in the High Court for rebate for the year 2010 and 2011 and in addition damages for loss of business opportunity in a sum of $40,000 (as per statement of defence filed in the High Court).

The Grounds of Appeal urged by the Appellant

[12] In its appeal before this court, the Appellant has raised eleven grounds of appeal. They are;

1. *THAT the learned Judge erred in law and in fact by determining the matter and delivering Judgment dated 25th of September 2019 and which was in the circumstances against the evidence and the weight of the evidence.*

2. *THAT the learned Judge erred in law and in fact by holding that the initial supplier agreement dated 23 of March 2010 was a rebate agreement when in fact it was Supplier Agreement*

Particulars

(I) The Appellant paid for the goods supplied by the Respondent to the Appellant within twenty (20) days from the Respondent's Statement date;

(II) The Appellant thereupon would be entitled to a rebate rate at six percent (6%) for goods supplied by the Respondent to the Plaintiff between the 1st day of February 2010 to December 2010 up to the value of one million dollars ($1,000,000.00) and thereafter the Appellant would be entitled to a rebate rate at ten percent (10%) for goods supplied to the Appellant over the value of one million dollars ($1,000,000.00).

3. *THAT the learned Judge erred in fact and in law by failing to hold that as per the initial Supplier Agreement, the Respondent supplied goods on credit to the Appellant at the Appellant's request and duly issued its statement of the goods supplied amounting to the total sum of* ***one million three hundred and fifty eight thousand three hundred and fifty seven dollars and forty eight cents ($1,358,357.48)*** *from February 2010 to December 2010.*

4. *<u>THAT</u>:*

(1) The learned Judge erred in fact and in law by failing to hold that per the initial Supplier Agreement Appellant lawfully and as contractually was allowed to deduct the sum of forty thousand seven hundred and fifty dollars and seventy two cents ($40,750.72) from its payment to the Respondent in the year 2010 as an automated discount at the rate of three percent (3%).

(2) Further, the Learned Judge further erred in law and fact by failing to hold that the deduction was allowed as implied by way of performance, such implication being afforded by the terms and conditions of the initial Supplier Agreement.

<u>Particulars</u>

(I) The Appellant was entitled to a rebate at ten percent (10%) for the year 2010 had further seven percent 7% deducted from its total purchase in the year 2010 and are in addition to the three percent 3% it had already deducted.

(II) As per the Initial Supplier Agreement, the Appellant was entitled to total rebate of $135,835.75 from which only 3% was automatically deducted being $40,750.23 with a balance payable by the Respondent to the Appellant being $95,085.03

5. *<u>THAT</u> the Learned Judge erred in fact and law by failing to hold that the Appellant and the Respondent negotiated a Second Supplier Agreement on or about 3 February 2011 for the supply of goods on credit for the year 2011.*

<u>Particulars</u>

(I) The Appellant was the moving party with respect to the Second Supplier Agreement and this Supplier Agreement was not a rebate agreement.

(II) It was a term and condition of the Second Agreement that provided that the Appellant paid for the goods supplied by the Respondent to the Appellant within fifteen (15) to twenty (20 days from the Respondent's Statement date the Appellant would be entitled to a rebate rate at five percent (5%) for goods supplied by the Respondent to the Plaintiff between the 1st day of January 2011 to December 2011;

(III) It was a further term and/or condition of the Second Supplier Agreement that 'To ensure rebates are met, payment must be made by 15th – 20th of the month; and

(IV) The evidence as led was to the effect that pursuant to the Second Supplier Agreement, from the period of January to March of 2011, the Respondent had supplied goods worth of $260,184.57

6. *<u>THAT</u>:*

(1) The Learned Judge erred in fact and in law in not holding that the Appellant did not make payment for the supplies made during the months of March ($47,016.53) and April $38,051.04) in total amounting to $85,067.57 due to the fact that the Respondent owed the Appellant balance rebate sum of $95,085.03 on the basis that the rebate payment was still owing, thereby entitling the Appellant to contra the payment with the debt owing which then amounted to still rebate balance owing of $10,017.46 ($95,085.03 - $85.067.57).

(2) Further and in the alternative, the Learned Judge failed to hold that the rebate was a set off as a rebate under the Second Supplier Agreement.

