IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-587

	BETWEEN	CS DEVELOPMENT NO. 2 LIMITED Plaintiff
	AND	ALDWYN JOHN COCKBURN AND JANET ELIZABETH COCKBURN AND KEITH IAN JEFFRIES SUED AS TRUSTEES OF THE ALDWYN AND JANET COCKBURN FAMILY TRUST Defendants

Hearing: 26 June 2009

Appearances: H. Rennie QC - Counsel for Plaintiff
R.P. Harley & S. Raizis - Counsel for Defendants

Judgment: 24 July 2009 at 2.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 24 July 2009 at 2.30 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Treadwells, Solicitors, PO Box 859, Wellington
Jeffries Raizis, Solicitors, PO Box 10641, Wellington

Introduction

[1] The plaintiff company, CS Developments No. 2 Limited, and the defendant trust, the Aldwyn and Janet Cockburn Family Trust, each apply for summary judgment in this proceeding against the other. Both applications are opposed. The applications concern whether Goods and Services Tax ("GST") on a sale of land, buildings and chattels from the defendant to the plaintiff was appropriately rated by the defendant at zero per cent as a going concern.

[2] The plaintiff as purchaser under the sale contract seeks judgment for:

(a) A declaration that under the Agreement for Sale and Purchase the defendants were required to deliver possession of the property in question to the plaintiff free of any tenancy and otherwise with vacant possession; and

(b) An order that the defendants deliver to the plaintiff a tax invoice in compliance with clause 12 of the Agreement for Sale and Purchase for the property specifying GST as $555,555.56; and

(c) Interest on the GST components.

[3] The defendants as vendors argue that they have already performed their obligations under the sale contract, including their obligation to deliver a proper GST tax invoice.

[4] It is convenient to deal with both summary judgment applications together. And I note also at this point that, at the hearing before me, I granted the plaintiff leave to defend the defendants' summary judgment application.

Background Facts

[5] On 26 May 2007 the defendants agreed in writing to sell their property at 148 Oriental Parade, Wellington (from which the Parade Café business had operated for some time) ("the property") to Hodge Properties Limited or nominee ("the Agreement"). On or about 22 June 2007, Hodge Properties Limited nominated Hodge Trustees Services Limited and/or its nominee as purchaser under the Agreement.

[6] The property had been subject to a lease from the defendant to Torta Holdings Limited, a company associated with the defendant, and this company operated and continues to operate the Parade Café at the premises. It seems the original lease had been sold and assigned to Torta Holdings Limited in 2004 from the then tenants, the A.J. & J.E. Cockburn Partnership. The term of this lease expired on 23 May 2007, three days before the Agreement was entered into. However, Torta Holdings Limited it appears continued to lease the property on a monthly basis pursuant to the holding over clause in the lease. In the "Tenancies" particulars section on the front page of the Agreement details of a lease to the "A.J. & J.E. Cockburn Partnership trading as Parade Café" were specified along with an expiry date noted at 23 May 2007.

[7] Clause 13.1 of the Agreement provides:

> "13.1 If this agreement relates to the sale of a tenanted property… then, unless otherwise expressly stated herein:
>
> (a) each party warrants that it is a "registered person" within the meaning of the Act; and
>
> (b) the parties agree that the supply made pursuant to this agreement is the supply of a going concern on which GST is chargeable at zero per cent."

[8] On or about 2 July 2007, Hodge Trustee Services Limited agreed with the defendants to vary the Agreement by a written Variation Agreement ("the Variation Agreement"). At this point "due diligence" had been completed by the purchaser, the Agreement became unconditional, and a deposit was paid. For the purposes of the Goods and Services Tax Act 1985 ("the GST Act"), this 2 July 2007 date when the

deposit was paid is the "date of supply". The Variation Agreement did several things. First, in clause 4 it stated specifically that "settlement was to be 1st April 2008 with vacant possession". (emphasis added). Secondly, it reduced the purchase price from $5,500,000.00 to $5,000,000.00, and thirdly, it provided for the sale to the plaintiff under the Agreement of additional chattels including all chattels associated with the Parade Café business.

