

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 020 of 2018**  
**[High Court Civil Action No. 222 of 2013]**

**BETWEEN** : **GENERAL MACHINERY HIRE LIMITED**  
**PARSHULA DEVI SINGH**, of Lautoka, Company Director  
**ALVIN KUMAR SINGH**, of Lautoka, Company Director  
**AJNIL KUMAR SINGH**, of Lautoka, Company Director

***Appellants***  
***(Original Plaintiffs)***

**AND** : **THE CHIEF EXECUTIVE OFFICER**  
**FIJI REVENUE & CUSTOMS AUTHORITY**

***Respondent***  
***(Original Defendant)***

**Coram** : Basnayake, JA  
Lecamwasam, JA  
Guneratne, JA

**Counsel** : Mr. C. B. Young for the Appellant  
Ms. R. Malani for the Respondent

**Date of Hearing:** 04 May 2022

**Date of Judgment:** 27 May 2022

**JUDGMENT**

**Basnayake, JA**

[1] I agree with the reasons and conclusions arrived at by Lecomwasam, JA.

**Lecomwasam, JA**

[2] This appeal is filed by the appellants against the judgment of the Learned High Court Judge at Lautoka dated 9<sup>th</sup> March 2018. The preliminary grounds of appeal urged by the Appellants are:-

*Grounds of Appeal*

1. *The Learned Judge erred in law in holding that there was no variation to the Deed of Settlement dated 9 July 2010 because... “The variation was one sided. It only benefits the Plaintiffs. There is no consideration for the variation to be binding”. (Paragraph 79 of the Judgment).*
2. *The learned Judge erred in law and in fact in holding that the Garnishee Notices issued by the Respondent were properly issued because there was no variation to the Deed and therefore “the penalties that were waived as part of the settlement became immediately payable... (Paragraph 116 of the judgment).*
3. *The learned Judge erred in law and in fact when he refused to accept the Appellant’s claim that the Respondent had acted in bad faith in issuing the Garnishee Notices (“Garnishees”) and/or the Departure Prohibition Orders (“DPOs”) against the Appellants.*
4. *The learned Judge erred in law when he held that the Appellants could not rely on the principle of estoppel because “Estoppel is not pleaded” (paragraph 83 of the judgment) when in fact estoppel was specifically pleaded in paragraph 72 of the Statement of Claim.*

5. *The learned Judge erred in law and in fact in not holding that the DPOs issued by the Respondent were in breach of S.31 of the Tax Administration Act and were unlawful null and void.*
6. *The learned Judge erred in law and in fact in not holding that the Garnishees issued by the Respondent were in breach of S.27 of the Tax Administration Act and were unlawful null and void.*
7. *The decision of the Learned Judge is against the weight of the evidence.*

[3] The following supplementary notice and grounds of appeal were appended to the preliminary grounds of appeal subsequently:

1. *The learned Judge erred in law in holding that there was no variation to the Deed of Settlement dated 9<sup>th</sup> July 2010 because”...The variation was one sided. It only benefits the Plaintiffs. There is no consideration for the variation to be binding.” (Paragraph 79 of the judgment).*
2. *The learned Judge erred in law and in fact in relying upon Moala Nata’s evidence contained in his second affidavit to hold there was no variation without considering his first affidavit and his cross – examination evidence.*
3. *The learned Judge was wrong to hold that the Appellants had not pleaded the implied term, governing the extension to 24 February 2011.*
4. *The learned judge was wrong to hold that the penalties waived in the settlement had become due and payable immediately upon the Appellants failure to pay the balance tax on 15 December 2010.*
5. *The learned Judge did not properly consider the evidence or the law applicable to the Appellants’ claim that the Respondent had acted in bad faith or had*

*committed tort of misfeasance in issuing the Garnishee Notices (“Garnishees”) and/or the Departure Prohibition Orders (“DPOs”) against the Appellants.*

6. *The learned Judge erred in law and in fact in not holding that the DPOs issued by the Respondent were in breach of S.31 of the Tax Administration Act and were unlawful null and void.*
7. *The learned Judge erred in law and in fact in not holding that the Garnishees issued by the Respondent were in breach of S.27 of the Tax Administration Act and were unlawful null and void.*
8. *The decision of the learned Judge is against the weight of the evidence.*

[4] As the facts require little elucidation beyond the description in the judgment of the Learned High Court Judge, I take the liberty of reproducing in verbatim the relevant paragraphs of the Judgment of the High Court which, based on the written submissions of the defendant, sets out the factual background of the matter at hand:

***“Background***

*[07] In 2010, FRCA (the defendant) carried out an audit of the plaintiffs’ tax affairs for the tax years ending 2000 to 2007. The audit related to income tax for those years only and company VAT. The audit of company VAT was limited to the sale of sub-divided commercial lots. As a result of the audit, the plaintiffs were assessed the additional undeclared income of FJ\$8,612,400. The tax payable out of the undeclared income of FJ\$8,612,400 was \$2,079,952.00. The penalties excluding tax were \$1,017,845.37. The total taxes and penalties for the discovered undeclared income were \$3,097,797.37.*