7. *<u>THAT</u> the learned Judge erred in law and in fact by failing to give due weight to the evidence of the Respondent's witness, Keith Travis, where he failed to adduce any evidence to show that:*

a) The appellant had failed to pay the Respondent within the stipulated payment term under the Initial Supplier Agreement as there was no invoices presented and delivery dockets and or any evidence of invoices issued and not paid within the 20 days of acknowledgment.

b) The appellant had wrongfully deducted three percent (3%) from the total sum payable in the year 2010 being the sum of forty thousand seven hundred and fifty dollars and seventy two cents ($40,750.72) as the Appellant and the Respondent ha agreed by conduct to deduct 3% from each monthly payment to the Respondent and thereafter to adjust the balance of the 10% at the end of the year;

c) The Appellant had failed to pay the Respondent within the stipulated payment tern under the Second Supplier Agreement as there was no invoices presented and delivery dockets and or any evidence of invoices issued and not paid within the 20 days of acknowledgment;

d) The Appellant had wrongly deducted three percent (3%) from the total sum payable for February 2011 being the sum of two thousand four hundred and fifty dollars and eighty six cents ($2,452.86) as there was no evidence presented to show that payment was made late and or outside the stipulated time;

e) The Appellant failed to pay the Plaintiff the sum of forty seven thousand sixteen dollars and fifty three cents ($47,016.53) for goods supplied to the Appellant on credit in March 2011.

f) The Appellant failed to pay the Respondent the sum of thirty eight thousand fifty done dollars and four cents ($38,051.04) for goods supplied to the Appellant on credit in April 2011.

g) The Appellant was not lawfully entitled to contra the payment with the debt owing which then amounted to still rebate balance owing of $10,017.46 ($95,085 - $85,067.57); and

h) That due to the Appellant's breach the Respondent has suffered loss and damages in total amounting to $129,223.74 on the ground that in the absence of such evidence, the finding of breach of the agreement was against the evidence and the weight of the evidence.

8. *THAT the Learned Judge erred in fact and in law by not holding that the Initial and the Second Supplier Agreement entered between the parties were varied by the parties in writing and partly by conduct, and insofar as it was by conduct, the conduct consisted of or is to be inferred from the evidence as led and relied upon that;*

   i. At all material times, the Respondent well knew that the Appellant's processing time of payments formed part of the agreement and the Respondent thereby accepted or alternatively signified their acceptance to the Appellant.

   ii. Further or in the alternative, by the course of dealings between the parties, it was agreed between them the preceding time involved by the Appellant and the subsequent release of cheques.

   iii. Further, the Respondent with full knowledge with the terms and conditions in the Supplier Agreements and the processing time and subsequent time for release of cheque retained the same and accepted the same without in any way dissenting from or objecting or demurring to any of the said terms and conditions herein above mentioned within a reasonable time of seeing the same or at all, and they thereby agreed to and accepted the said terms and conditions including the processing time and subsequent time for release of cheques and/or signified their acceptance of the same to the Appellant or alternatively by their silence and conduct, with full knowledge of the process time agreed and permitted the same.

   iv. That any delay in supply of stock by Respondent to the Appellant or any non-supply of stock by the Respondent, the Appellant was advised by the Respondent well in advance so as not to cause business disruption and/or loss to the appellant.

9. *THAT the Learned Judge erred in law and in fact failing to constitute the Agreements and further by not holding that the Appellant was entitled to deduct 3% from each monthly payment to the Respondent and thereafter to*

adjust the balance of the 10% and 5% respectively at the end of the years respectively.

10. *<u>THAT</u> the learned Judge erred in law and in fact failing to hold that the Respondent closed operations having breached the second agreement with the defendant something in March 2011 which caused the Appellant to sustain loss and damage by reasons of insufficient stock being available for retail sale in its stores.*

Particulars

(i) *At all material time the Respondent knew or ought to have known that failing to give notice of non-supply by the Respondent to the Appellant would cause substantial loss, damages, expenses and inconvenience to the Appellant as a retailer of these products;*

(ii) *As a result of the Respondent's actions and conduct, the Appellant was forced to negotiate with other suppliers in a short period of time to replenish its stock levels in its sores and as a result the Appellant has suffered loss and damage amounting to approximately $40,000.00*

(iii) *The appellant at all times reasonably mitigated its losses caused by the Respondent's breach of contract.*

11. *<u>THAT</u> the Appellant reserves its right to argue and/or file further or revised grounds of appeal.*

[13] I find that the grounds of appeal overlap with each other. In addition some of them are wrongly premised. They cannot be considered separately but during the course of this judgment I will respond to them appropriately. The first ground being a general ground will be dealt with at the end. Learned counsel for the Appellant informed this court at the hearing that he is not pursuing the tenth ground of appeal. The eleventh ground states that the Appellant reserves the right to argue and/or file further or revised grounds of appeal. That was not done. That leaves nine grounds of appeal in all to be looked into by this court.

<u>Under what circumstances was the Appellant entitled to a rebate in terms of the 2010 agreement</u>?