[9] A second variation to the Agreement was entered into on 4 July 2007. This provided that for the purposes of the accrual rules under the Income Tax Act 2004 the purchase price was the "lowest price" the parties would have agreed for the sale of the property. Further provisions in this second variation which would have granted the plaintiff the right to use the name "Parade Café" and full and complete access to the business and its records were deleted by the parties. I need say nothing more on that aspect.

[10] By a deed of nomination dated 5 July 2007, Hodge Trustee Services Limited nominated the plaintiff to be the purchaser under the Agreement as varied.

[11] On 11 February 2008 the plaintiff then itself entered into an Agreement to Lease the Parade with Torta Holdings Limited. The lease was to commence on 2 April 2008. It is a matter of dispute as to whether the plaintiff realised that Torta Holdings Limited was already leasing the property from the defendant.

[12] As the date for settlement of the sale of the property was approaching, on 19 March 2008 the defendant forwarded a settlement statement to the plaintiff. An amended settlement statement was forwarded on the same day. The amended settlement statement identified GST of $625,000.00 as payable by the plaintiff in addition to the purchase price. However, these statements were incorrect, as the Agreement provided that the purchase price was to be "Inclusive of GST" and not "Plus GST". This is not contested.

[13] This error was brought to the attention of the defendants' solicitors who then stated that as there was a continuing tenancy, the sale was of a "going concern" and

therefore was zero-rated for GST purposes pursuant to the GST Act. This was rejected by the plaintiff however and further negotiations took place.

[14] Finally, settlement took place one day late on 2 April 2008 and this was without prejudice to the parties' positions on the GST question. Also on 2 April 2008, Torta Holdings Limited commenced occupation of the premises under its 11 February 2008 Lease Agreement with the plaintiff.

[15] The defendants subsequently issued a tax invoice with GST rated at zero per cent and on this basis, filed their GST return, which it seems was "accepted" by the Commissioner of Inland Revenue.

[16] The plaintiff's argument is that the sale was not of a going concern, and that GST is payable on the transaction at a rate of 12.5 per cent. By failing to provide a tax invoice in accordance with this requirement, the defendants are said to have failed to comply with their obligations under the Agreement. In response, the defendants argue that the sale was of a going concern, that the tax invoice issued indicating a zero per cent rate of GST was correct and this fulfilled their obligations under the Agreement.

Goods and Services Tax Act 1985 ("GST Act")

[17] Turning now to the GST Act itself, "Going concern" is defined in s 2 in the following way:

> **"Going concern**, in relation to a supplier and a recipient, means the situation where—
>
> (a) There is a supply of a taxable activity, or of a part of a taxable activity where that part is capable of separate operation; and
>
> (b) All of the goods and services that are necessary for the continued operation of that taxable activity or that part of a taxable activity are supplied to the recipient; and
>
> (c) The supplier carries on, or is to carry on, that taxable activity or that part of a taxable activity up to the time of its transfer to the recipient."

[18] "Taxable activity" is defined in s 6 as follows:

> (1) For the purposes of this Act, the term **taxable activity** means—
>
> (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
>
> (b) Without limiting the generality of paragraph (a) of this subsection,] the activities of any public authority or any local authority.
>
> (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity."

[19] The relevant taxable activity in this case is that of carrying on the business of letting properties as a Landlord.

[20] Section 8(1) provides:

> "Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of [12.5 percent] on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply."

[21] Section 11(1)(m) provides that a supply of goods that is chargeable with tax under s 8 of the Act must be charged at the rate of 0% if it is:

> "(m) the supply to a registered person of a taxable activity, or part of a taxable activity, that is a going concern at the time of the supply, if-
>
> (i) the supply is agreed by the supplier and the recipient, in writing, to be the supply of a going concern; and
>
> (ii) the supplier and the recipient intend that the supply is of a taxable activity, or part of a taxable activity, that is capable of being carried on as a going concern by the recipient."

[22] If the Agreement provided for the sale of a going concern and s 11 applies, then it would appear the defendant was correct to have provided an invoice as it did in which GST was charged at zero per cent. If s 11 does not apply, however, then s 8 provides that GST of 12.5 per cent is payable on this transaction. In this event, as

the Agreement clearly provided that the purchase price was inclusive of GST, the 12.5% GST amount would need to be accounted for as an output tax by the defendants to the Commissioner of Inland Revenue from the $5 million purchase price, and the plaintiff would be entitled to claim this amount as an input tax in its return.