*[08] Subsequently, FRCA issued Amended Notices of Assessments to the plaintiffs. This amount assessed for each of the plaintiffs was as follows:*

***Amended Assessments***

<i>Praushila Devi Singh</i>	\$ 1,164,800.00
<i>Alvin Kumar Singh</i>	\$ 748,800.00
<i>Ajnil Kumar Singh</i>	\$ 748,800.00
<i>General Machinery Hire Ltd (Income Tax)</i>	\$ 2,800,000.00
<i>General Machinery Hire Ltd (VAT)</i>	\$ 3,150,000.00
<b>TOTAL</b>	<b>\$ 8,612,400.00</b>

[09] The total taxes, excluding penalties, payable for the additional undeclared income of FJ\$8,612,400.00 was FJ\$2,079,952.00. This figure was made up as follows:

**Total Taxes excluding Penalties**

<i>Praushila Devi Singh</i>	\$ 377,104.00
<i>Alvin Kumar Singh</i>	\$ 242,424.00
<i>Ajnil Kumar Singh</i>	\$ 242,424.00
<i>General Machinery Hire Ltd (Income Tax)</i>	\$ 868,000.00
<i>General Machinery Hire Ltd (VAT)</i>	\$ 350,000.00
<b>TOTAL</b>	<b>\$ 2,079,952.00</b>

[10] The total penalties for additional undeclared income of FJ\$8,612,400.00 was \$1,017,845.37. This figure was made up as follows:

**Total Penalties Excluding Taxes**

<i>Praushila Devi Singh</i>	\$ 282,828.00
<i>Alvin Kumar Singh</i>	\$ 181,818.00
<i>Ajnil Kumar Singh</i>	\$ 181,818.00
<i>General Machinery Hire Ltd (Income Tax)</i>	\$ 283,881.37
<i>General Machinery Hire Ltd (VAT)</i>	\$ 87,500.00
<b>TOTAL</b>	<b>\$ 1,017,845.37</b>

[11] The total taxes payable, including penalties by the plaintiffs arising out of the additional undeclared income of FJ\$8,612,400.00 was \$3,097,797.37. The figure was made up as follows:

**Total Taxes & Penalties**

<i>Praushila Devi Singh</i>	\$ 659,932.00
<i>Alvin Kumar Singh</i>	\$ 424,242.00
<i>Ajnil Kumar Singh</i>	\$ 424,242.00
<i>General Machinery Hire Ltd (Income Tax)</i>	\$ 1,151,881.37
<i>General Machinery Hire Ltd (VAT)</i>	\$ 437,500.00
<b>TOTAL</b>	<b>\$ 3,097,797.37</b>

(See Exhibit 6 at paragraphs 14 to 17)

[12] There was a further integrated audit carried out relating to the plaintiffs' company VAT and plaintiffs' income. Further assessments were issued to the first plaintiff. There are court proceedings afoot in the Tax Court in Suva over these assessments. (Exhibit 15 and Exhibit 16 being the Statements of Claim and Defence respectively in the Tax Court of the High Court of Fiji Action No. HBTC 1 of 2013)

**Plaintiff Proposes Settlement**

[13] Following the issue of the Amended Assessments, the plaintiffs proposed settlement of their tax liabilities and penalties. The parties then signed a Deed of Settlement for the Amended Assessments issued by the defendant.

**Deed of Settlement**

[14] The Deed of Settlement (Exhibit 7 at Annexure MN 7) gives the background to the Deed of Settlement. It says:

*[1] In early 2010, FRCA issued a number of Amended Assessments in relation to tax audits of General Machinery Hire Limited and its directors.*

*[2] On 20 May 2010, General Machinery Hire Limited and its directors lodged an objection to the Amended Assessments with FRCA followed by another objection lodged in the same matter by Munro Leys on 5 July 2010, on behalf of General Machinery Hire Limited.*

*[3] Whilst FRCA was processing the objection and auditing other tax issues, General Machinery Hire Limited and its directors, on the 8 July 2010, proposed for a settlement of the tax liabilities.*

*[4] General Machinery Hire Limited and its directors and FRCA have agreed to settle the tax liabilities in the matter set out in this Deed”.*

***Main Terms of the Deed of Settlement***

*[15] The main terms of the settlement is recorded at Clauses A, B and E of the Deed of Settlement. Clauses A, B and E say:*

*“[A] General Machinery Hire Limited and its directors will pay the amount of FJ\$1,729,952.00 to FRCA (on signing of this Deed) representing income taxes in respect of the years 2000 to 2007.*

*[B] In relation to [A] above the settlement to be effected as follows:*

- (i) FJ\$500,000.00 as part payment of the outstanding tax liability of FJ\$1,729,952.00.*
- (ii) The balance to be paid FJ\$50,000.00 per month for four months for review by 31<sup>st</sup> October 2010 in view of full settlement.*