[14] The crucial issue to be determined in this case is as to whether the 'rebate' as contained in the 2010 agreement is contingent on timely payment by the Appellant. In other words whether payment within 20 days was a pre-condition to be entitled to a rebate. This comes

to the fore only in respect of the 2010 agreement since there is consensus between the parties as to how the rebate would apply in terms of the 2011 agreement (Appellant is entitled to a rebate of 5% only if payment is made within 15 days). The quantum (percentage) of the rebate as well as to how the rebate was agreed to be recovered are matters that will have to be decided alongside this issue. It is thereafter that the questions as to whether a variation has been made to the written contract terms and whether a set off was possible will have to be determined.

[15] I am of the view that the accuracy of the claims made (their calculation – since the Appellant maintains it made deductions and a set-off) and awarded is a matter that is best addressed once the answers to these issues are found and therefore, I will adopt that approach in this judgment.

[16] The 2010 agreement begins as follows;

> *'This Supplier Agreement (SA) concludes five components of supplier negotiations which are **Payment Terms**, **Rebates**, Discount, Promotions and Gondolla Fees. The following rates and amounts are representative of these negotiations'* (emphasis added).

[17] Clause 1 of the 2010 agreement states that;

> *'The parties acknowledge that the "Terms" are the following: a. **20 days from the statement date'*** (emphasis added).

It must be understood that the *"Terms"* here are the *'Payment Terms'* since that is what the opening paragraph of the agreement indicates.

[18] As for 'rebate', clause 2 states that:

> *"The parties acknowledge that the **rebate terms** are the following:*
>
> *a. $....................(rebate amount) or a …………% of purchases for the period specified in (c) below. This rebate is based upon the following;*
> *$1.00 - $1.0m is 6% Rebate*
> *$1.0m Above is 10% Rebate*
>
> *b. % of monthly purchases.*
>
> *c. This rebate shall be for the period 1st February 2010 to December 2010.*

d. *Rebates targets will be adjusted retrospectively in the month, which the new slab is reached, and reconciled from the first Fijian dollar's purchases".* (emphasis added)

[19] Whilst clause 2 deals with the quantum (percentage) of the rebate, its period of application and the determination of the slab (including its reconciliation), clause 7 becomes relevant in the determination of the manner in which the rebate is payable to the Appellant. It reads as follows; *"The Rebate and gondola space income* ***will be payable*** *to CFL the following terms and conditions: a. Month deducted from the payment".* (emphasis added. 'CFL' referred to therein is the Appellant).

[20] These contractual terms ought to be interpreted bearing in mind the testimony of the respective witnesses, particularly in view of the Appellant asserting that the written terms have been varied partly in writing and partly by conduct. As pointed out earlier, the parties were at variance with regard to how the rebate is to be applied in terms of the 2010 agreement.

[21] The Respondent's position is that the Appellant (as purchaser) ought to make payment to the Respondent (as supplier), for the monthly supplies within a period of 20 days of the 'statement date' if it were to be entitled to the rebate. In support of its position, the Respondent relied on clause 1 of the 2010 agreement which set out the payment terms and clause 2 which had details of the rebate. The sole witness of the Respondent Keith Treffers (PW1), who was a Director of the Respondent has explained his position in relation to the terms contained in the 2010 agreement on those lines (at page 313 of the copy record).

[22] The Appellant on the other hand claims that the 2010 agreement does not spell out such a pre-condition and claimed that it was entitled to the rebate irrespective of when payment was made.

[23] In support of this interpretation, the Appellant relied on the provisions contained in the 2011 agreement. The Appellant drew attention to the hand written notation at the bottom of the first page. That reads as; ***'To ensure rebates are met, payment must be made by 15th – 20th***

of the' (emphasis added. PW1 and counsel for the Appellant have agreed in the High Court that *'15th – 20th of'* should be understood as *'15th – 20th of the month'* - at page 376 of the copy record). In addition, the language in clause 1 of the 2011 agreement was referred to which reads as; *'15 days payment'* and pointed out that there was clarity that the rebate was available only if payment was made within that window.

[24] The Appellant's witness (DW1) claims that the absence of such clear terms in the 2010 meant that timeliness of payments was not a pre-condition for rebates in terms of the 2010 agreement (page 376 -377 of the copy record). Nevertheless, DW1 admits that as per clause 1 of the 2010 agreement, 'payment terms' were '20 days from the date of the statement'. He said; *'In that clause once the supplier gives out the statement. Say one to thirty days for January, so it is due on the 20th of February'* (page 407 of the copy record).

[25] PW1 however disagrees and has gone on to explain that there was no difference between the two agreements regarding how the rebate would apply. They both depended on timeliness of payments. He drew attention to the handwritten notation at the bottom of the first page and explains that it has been inserted there in order to emphasize on timeliness of payment. He says; *'So to me that looks like they reminding some body of it, somebody with internally of MH's'* – meaning a reminder to the Appellant (page 315 - 316 of the copy record). PW1 infact has said under cross-examination that the handwriting on the 2011 agreement is that of the Appellant and counsel for the Appellant has agreed that it was so (at page 376 of the copy record).