Summary Judgment Principles

[23] Rule 12.2 of the High Court Rules provides:

> **"12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action].
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed."

[24] On a summary judgment application by a plaintiff, the principles to be applied have been recently summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187 in the following way:

> "[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried*: Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)."

[25] The position is somewhat different on a defendant's application for summary judgment against a plaintiff. McGechan on Procedure at para. HR12.2.07 deals with this (in part) in the following way:

> "HR12.2.07 **Onus on defendant**
>
> (1) **Effect of material disputes of fact**
>
> Where the defendant applies for summary judgment, the position is rather different from an application by the plaintiff. A defendant's application is similar to a striking-out application in that the defendant has to show that the plaintiff cannot succeed. The difference between an application for summary judgment and an application to strike out is that the summary judgment application requires affidavit evidence to be provided. It will therefore be possible to obtain judgment on the basis of material other than that contained in the pleadings. As in the case of an application by the plaintiff, if there are material disputes of fact which cannot be resolved on affidavit, summary judgment will have to be refused."

Tax Administration Act 1994 ("TAA") Argument

[26] At the outset, counsel for the defendant raised arguments concerning s 109 of the Tax Administration Act 1994 which it is convenient to address first. S. 109 provides:

> "**109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) Every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.]"

[27] "Disputable decision" is defined in s 3:

> **"disputable decision** means—
>
> (a) An assessment:
>
> (b) A decision of the Commissioner under a tax law, except for a decision—
>
> (i) To decline to issue a binding ruling under Part 5A; or

(ii) That cannot be the subject of an objection under Part 8; or

(iii) That cannot be challenged under [Part 8A; or]:

(iv) that is left to the Commissioner's discretion under sections 89K, 89L, 89M(8) and (10) and 89N(3)."

[28] Here, the defendants rely on the fact that the Commissioner approved the defendants' GST return, and contend that this is a disputable decision which the plaintiff cannot challenge in court. Counsel for the defendants pointed to *R Hannah & Co Ltd v Walker* (1994) 16 NZTC 11,245 as a case useful to this issue, if not directly on point. In that case the parties had agreed in a written contract that any income tax issue would be determined by objection proceedings. Summary judgment before an objection had been determined was denied. While in the present case, there was no reference to such procedures in the Agreement, counsel for the defendants argues that the fact remains that these procedures were available to the plaintiff here. In response, counsel for the plaintiff argued that *R. Hannah & Co. Ltd* was simply not relevant to the case at hand, as it concerned a procedure which was agreed upon by the parties in their contract. Counsel further noted that despite the finding that the objection proceedings were the appropriate course, the Court did not find that it had no jurisdiction to continue with the litigation. Rather, summary judgment was refused and the case adjourned so that the parties could have recourse to the procedure they had set out in their contract.

[29] Before me, counsel for the defendants also pointed to *In re Preston* [1985] AC 835 in support of the proposition that where taxation legislation provides for a statutory challenge to decisions made under that legislation, those statutory procedures should be followed. However, it is noted that this is said in the context of the principle that judicial review is not usually available where an alternative remedy exists (On this, see Lord Scarman's comments at p. 852).

[30] *Andersen v Commissioner of Inland Revenue* (2006) 22 NZTC 19,995 (HC) and *Commissioner of Inland Revenue v Willy* (2004) 21 NZTC 18,707 (HC) were also referred to me. Counsel for the defendants Mr. Rennie QC suggested that these were illustrative of the effect of s 109 of the TAA. Counsel for the plaintiff however

indicated that he had difficulty seeing any significant relevance in these cases. I agree.

[31] The defendants also appeared to rely on *Contract Pacific Limited v Commissioner of Inland Revenue* (2009) 24 NZTC 23,092 as support for their argument that the Court has no jurisdiction to make the orders sought by the plaintiff. In that case, the High Court stated:

> "[161] Contract Pacific also seeks an order requiring the Commissioner to refund the amount of the credit adjustment in conformity with the assessment of 5 February 2001. However, s 109 of the Tax Administration Act prohibits the correctness of an assessment from being disputed in proceedings other than those brought under Part 8 or Part 8A of the Act. The relief sought in the second cause of action is in the nature of seeking an order to confirm the correctness of an assessment allegedly made on 5 February 2001. The Commissioner contends that no such assessment was made. It seems to me that Contract Pacific is seeking to obtain a court order that confirms the correctness of an alleged assessment. I cannot see how there is jurisdiction to do that outside of the Part 8 and Part 8A procedure."