***(iii) The full settlement to be cleared by 15<sup>th</sup> December, 2010 for Company and its directors.***

***[E] Full waiver of penalties upon settlement of full tax liability of FJ\$1,729,952.00 as in clause (A) above by 15<sup>th</sup> December 2010.” (My emphasis)***

***[F] VAT Audit to be suspended until full settlement of income taxes by 15<sup>th</sup> December 2010.”***

### ***Payment Mechanism under Deed of Settlement***

***[16] \$500,000.00 was payable immediately on the signing of the Deed of Settlement in terms of Clause B (i) of the Deed of Settlement. Clause B (ii) required that a ‘balance to be paid FJ\$50,000.00 per month for four months for review by 31 October 2010, in view of the full settlement.***

***[17] On 20 August 2010, the defendant applied for a refund of \$308,888.93 towards the outstanding taxes and penalties under the Deed of Settlement. After 31 October 2010 (the review date), the balance owing under the Deed of Settlement was \$768,703.07. This amount was to be paid by 15 December 2010, in terms of the Deed of Settlement.***

***[18] Notably, the Deed of Settlement provides no repayment schedule for the period between 1 November 2010 and 15 December 2010. The \$50,000.00 per month was for four months only i.e. by 31 October, 2010 – Clause B (ii).***

***[19] The plaintiffs defaulted in the payment as per the Deed of Settlement. The remaining balance of \$768,703.07, which was to be paid by 15 December 2010 (See Clause B (iii)).***

***[20] According to the plaintiffs, they applied for an extension of time for payment beyond 15 December 2010 and it was allowed by the FRCA.***



*[21] The FRCA denies granting any extension for payment beyond 15 December 2010. The FRCA issued process such as DPO and Garnishee to recover the remaining balance payable under the Deed of Settlement and recovered.*

*[22] The plaintiffs bring this action against the FRCA and claim damages on the ground that the DPO and the Garnishee issued by the FRCA against the plaintiffs are unlawful and null and void given that there was an extension of time allowed by the FRCA to make payment beyond 15 December 2010.*

[5] Against the above factual background, the following facts had been admitted by the parties at the pre-trial conference:

- 1. The first named plaintiff is, and was at all material times, a limited liability company having its registered office at 21 Bouwalu Street, Lautoka.*
- 2. The second, third and fourth named plaintiffs are, and were at all material times, the directors and shareholders of the first named plaintiff.*
- 3. The first named plaintiff has been carrying on the freight and cartage business from Lautoka since 1983.*
- 4. Each of the named plaintiff is, and was at all material times, a registered tax payer under the Income Tax Act having Tax Identification Number as follows:*

*Company - TIN: 50-06705-0-7*

*Praushila Devi Singh - TIN: 19-11899-1-7*

*Alvin Kumar Singh - TIN: 19-35774-0-6*

*Ajnil Kumar Singh - TIN: 19-39428-0-8*

- 5. At all material times the defendant acted by his Acting General Manager Taxation and Compliance Auditor.*
- 6. On 26 May 2010, the defendant served Departure Prohibition Order (“DPOs”) at 21 Bouwalu Street, Lautoka for:*

- (i) The second named plaintiff, Praushila Devi Singh;*
- (ii) The third named plaintiff, Alvin Kumar Singh; and*
- (iii) The fourth named plaintiff, Ajnil Kumar Singh.*

*7. On 17 June 2010, the defendant issued Notices of Garnishee in respect of the second, third and fourth named plaintiffs to:*

- (i) Bank of Baroda, Suva in respect of Praushila Devi Singh for \$918,345.98;*
- (ii) Bank of Baroda, Suva; ANZ Bank, Suva and Westpac Banking Corporation, Suva in respect of Alvin Kumar Singh for \$418,029.46.*
- (iii) Bank of Baroda, Suva; ANZ Bank, Suva and Westpac Banking Corporation, Suva in respect of Ajnil Kumar Singh for \$414,006.47.*

*8. At the plaintiffs' request made in writing on 9 July 2010, and following a meeting between the fourth named plaintiff and Acting General Manager Taxation, the defendant exercised its powers under section 25 and 48 of the Tax Administration Act 2009 a compromise was reached between the plaintiffs and the defendant.*

*9. The agreement between the plaintiffs and the defendant was reduced to writing and contained in a Deed of Settlement dated 9 July 2010.*

*10. Pursuant to the Agreement:*

- (i) The plaintiffs paid \$500,000.00 to the defendant on 9 July 2010;*
- (ii) The defendant withdraw all the Garnishees and DPOs on 9 July 2010; and;*
- (iii) The plaintiffs and defendant signed the Deed of Settlement on 11 and 13 July 2010 respectively.*