[26] I observe that the learned High Court Judge has not dealt with the issue as to how the rebate applies in terms of the 2010 agreement as an initial issue but looked at it in conjunction with all other matters. Having done so, he has at paragraph 45 of his judgment arrived at the conclusion that; '*The 2010 agreement included a provision in clause 1 for prompt payment and that this was what the parties understood'*. He once again discusses this issue at paragraphs 49 -51 of his judgment and it must be understood from that discussion that he has arrived at the conclusion that rebate is contingent on payments being made within 20 days from the date of the statement.

[27] Learned counsel for the Appellant in his supplementary written submissions filed in this court has emphasized that *'written commercial contracts must be interpreted objectively'*. I am in full agreement with that submission. He has also cited the judgment of the High Court of Australia in the case of **<u>Mount Bruce Mining Pty v Wright Prospecting Pty</u> (2015) 256 CLR 104** in support of that position. He has cited several paragraphs of that judgment which I agree are relevant to this case but I wish in particular to quote the following parts;

> *'The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to text, context ..... and purpose'. 'In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That enquiry will req*uire *consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract'. 'Ordinarily, this process of construction is possible by reference to the contract alone……'. 'However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where the task is facilitated by an understanding of the geness of the transaction, the background, the context[and] the market image the parties are operating'.*

I am in full agreement with these views and will therefore follow that approach in the interpretation of this contract.

[28] The opening paragraph of the 2010 agreement clearly spelt out its purpose. It dealt with five components of negotiations and the first two components identified therein are 'Payment Terms' and 'Rebates'. Clause 1 accordingly spells out as to what the payment terms are. It is specifically stated therein that it is '20 days from the statement date'. Clause 2 goes on to describe the extent of the rebate by way of a percentage, depending on the total volume of purchases and the applicable period.

[29] It must be understood that a rebate is an advantage given to the purchaser. Why would a supplier give a rebate to the purchaser? Needless to say, there must be an advantage to the supplier as well. That advantage certainly is timely payment. There is no other way in which the bargain between the parties can be understood. Clause 2 cannot be interpreted in isolation. It necessarily must be read together with clause 1.

[30] PW1 has been unequivocal in what he said in the High Court. Under cross-examination he clarified the purpose for the rebate as follows; *'I said that was incorrect and if there was no incentive or penalties then why would the agreement be in place at the first place. Wouldn't there be no need for this. The agreement existed for the two parties to benefit. And our benefit was prompt payment. Their benefit was a rebate on prompt payment. So simply by the fact in my opinion that the agreement existed, the 2010 one. They made it clear on the 2011 one but on the 2010 one I still say that the agreement should be taken in the spirit that it was wanted for'* (at page 378-379 of copy the record).That explains the commercial purpose that was sought to be secured by the parties.

[31] It must also be noted that at the trial, when the learned counsel for the Respondent sought to produce the statements issued to the Appellant in order to establish delay in payments, learned counsel for the Appellant continuously raised objection on the basis that the statements cannot be produced without the supporting invoices (infact there was no basis for such objection because the Appellant was not disputing the total value of supplies or the total of payments made). What is interesting however, is the way in which he couched his objection. He says; *'Sir why I'm saying this my Lord, I know I'm making it difficult for my friend. Issue is when was the invoice raised? When was the payment done? They are saying we did the payment late. So they haven't prove the fact there is the invoice in this date and we paid it late'*. Further, in reply to court he goes on to state; *'Yeah they are saying we paid later they have to prove we paid later (at page 350 of the copy record).* Most importantly he again says ***'Whether we entitled to rebate? So they have to prove that we paid them late. That's one of the things they have to prove. That's the issue here my Lord – rebate'*** (emphasis added. at page 352 of the copy record). It must be noted that these exchanges took place when PW1 was testifying regarding payments made in respect of the 2010 agreement.

[32] Wittingly or unwittingly, that was a clear acknowledgement on the part of the Appellant that the rebate was available only if payments were made on time. If it was not the case, why was he concerned with the need to establish delay in payments? This in my view completely cuts across the Appellant's position regarding the rebate. I must also add that I find the claim of the Appellant to be rather obnoxious and devoid of commercial sense.

What significance did the "payment terms' as contained in the agreement have if that was not to be a consideration?

[33] For all the reasons explained by me above, I hold that in terms of the 2010 agreement timeliness of payment was key. The Appellant was entitled to a rebate only if payments in respect of the supplies were made within the agreed payment window of 20 days as set out in clause 1 of that agreement. As for the 2011 agreement, there is common ground that rebate was contingent on payment being made within 15-20 days and therefore does not require any determination by court. The second ground of appeal should therefore fail and this conclusion will have a bearing on the other grounds of appeal as well.

What was the quantum of the rebate?

[34] The next matter that would have required interpretation is the quantum of the rebate (as a percentage of the purchases) that the parties had agreed in terms of the two agreements. This involved an interpretation of clause 2 of the agreement. The doubt infact was only in relation to the 2010 agreement. There was no such ambiguity as far as the 2011 agreement was concerned and the parties had agreed that a flat rate of 5% rebate applied thereunder.

[35] On this issue, PW1 has stated that according to the 2010 agreement, it was not a flat rate of 10% if total purchases exceeded $ one million. If it was below $1 million, the lower amount namely 6% would apply and the 10% rebate was only in respect of what was above $ 1 million (at page 373 -374, 377-378 of the copy record). DW 1 on the hand has said that they were entitled to a flat rate of 10% rebate if the total sales exceeded $1 million (page 409, 417 of the copy record).

[36] The learned High Court Judge has not come to a specific conclusion on this issue since he has gone on to discuss the deductions made on a monthly basis and the other figures. Upon clarification being sought by this court from learned counsel for the Appellant on this issue, at first he submitted that it would be 6% for the first slab of $1 – 999,999 and 10% for anything over $ 1 million. However, he later submitted that it would be a flat rate of 10% if total purchases exceeded $ one million. This of course is in line with the position DW1 has taken in the High Court. When this court posed the same question to the learned counsel for the Respondent, he agreed with the second position taken by the learned counsel for the

Appellant. Although this is contradictory to the stand taken by PW1 in the High Court, I do not think it will have any impact on the ultimate decision of this case.

[37] This issue will only be of academic interest in view of my ultimate finding and hence I will not venture to make a determination on this particular issue.

The deduction of 3% by the Appellant from the monthly payments

[38] It was submitted by learned counsel for the Appellant that since his client was entitled to the rebate irrespective of when payment was made in terms of the 2010 agreement, the Appellant had taken steps to deduct 3% from the monthly payments made to the Respondent. He asserted that it had become a practice and that by virtue of its failure to object to such deduction, the Respondent had acquiesced to the practice adopted by the Appellant. On that premise he argued that the Respondent has admitted that the Appellant was entitled to a rebate under the 2010 agreement and hence it was entitled to a further 7% as rebate since the total sales for that year had exceeded $ one million. He asserted that the rebate provisions contained in the 2010 agreement should be construed that way since the terms of that agreement has since been varied by the conduct of parties. In the written submissions, the Appellant goes to the extent of saying that the payment terms have thus been varied taking into consideration the processing time and issue of cheques.

[39] If however the deductions were made on that premise, why did the Appellant deduct only 3% and not 6%? Nowhere in the agreement is a 3% mentioned and the percentage mentioned in the 2010 agreement was 6% for purchases below $ one million (provided as already held by me the payments were settled within 20 days of the statement).

[40] If it is to be considered as acquiescence and thus a variation of the original terms with regard to the rebate, the Appellant must establish that the Respondent acquiesced with full knowledge of what the Appellant sought to do. Evidence at the trial thus becomes most relevant.

[41] I will now examine what DW1 has said at the trial with regard to this deduction of 3%. His testimony was; *'These are normally in our terms if you see. We normally adjust* ***because we have a certain business practice of 3% retention'*** (emphasis added. at page 408 of the

copy record). He then goes on to say how a further 3% or 7% would have been recovered depending on the total value of purchases. Infact, the deduction of 3% instead of 6% had disturbed the learned High Court Judge during the trial and he has sought clarification from DW1. The learned High Court Judge posed the question *'Okay that is the part I don't know about. I am confused about because you suddenly come up with 3%. Yet I don't see any 3% in the agreement?*. DW1 responded as follows; *'We have a business practice to minus 3% from the payment. We are also entitled for this arrangement if we .....'* (at page 417 of the copy record). It must be pointed out here that his explanation even thereafter has not at all been convincing. He owed a clear and cogent explanation as to why the Appellant had decided on 3% instead of 6% if infact they were convinced that they were entitled to a rebate under the 2010 agreement. It is unfortunate that DW1 has not been cross-examined on this issue adequately thereby depriving the trial court of much needed clarification on an important aspect.