*11. The Deed of Settlement provided inter alia:*

*“*

- A. *General Machinery Hire Ltd and its directors will pay the amount of FJ\$1,729,952.00 to FIRCA (on signing of this Deed) representing income taxed in respect of the years 2000 to 2007).*
- B. *In relation to (A) above the settlement to be effected as follows:*
- (i). FJ\$500,000.00 as part payment of the outstanding tax liability of FJ\$1,729,952.00.*
  - (ii). The balance to be paid FJ\$50,000.00 per month for four months for review by 31st October 2010, in view of full settlement.*
  - (iii). The full settlement to be cleared by 15<sup>th</sup> December, 2010 for the Company and its directors.*
- C. *Departure Prohibition Orders to be revoked upon settlement of part payment as in clause B (i) above.*
- D. *Garnishee Orders to be revoked upon settlement of part payments as in clause B (i) above.*
- E. *Full waiver of penalties upon settlement of full tax liability of FJ\$1,729,952.00 as in clause (A) above by 15<sup>th</sup> December 2010.*
- F. *VAT Audit to be suspended until full settlement of income taxes by 15<sup>th</sup> December 2010.*
- G. *The tax audits by FRCA on General Machinery Hire Limited and its directors in respect of income tax issues for the years 2000 to 2007 are now closed.*
- H. *That in relation to the tax liability as comprised in amended assessments for the years 2000 to 2007 for the sum of FJ\$1,729,952.00, there shall be no objection/appeal by General Machinery Hire Limited and its directors, in respect of that amended assessments. The objection letter lodged by Munro Leys on behalf of General Machinery Hire Limited on 5<sup>th</sup> July is now withdrawn in full.*
- I. *There shall be no further objection/appeal by General Machinery Hire Limited and its directors, their representatives or agents or nominees in respect of any amended assessments for the years 2000 to 2007.*

- J. *Upon signing of this Deed, any matter directly or indirectly relating to the subject matters, as contained in Clauses 1, 2, 3 and 4 of this Deed, shall not be further disputed by either party, their representatives or agents or nominees.*
- K. *There shall be no proceedings taken by party, their representatives or agents or nominees in respect to any clause of this Deed, in any court of law.*
- L. *The parties undertake to maintain strict confidentiality of this Deed and its terms.*
12. *The plaintiffs made payments to the defendant for the months of August, September and October 2010, pursuant to paragraph B (ii) of the Deed of Settlement.*
13. *The plaintiffs paid to the defendant:*
- (a) \$350,000.00 on 25 November 2010, including November payment of \$50,000;*
  - b) \$50,000.00 on 29 December 2010; and*
  - (c) \$50,000.00 on 31 January 2011.*
14. *The defendant, by letter of 11 February 2011, demanded payment of income tax arrears, VAT arrears and penalties from the plaintiffs as follows:*
- (i) the second named plaintiff, Praushila Devi Singh, a total of \$973,906.50;*
  - (ii) the third named plaintiff; Alvin Kumar Singh, a total of \$321,722.14; and*
  - (iii) the fourth named plaintiff, Ajnil Kumar Singh, a total of \$329,200.41.*
15. *On 24 February 2011, the plaintiffs paid to the defendant the sum Of \$50,000.00.*
16. *After receiving the \$50,000 on 24 February 2011, the defendant purported to repudiate the Deed of Settlement by serving his letter dated 25 February 2011, at midday on 24 February 2011, stating therein that the defendant will no longer comply with the Deed “since it is null and void of any legality soon after the company breached Clause B (ii)...”.*

17. *On 25 February 2011, the plaintiffs wrote to the defendant. Despite that letter, the defendant issued letters on the same day, 25 February 2011, to the second, third and fourth named plaintiffs seeking information about matters settled by the Deed of Settlement.*
18. *On 16 March 2011, the defendant advised the plaintiffs that the Deed of Settlement was “now null and void of any legality”.*
19. *On 31 March 2011, the plaintiffs made the March payment of \$50,000.00 to the defendant.*
20. *On or about 6 April 2011 the defendant issued fresh Notices of Garnishee to:*
  - (i) Bank of Baroda, Suva in respect of Praushila Devi Singh for \$869,820.58 and \$65,886.27;*
  - (ii) Westpac Banking Corporation, Suva in respect of Alvin Kumar Singh for \$286,998.58; and*
  - (iii) Westpac Banking Corporation, Suva in respect of Ajnil Kumar Singh for \$290,612.03.*
21. *On 13 April 2011, the plaintiffs wrote to the defendant.*
22. *The defendant did not reply to the plaintiffs letter of 13 April 2011.*
23. *The plaintiffs then Solicitors, Vijay Naidu & Associates, wrote to the defendant on 15 April 2011; 6 May 2011; 9 May 2011 and 18 May 2011.*
24. *On 28 April 2011, the plaintiffs paid \$40,000.00 to the defendants and the defendant obtained \$10,000.00 under fresh Garnishees to make up the April payment of \$50,000.00.*
25. *On 19 May 2011, the defendant replied to the plaintiffs Solicitors, Vijay Naidu & Associates.*
26. *On or about 24 May 2011, the defendant issued fresh DPOs against the second, third and fourth named plaintiffs.*
27. *The plaintiffs paid \$50,000.00 to the defendant on 31 May 2011.*
28. *On 1 June 2011, the defendant issued Notices of Garnishee in respect of the second named plaintiff, Praushila Devi Singh to:*
  - (i) Receivers of Denarau Investment Ltd & Denarau Internal Limited for \$256,401.00;*