[42] Explaining the Respondent's position with regard to this issue, PW1 has testified that the Respondent was not aware that any deductions were being made as rebate and has pointed out that there never was a question of deducting 3% in the agreement. Further, at no point did the Respondent indicate that 3% was being deducted on account of rebate. He went on to explain that such position was taken up for the first time only after the Appellant stopped payments for the months of March and April 2011. This has actually surfaced during the exchange of letters between the parties after May 2011(at page 365, 384 of the copy record). He has categorically stated that it was illegal for the Appellant to have deducted 3% on a monthly basis and has gone on to state that infact rebate calculation was a matter for the Respondent. It is pertinent here to note that clause 7 of the 2010 agreement stated that the rebate **will be payable** to the Appellant and there was no mention of the Appellant unilaterally deducting any sums from the monthly payments.

[43] PW1 has however explained that short payments indeed were a regular occurrence during the contract. He has gone on to explain that they continuously took up the issue of short payments with the Appellant and that the Appellant had always promised to verify and revert but never did so. Infact he had provided detailed answers in this regard and conceded that they could not argue with the Appellant since they were a very large customer of the

Respondent and hence they just carried forward in the hope that such short payments will be adjusted through future payments (at page 380-382 of the copy record).

[44] If the Appellant was making deductions on account of rebate as described by DW1, why didn't they indicate that position to the Respondent at least when they were confronted with the issue of short payments? They could well have informed the Respondent that the deductions were on account of rebate. DW1 has been cross examined as to whether they informed the Respondent that 3% was being deducted as rebate and he has answered in the affirmative. But when asked specifically whether he has any proof of such communication, he has simply said 'at the moment' (at page 424 of the copy record). Even later on, under cross examination, the witness has merely said that it might be in the file but he does not have it with him (at page 427 of the copy record). This perhaps is why the learned High Court Judge has observed in his judgment that DW1 was evasive and misleading (at para 40 - 41 of his judgment).

[45] PW1 has categorically stated that the Respondent was unaware that the Appellant was making deductions on account of rebate and that he simply believed they were short payments and would be reconciled later. Considering the totality of his evidence and the testimony of DW1, I consider the version of PW1 to be plausible. It could very well be that these deductions were standard practice on the part of the Appellant as ***retention*** (as stated by DW1) to be adjusted later. As adverted to earlier, this was the belief of PW1 and he expected that they would be adjusted through future payments. The evidence of PW1 was that they regularly raised issue over short payments.

Were the terms of the two written agreements subsequently varied by the conduct of parties?

[46] If the Respondent had not been informed that the 3% deductions were being made as rebate and particularly when there was no basis whatsoever to deduct 3% since such a percentage was not mentioned anywhere in the agreement, how can the Appellant claim that there has been acquiescence on the part of the Respondent? There has been no silence on the part of the Respondent. His position was that they constantly protested about the short payments. None of that evidence has been controverted at the trial.

[47] It is also important to note that clause 10 of the 2010 agreement specifically states that ***'Any changes must be in writing and formalised with a new SA'*** (emphasis added). It is therefore clear that there could not have been any variation of those terms by way of conduct.

[48] The conduct of the Respondent cannot be construed as acquiescence pertaining to payment terms or deductions as rebate. The evidence led at the trial clearly demonstrates that the Respondent has acted with a full understanding of the terms of the agreements and that the position taken up by the Appellant is an afterthought as contended by PW1.

[49] Having considered the totality of the circumstances, I hold that there was no provision in terms of the agreement for the deductions made and that there has been no variation of the written terms contained in the 2010 agreement by conduct of the parties or otherwise as submitted on behalf of the Appellant. The fourth, eighth and ninth grounds of appeal should therefore fail.

[50] However, as to whether the Respondent was entitled to the recovery of the total sum so deducted ($40,750.72 and $2,452.86) is a matter that I will decide later when dealing with the relief sought by the Respondent and awards made by the High Court.

Was there a delay in the payments made by the Appellant?

[51] I have already determined that in terms of the 2010 agreement, the Appellant was entitled to a rebate only if it made payment within 20 days of the statement whilst there was common ground that payment had to be made within 15-20 days in respect of the 2011 agreement. The Respondent asserts in the amended statement of claim that the Appellant did not make payment within such periods. It was therefore necessary for the Respondent to establish such delay in payment.

[52] PW1 has said in his evidence that statements were sent on the last day or a day before the last day of every month (at page 356 of the copy record). He has gone on to explain that all payments by the Appellant were by way of cheques and that all such cheques were received by the Respondent later than 20 days from the date of the statement. He further stated that quite often, the cheques were postdated - 7 or 8 days ahead. There were no

automatic fund transfers. PW1 has categorically stated that payment was late every single month except in January 2011 where the rebate was allowed (at pages 364, 367 and 389 of the copy record). He went to the extent of saying that when there was no response to repeated requests for payment, they would stop supply to one or two smaller stores of the Appellant as either a threat or warning and when that was done, the cheques would be delivered (at page 320 – 321). The statements issued by the Respondent and its Bank deposit slips were produced at the trial (pages 355-357 & 362-363 of the copy record).