*(ii) Receivers of Denarau Investment Ltd & Denarau International Limited for \$83,343.78.*

*(iii) Manjula Jeram of Denarau Investment Ltd for \$82,343.78; and*

*(iv) Manjula Jeram of Denarau Investment Ltd for \$628,941.00*

*29. On 8 July 2011, the defendant made a demand on the third named plaintiff, Alvin Kumar Singh, and fourth named plaintiff, Ajnil Kumar Singh, to pay \$244,874.91 and \$248,006.72 respectively.*

*30. On 15 June 2011, the defendant made a demand on the second named plaintiff, Praushila Devi Singh, to pay \$339,745.18.*

*31. On 15 August 2011, the plaintiffs issued judicial review proceedings against the defendant.*

*32. On 25<sup>th</sup> October 2011, the Defendant withdrew the DPOs against the second, third and fourth named plaintiffs.*

*33. On 27 June 2012, the defendant issued new DPOs against the second, third and fourth named plaintiffs and these DPOs were still in force on 20 December 2013.*

[6] I also reproduce from the Judgment of the High Court the following evidence deposed by the Plaintiff by way of affidavit, which is germane to this appeal:

*[25] In his first affidavit dated 12 August 2011, Ajnil Kumar Singh, the 4<sup>th</sup> named plaintiff (Exb.1) deposed that:*

*(a) General Machinery Hire Limited was engaged in the freight and cartage business from Lautoka since 1983. Plaintiffs 2, 3 and 4 are the Directors of the Company being the Mother and her two sons, respectively. Following an audit of the plaintiffs tax affairs, the defendant issued Notices of Amended Assessment to the Company on 4 May 2010, and to each of the Directors on 21 May 2010, for the tax years ending 31 December 2000 to 31 December 2007. They were assessed with additional income taxes and penalties.*

*(b) The defendant issued DPOs and Garnishees against the Second, Third and Fourth plaintiffs.*

(c) *The plaintiffs filed an Objection to the Amended Assessment through Munro Leys, Lawyers of Suva.*

(d) *But the plaintiffs desired to settle the demands for tax and penalties with the defendant for the following reasons deposed by Ajnil at paragraph 12 of his first affidavit:*

***“Meeting with Mr Nata – 9/7/10***

*12. I made an appointment to see Mr. Moala Nata of Fiji Revenue & Customs Authority, Suva on 9 July 2010 to discuss the Notices of Amended Assessments dated 21 May 2010; the DPOs and the Notices of Garnishee. **The Notices of Garnishee had the effect of freezing all our business and personal accounts. That effectively crippled the operation of the Company’s business. It became imperative to get the Defendant to withdraw the Notices of Garnishee urgently to allow the operation of the Company’s business.***

*On the previous day, 8 July 2010, my mother, my brother, the company Accountant, Magan Lal, and I discussed the matter at great length and came to the conclusion that the quickest way forward was to reach a compromise with the Defendant and offer to pay a large down payment. We then persuaded Bank of Baroda to advance us \$500,000.00 to pay the Defendant. The Bank issued the cheque payable to the Defendant on that day and I took that cheque with me to Suva on 9 July 2010.”*

(e) *The parties then entered into negotiations and eventually came to an agreement, which was reduced to writing in the form of the Deed of Settlement executed on 9 July 2010.*

(f) *The plaintiffs then withdrew their filed Objection to the Amended Assessment.*

(g) *The Deed provided for payment of the **total tax liability of \$1,729,952.00** by payment of \$500,000.00 upon signing and periodic payments of \$50,000.00 per month for four months with full settlement on 15 December 2010. The plaintiffs paid the \$500,000.00 and*

*made payments of \$52,360.00 for August and \$50,000.00 for each of the months of September and October 2010.*

*(h) The Deed also provided **for review by 31 October 2010**. However, Nata was not able to meet with Ajnil on that day. They eventually met on 25 November 2010. At that meeting, Ajnil handed Nata a letter dated 24 November 2010 requesting an extension of the deadline of 15 December 2010, to the end of June 2011 with payments of \$50,000.00 a month.*

*(i) Nata agreed to extend the deadline to 24 February 2011 and he also agreed*

*that on which date **he would meet and review all arrangements**. At Ajnil's request he wrote in hand on the plaintiffs' copy of the letter.*

*".....accept the payments as it is ok.*

*Apportion the \$50,000.00 amongst the Directors equally.*

***I will meet and review all arrangements on 24/2/2011".***

*(j) About two weeks before the promised meeting of 24 February 2011 took place, the defendant wrote to the plaintiffs on 11 February 2011 stating that "in view of your default in the payment of taxes due, 25% late payment penalty has been charged under the provisions of s44 of the Tax Administration Decree" and demanded payment of income tax, VAT arrears and penalties.*

*(k) The plaintiffs continued to make payments under the Deed including a payment on 24 February 2011.*