[53] PW1 has been cross examined as to why the Respondent accepted payments if they were short as well as late. It has been suggested that the Respondent could have refused to accept payment and terminated the contract. But PW1 has explained why from a business perspective it was important for them to accept such payment notwithstanding the delay and being short. They required the money to settle their suppliers and ensure they continued with their supplies (at pages 386 -388 of the copy record).

[54] He has also said; *'What you have to understand, yes, we continued with it. You also have to understand that we did not give them the rebate because they were late paying and you must also understand that they never ever, ever queried was because they were very clear and aware of the fact that the payment was made outside of the agreed terms. That is the reason why there was never a claim put against us for a rebate'*(at page 388 of the copy record).

[55] No attempt has been made by the Appellant to counter such claims of PW1 or place before court evidence to the contrary.

[56] Most importantly under cross examination, DW1 has admitted delay in payments relating to the 2010 agreement. His answer was; ***'2010 yeah we have paid on that day. Not specifically on the 20th every month but obviously on the 20th to 30th'*** and then in answer to the question ***'so is it correct that some payments were not made in time?'***, he said ***'obviously'*** (emphasis added. at page 425 of the copy record).

[57] The above evidence taken in their totality, in my view was adequate to establish on a balance of probability, delay in payments under both agreements and therefore it is clear that the Appellant was not entitled to any rebate.

The amount claimed and the amount awarded

[58] Since I have made determinations on the above issues, I will now deal with the reliefs sought by the Respondent in the trial court and the relief awarded by that court. As morefully stated by me in paragraph 6 above, the sum claimed by the Respondent in the amended statement of claim comprised of two components. The first being $40,750.72 which was the total of 3% deducted monthly in the year 2010. It is common ground that this amount has been deducted by the Appellant on a monthly basis.

[59] The second claim was for a sum of $88,473.02. This comprised of a sum of $2,452.86 being 3% of the deduction made in the month of February 2011 and the sums of $47,016.53 and $38,051.04 being payment due for supplies made during the months of March and April 2011 respectively (the total for these two months is $85,067.57). The Appellant admits that the said sum of $85,067.57 was payable in respect of the purchases it made during the months of March and April 2011 but justified its non-payment on the basis of a 'set off' against the total sum of $95,085.03 it alleged was due to it as rebate for the year 2010.

[60] The learned High Court Judge has awarded the Respondent the said sum of $ 85,067.57. He had concluded that the Appellant was not entitled to a rebate for the year 2010, in view of delayed payments (paragraph 45 of the judgment). The High Court has also observed that the Appellant was not entitled to the 3% deductions. However, the High Court has ultimately decided to award only the sum of $85,067.57 to the Respondent.

[61] He has not awarded the sum of $40,750.72 which was claimed under 'loss of income for 2010' and the sum of $2,452.86 which was claimed under 'loss of income for 2011'. The reason for not awarding the claim of $40,750.72 is found in paragraph 47 of his judgment. No finding has been made regarding the sum of $2,452.86. At paragraph 47 he says that; *'There was no evidence adduced by DW1 to satisfy me that the total sales to CFL in 2010 was $1.35 million. Accordingly, I refuse to accept this as true. Why DW1 did not simply extract the relevant commercial documents from CFL's files, is a mystery to me. Since I am not accepting this as proved, MCFL also cannot justifiably ask to be refunded the sum*

of $40,750 which was retained by CFL based on the estimated but unproven $1.35 million total sales volume for 2010'.

[62] A perusal of the High Court judgment bears out that infact he has dealt with the deductions made by the Appellant and at paragraph 23 of the judgment referred to these figures. However, he has at paragraph 47 referred to a portion of the cross-examination of DW1 and arrived at the above conclusion without having appreciated that these were figures that have clearly been agreed between the parties. They are set out in the statement of claim and the amended statement of claim of the Respondent as well as acknowledged during the trial and in the written submissions filed by the parties in the High Court. Therefore, there was no requirement of any further proof. The calculation of $40,750.72 has been arrived at on the basis that the total sales of the Respondent for the year was $1, 358,357.48 (the calculation being 3% of 1,358,357.48 = 40,750.72). Hence this finding of the learned High Court Judge is erroneous. What was required was to determine whether those sums will be awarded having regard to the circumstances. To that extent the third ground of appeal has merit but will have no bearing on the ultimate decision of this court.

[63] The final decision of the High Court was to award the sum of $85,067.57 which was the total value of supplies made by the Respondent to the Appellant during the months of March and April 2011 for which admittedly the Appellant did not make payment. He has infact stated as to what this award was at sub paragraph (i) of paragraph 55 of his judgment.

<u>Conclusion</u>

[64] For the reasons morefully set out in this judgment, I have held that the Appellant was not entitled to a rebate in terms of the 2010 agreement and therefore the claim of the Appellant that it was entitled to receive a total of $135,835.75 as rebate for the year 2010 has to fail. The Appellant was not entitled to set-off any amount from payments to be made in the year 2011 and was liable to pay the admitted sum of $85,067.57 to the Respondent as payments for purchases made in March and April 2011. The High Court has granted this relief.

[65] The next issue is whether the sum of $40,750.72 being deductions already made in 2010 and the sum of $2,452.86 which the Respondent claims has been deducted in the month of February 2011 should be awarded to the Respondent.

[66] In deciding this issue, my attention is drawn to the concluding part of PW1's evidence. PW1 in re-examination has spoken of the ultimate amount the Appellant owes the Respondent and has said; *'Forget about the discounts and the rebates and all that. The amount that I was not paid was the last amount that I supplied to them. The last statement whatever that was. Whether it was ninety or a hundred that is what I was not paid………'* (at page 401-402 of the copy record). To me this was an indication of his desire to confine the Respondent's claim to the total sum he did not receive for the supplies made during the months of March and April 2011 which admittedly was $ 85,067.57 and abandon the rest of the claims (the sum of $40,750.72 and the sum of $2,452.86). He referred to these as short payments and has admitted that he did not pursue the recovery of these sums vigorously since he did not want to antagonize the Appellant and lose the business the Respondent had with the Appellant. The Respondent has not appealed the Judgment of the High Court which disallowed that part of its claim. That demonstrates that they were content with the award. Therefore, I do not think that this court should re-visit that issue and it should ideally be considered as having been abandoned at the trial. The Appellant did not pursue ground number 10 and hence no determination is made in that regard. The fifth, sixth and seventh grounds of appeal must therefore fail.

[67] The last ground of appeal to be decided is the first ground as urged by the Appellant. Learned counsel for the Appellant submits that the Judgment of the learned High Court Judge is against the weight of the evidence and that he fell into error in construing the agreements. Although this broad statement has been made there is no specific reference to any finding by the judge which is against the evidence led at the trial. The main task at the trial was to construe the two agreements that the parties had entered into and I find that the learned High Court Judge had construed them having referred to the relevant clauses contained therein and by reference to the evidence placed before him. Under different heads he has adverted to the issues to be determined and has given reasons for his conclusions.

[68] The Appellant seems perturbed about the comments the learned High Court Judge has made with regard to DW1. A large portion of submissions have been dedicated to this aspect. There again I find that the learned High Court Judge has explained why he came to

that conclusion. The trial judge was in the best position to make an assessment of the testimony of a witness. It is the task of a trial judge to assess the creditworthiness of a witness depending on the content of his evidence as well as his general demeanor whilst giving evidence. The observation of the learned judge is based on what he has perceived in court and an appellate court will not interfere with such finding unless the record bears that such conclusion was wholly unwarranted. I do not think that was the case in this instance.

[69] The Appellant has cited several authorities in support of his contention that the High Court has failed to give due weightage to the evidence led at the trial. Whilst agreeing that a trial judge should analyze and apply the evidence in relation to the matters in issue and give reasons for the conclusions reached, it must be understood that different judges adopt different styles in fulfilling this task. I do not think that the trial judge has failed in that duty in arriving at his conclusions. The one instance where he has arrived at an erroneous conclusion has been pointed out by me and I have dealt with the consequence of that error. It is refreshing to note that despite the criticism of the judgment of the High Court, learned counsel for the Appellant has seen it fit to acknowledge that there cannot be reasons given for each factual finding. He states at paragraph 23 of his supplementary submissions that; *'It is further not to be interpreted that we are asserting in our submission that it is necessary for a trial judge to state expressly his or her reasons for each factual finding made which led to or was relevant to, his or her ultimate conclusion of fact. However, what is necessary is that the essential ground or grounds upon which the decision rests should be articulated'.* I do not find that the judgment of the High Court is against the weight of the evidence led at the trial and hence ground one also should fail.

[70] I have taken into consideration the provisions contained in Section 13 of the Court of Appeal Act as well as Rule 15 (1) of its Rules (Cap 12) in the determination of this appeal.

Orders of Court

1. Appeal dismissed.
2. The orders of the High Court awarding the Respondent (Plaintiff) a sum of $85,067.57, interest at the rate of 6% per annum on that sum and costs of $2,500.00 are affirmed.
3. In all the circumstances of this case, I do not award costs of this appeal.

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

....
Hon. Justice V. Dayaratne
JUSTICE OF APPEAL