*(l) At midday on 24 February 2011, the defendant faxed a letter to the plaintiffs (**dated 25 February 2011**) stating that the plaintiffs had breached the Deed of Settlement and that the defendant "will no longer comply with the deed since it is null and void of any legality soon after the company breached (the) clause (for full settlement by 15 December 2010). Therefore, the audit of your company directors for the years from 2000 to 2007 and thereafter will continue from now".*



- (m) Between 25 February 2011 and 2 March 2011, the plaintiffs tried very hard to contact Nata for the meeting.*
- (n) On 2 March 2011, Ajnil met Mohammed Asif Hanif and Rajnesh Lal but Nata was not present. When explained the purpose of the meeting Hanif and Lal agreed Nata should be present and also agreed to meet with him on 10 March 2011.*
- (o) On 10 March 2011, Ajnil met Nata, Mohammed Asif Hanif and Rajnesh Lal at FRCA Office in Suva. When the meeting started, Ajnil briefly reminded Nata about the previous discussions at which point Nata said he did not wish to have anything further to do with General Machinery Hire Limited and left the meeting. Ajnil then handed a letter dated 9 March 2011, to Asif Hanif. He and Rajnesh Lal read the letter. Then both Asif Hanif and Rajnesh Lal told Ajnil to keep making the monthly \$50,000.00 payment as per the arrangement with Nata of 25 November 2010. They did not discuss the matter further.*
- (p) On 16 March 2011, the defendant wrote to the plaintiffs reaffirming its earlier position that the Deed was null and void as far as he was concerned.*
- (q) The plaintiffs continued to make payments and the defendant, pursuant to garnishee orders, obtained payments from the plaintiff's bank account in March, April and May 2011, including the garnishee to Bank of Baroda on 18 May 2011.*
- (r) The plaintiffs' previous solicitors; Vijay Naidu wrote several letters to the defendant in April and May, but none were replied to until 19 May 2011, when the reply said to continue discussions with Nata.*
- (s) On 24 May 2011, the defendant issued DPO against the second, third and fourth plaintiffs.*
- (t) On 31 May 2011, the plaintiffs' accountant and solicitor met with Nata but were told that no further discussions would be entered into in respect of the Deed of Settlement.*
- (u) By then the plaintiffs had overpaid the amount due under the Deed by \$100,187.57.*
- (v) On 25 October 2011, the defendant revoked the DPOs issued against the second, third and fourth plaintiffs.*

(w) PW1 also filed a Supplementary Affidavit on 23 February 2012 (**Exb. 4**), providing evidence of plaintiff's loss and damage.

(x) PW1 supplemented his affidavit evidence by his oral testimony.

[7] The following evidence deposed by the Defendant by way of affidavit, which is germane to this appeal is also reproduced from the Judgment of the High Court:

*Defendant's evidence*

[26] Moala Nata (DW1), Rajnesh Lal (DW2), Mohammed Asif Hanif (DW3) and Luisa Draunibaka (DW4) gave oral testimony for the defendant.

[27] DW1 filed his first affidavit sworn on 12 October 2011 (Exb.2) in reply to Ajnil's first affidavit dated 12 August 2011".

[8] However, the Plaintiff moved the High Court for the following reliefs/declarations:-

(a) A DECLARATION that the Deed of Settlement dated 9 July 2010 was lawfully entered into by and was binding on the Defendant.

(b) A DECLARATION that the Deed of Settlement dated 9 July 2010 was lawfully varied on 25 November 2010 and the variation was binding on the Defendant.

(c) A DECLARATION that the Deed of Settlement dated 9 July 2010 was lawfully varied on 25 November 2010 continued in full force and effect beyond 24 February 2011 and was binding on the Defendant.

(d) A DECLARATION that the Deed of Settlement dated 9 July 2010 as lawfully varied on 25 November 2010 was further varied on 10 March 2011 and such variation was binding on the Defendant. Alternatively, the variation made on 25 November 2010 was confirmed on 10 March 2011 and was to continue in full force and effect beyond 10 March 2011 and was binding on the Defendant.

- (e) A DECLARATION that all the Notices of Garnishee issued by the Defendant in respect of the second, third and fourth named Plaintiffs between 9 July 2010 and 10 August 2011 were unlawful and null and void.
- (f) A DECLARATION that the DPOs issued by the Defendant against the second, third and fourth named Plaintiffs on 24 May 2011 and 27 June 2012 were unlawful and null and void.
- (g) A DECLARATION that the Plaintiffs have overpaid to the Defendant under the Deed of Settlement dated 9 July 2010.
- (h) AN ORDER that the Defendant refund to the Plaintiffs all monies overpaid under the Deed of Settlement dated 9 July 2010 together with interest thereon calculated from the due date to the date of payment at the rate of 12% per annum compounded monthly or at such other rate or for such other period as may seem just to this Honorable Court.
- (i) AN ORDER that any provision of the Deed of Settlement dated 9 July 2010 as varied which is unenforceable should be severed from it and the remaining Deed as severed confirmed as binding on the Defendant.
- (j) EXEMPLARY OR AGGRAVATED DAMAGES for misfeasance in a public office.
- (k) ALTERNATIVELY, EXEMPLARY OR AGGRAVATED DAMAGES for acting without jurisdiction and unlawfully under S.27 and/S.31 of the Tax Administration Decree 2009.
- (l) EXEMPLARY OR AGGRAVATED DAMAGES for acting unlawfully and/or in bad faith between 25 November 2010 and 30 June 2012.

(m) DAMAGES for loss of business etc. (to be quantified at trial).

(n) COSTS of these proceedings on an indemnity basis.

(o) SUCH further or other Orders as this Honorable Court deems just.

[9] Against the above background, I find that the outcome of the instant appeal pivots on whether the document given by Nata on 24<sup>th</sup> February 2011 amounts to an “extension of time”, which may be a variation as envisaged in the Act. A ‘Variation’ means any amendment of or change to the contract, including any amendment, novation, extension however affected. However, ordinarily a variation may only be effective if both parties consent to such variation. If the document in question fulfils all requirements to form a valid variation of the contract, then the stance taken up by the Respondent cannot hold water. If the Court reasonably decides otherwise, the liability of the Appellants will be established, prompting them to pay accordingly.

[10] On that note, I will now refer to the content of the Deed of Settlement, which only stipulates the agreements between the parties including the mode of payment to be effected as per the settlement. Accordingly, the appellants agreed to pay \$500,000.00 as part payment of the outstanding Tax liability of \$1,729, 952.00 and another \$200,000 to be paid in 4 monthly instalments of \$50,000.00 Fijian dollars. These instalments were agreed to be paid in the months of August, September, October, and November. The deed does not provide an instalment scheme for the remainder of the payment, which exceeds \$1 Million.

[11] According to the said Deed of Settlement, no other arrangement but to pay the entirety of the balance amount at once before 15<sup>th</sup> December can be perceived. The parties had agreed to review the matter on 31<sup>st</sup> October, which unfortunately happened to be a Sunday, due to which the parties had not met. Thereafter, Ajnil Kumar Singh, one of the Plaintiffs, had met with Mr. Nata, the main Officer who had given evidence before the High Court, on 25<sup>th</sup> November, presumably regarding the mode of payment of the

remainder of the due amount. The Plaintiff had conveyed to Mr. Nata that the company had experienced a slowdown in new work, putting them in dire circumstances and had requested further time to make the payment.

- [12] This meeting is significant as one of the two documents germane to this appeal is said to have been made by Mr. Nata in his handwriting at this meeting. According to paragraph 14 of the Respondent's submission, the respondent had commented on this document as follows:

*“NMOU/LEU/ACCU.D.Lal  
Accept payment as it is ok  
Apportion the \$50,000 amongst the directors equally  
I will meet and review all arrangements on 24/2/2011  
MN 25/11/10”*

- [13] The respondent is of the stance that this document is not an extension of time for payment thereby constituting a change or variation to the date of final payment but prepared only for internal use. The respondent strongly maintains that no extension was given for the Appellants to make any payment beyond 15 December 2010. As the respondent maintains that the document in question is an internal document addressed to two officers giving instructions to accept the payment of \$50,000 and apportion it equally among the Directors, it is the duty of this court to ascertain whether this document is only an instruction for internal purposes and not in fact a variation as suggested by the Appellants.

- [14] In order for the said document to constitute a variation of the contract, it must have been agreed or consented to by both parties. The question to be determined here is whether the respondent consented to the document in question granting an extension of time on the face of it, which the appellants contend is a variation of the contract between the parties?

[15] Consent or freedom of contract is at the core of contract law. Consent is defined in the Oxford Dictionary of Law 2018 as “*an agreement by choice by one who has the freedom and capacity to make that choice, without duress or deception, and with sufficient legal competence to give it*”. Weeramantry on ‘The Law of Contract’ (Vol.1, pg. 155, section 158) states that a valid contract is not formed unless there “*actually exists, or one which, having regard to all surrounding circumstances, it will by a fiction deem to exist in the minds of the parties*” an intention to enter into legal relations. The unilateral consent of the appellant alone does not suffice for the content of the document to amount to a variation. The respondent vehemently denies that the document constitutes consent. Therefore, this court must now decide if the respondent’s objections can be sustained.

[16] In determining consent and intention of the parties, it is important to accept the presence of different types of consent. While the absence of express consent may void a contract, there may exist other objective manifestations of consent which may not amount to express consent, yet, it nevertheless would imply consent of the parties. Implied Consent can be derived when surrounding circumstances lead a reasonable person to believe his consent had been given although not direct or express. It is an assumption of permission to do something that is inferred from the actions of an individual and the facts and circumstances rather than explicitly provided and the other party receives communication of it. Implied consent means consent which is inferred from signs, actions or facts, or by reason of inaction, or silence, or conduct.

[17] As such, I will now lend my mind to whether the note of Mr. Nata signifies implied consent to the extension of time, thereby constituting a variation of the contract. It is to be noted that this handwritten note was made by Mr. Nata on the letter of request given to him by the 4<sup>th</sup> Plaintiff requesting an extension of time and was made on the copy of the letter retained by the Plaintiffs. If the said note was meant for internal purposes only, furnishing a copy of the letter to the 4<sup>th</sup> Plaintiff with the endorsement is unnecessary. This vitiates the argument that the note was only for purposes of internal use. It is safe to assume that it was for the use of both parties.

- [18] Several other factors denoting implied consent came to light on perusal of the evidence before this court. Firstly, the latter part of Mr. Nata's note which reads "I will meet and review all arrangements on 24/2/2011..." runs counter to the respondent's assertion that no payment beyond 15 December 2010 as envisaged in the Deed of Settlement was permitted and therefore the note does not constitute an extension of time. If such was the case, assigning a date for review beyond the date for final payment seems redundant. Noting a date of review beyond the date for final payment as stipulated in the Deed of Settlement signifies a willingness to depart from the terms agreed to previously. The Act merely requires a variation to be in writing without a format for such variation. This note in question is accordingly none other than a variation of the initial contract between the parties.
- [19] Secondly, the Plaintiffs had continued to make payments beyond the initially agreed date up to 24<sup>th</sup> February 2011 and even thereafter, up to June 2011. Apart from a letter issued on 11<sup>th</sup> February 2011 stating that "*in view of your default in the payment of taxes due, 25% late payment penalty has been charged under the provisions of Section 44 of the Tax Administration Decree*" the respondent had accepted payment without demur.
- [20] Thirdly, Mr. Nata at paragraph 31 of his affidavit filed in this Court has denied a meeting or fixing a meeting for 31<sup>st</sup> October 2010. However, the Deed of Settlement itself states at B (ii); "*the balance to be paid \$50,000 per month for 4 months for review by 31<sup>st</sup> October, 2010*". In view of the date of review mentioned in the Deed of settlement, Mr. Nata being a witness to the Deed of Settlement cannot deny knowledge of its contents.
- [21] On the strength of the foregoing, I conclude that the note in question which the Respondent argued as being a mere internal matter but which stood communicated to the Appellant. Thus, the elements of "variation by consent (Implied)" stood satisfied. It constitutes a valid variation to the contract between the parties, which the respondent cannot reasonably deny.

[22] The said Mr. Nata had also incredulously attempted to deny any knowledge of the existence of his own affidavit before this court. While I am disinclined to entertain such immature attempts to discredit evidence, I rely on the content of his affidavit viz, admission in paragraph 29 to conclude that the Appellants had regularly been making payments without default up to October 2010 as agreed upon in the Deed of Settlement. Such regular payments together with the variation agreed upon by the parties dispensed with the need for the Respondent to take steps to issue Garnishee orders or DPOs. Hence, I hold that the DPOs and Garnishee orders issued by the Respondent are invalid.

[23] One final issue i.e. the amount required to be paid by the Appellants, requires resolution. At paragraph 20 of his affidavit, Mr. Nata states that “*the principal tax, excluding Company VAT, was \$1,729,952.00*”. Therefore, the amount payable by 15<sup>th</sup> December 2010 was undoubtedly \$1,729,952.00 and nothing more. The Deed of Settlement is also based on this amount. Under clause F of the Deed of Settlement, parties agreed the VAT Audit to be suspended until full settlement of Income Taxes on 15 December 2010. However, as an extension of time by way of variation of contract is now established, respondent cannot argue in favour of the existence of any other additional payments or penalties in lieu of defaulting payment on 15 December 2010.

[24] In the light of the foregoing, I answer the grounds of appeal 1, 2 and 4 - 7 in the affirmative. In respect of Ground 3, I am of the view that the Respondent had acted under the mistaken belief that a variation had not taken place when issuing the Garnishee orders and DPOs. Therefore, mala fides could not have been imputed.

[25] In conclusion, I allow the appeal and set aside the judgment of the Learned High Court Judge dated 9<sup>th</sup> March 2018

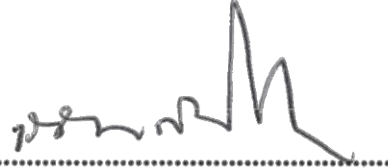
**Guneratne, JA**

[26] I agree with the judgment of Lecamwasam, JA and the reasons contained therein.

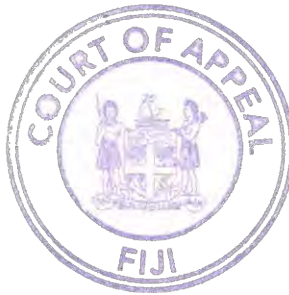


**The Orders of the Court:**

1. *The High Court Judgment dated 9<sup>th</sup> March 2018 is set aside.*
2. *Appeal allowed.*
3. *Respondent to pay at the rate of \$5000.00 (\$5000 x 4) each to the Appellants as costs.*



.....  
**Hon. Justice E. Basnayake**  
**Justice of Appeal**



.....  
**Hon. Justice S. Lecamwasam**  
**Justice of Appeal**



.....  
**Hon. Justice A. Guneratne**  
**Justice of Appeal**