[32] Counsel for the plaintiff Mr. Rennie QC argued no decision of the Commissioner is engaged by the plaintiff's present proceedings, and s 109 of the TAA is irrelevant here. He suggested that s 109 concerns litigation between the taxpayer and the Commissioner only, and the Commissioner is not a party to these proceedings. All of the cases cited for the defendants pursuant to s 109 he said are consistent with this analysis.

[33] Mr. Rennie QC went on to submit that to suggest that s 109 of the TAA ousts the jurisdiction of the Court to deal with a contractual issue between plaintiff and defendant is extraordinary. There is no evidence of such a significant ousting in s 109 itself or in any of the cases which have considered it.

[34] I agree. In my view, there is no reason, in the words of the TAA or in the case law, to think that s 109 ousts the jurisdiction of the Court to determine a contractual dispute between two parties to a contract. Here, the plaintiff is contractually entitled to a correct GST tax invoice. This is a purely legal matter, and does not rest on a particular view of any disputed facts, making it appropriate as I see it for determination in summary judgment. I am satisfied that s 109 of the TAA does not prevent the determination of the plaintiff's claim in this Court.

Supply of a Going Concern

[35] As I have noted above, to be zero-rated for GST purposes, the Agreement here must have been for the supply of a taxable activity (in this case, an activity of letting property as a landlord) that is a going concern at the time of supply.

[36] I repeat that Section 6(1) GST Act defines "taxable activity" as follows:

> "For the purposes of this Act, the term taxable activity means –
>
> (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for consideration and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association or club.
>
> …."

[37] And again, Section 11(1)(m) provides as follows:

> "11 (1) [Zero-rated goods] A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> …
>
> (m) The supply to a registered person of a taxable activity, or part of a taxable activity, that is a going concern at the time of supply, if-
>
> (i) The supply is agreed by the supplier and the recipient, in writing, to be the supply of a going concern; and
>
> (ii) The supplier and the recipient intend that the supply is of a taxable activity, or part of a taxable activity, that is capable of being carried on as a going concern by the recipient …".

[38] Section 9 provides for the time of supply:

> "9 (1) [Time of Supply] subject to this Act, for the purposes of this Act supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply."

[39] On these aspects, the plaintiff relies on the words of the Agreement as varied. Under the (varied) Agreement, the plaintiff was entitled to acquire the property with "vacant possession". As such, the plaintiff's argument here is that first, the plain meaning of these words "vacant possession" is entirely clear and accepted by established authorities over many years and that secondly, here contractually the business of being a landlord was not supplied by the defendant to the plaintiff as there was no continuing tenancy.

[40] In response, the defendants contend that the words "vacant possession" do not mean that the plaintiff was entitled to take title under the Agreement free of all tenancies. The defendants point to what they say is the factual position that Torta Holdings Limited has, in a physical sense at least, been the tenant of the property and it contends the operator of the Parade Café in the premises there, at all times. Before settlement, it was the tenant of the defendants, and on 2 April 2008, the day of delayed settlement, it became the tenant of the plaintiff.

[41] As such, it is argued that the plaintiff is not entitled to the declaration sought, and the Court does not have jurisdiction to order the defendants to produce another tax invoice, as they have already complied with their obligation to provide a tax invoice in terms of s 24(1)(a) of the GST Act and clause 12.2 of the Agreement. The plaintiff responds that the defendant is contractually obliged to provide an invoice which is correct which they have not done.

[42] In order to be zero-rated for GST purposes, the Agreement must not only relate to a taxable supply activity which is a going concern, but pursuant to s 11(1)(m)(i) of the GST Act, the supply must be agreed by the parties in writing to be the supply of a going concern. If the supply here was of a "tenanted property" pursuant to the Agreement, then clause 13.1 of the Agreement fulfils the writing requirement. The defendants argue that this is the case. The plaintiff denies this.

[43] The defendants contend that on 2 July 2007, when the Variation Agreement was entered into, the parties knew that the words "vacant possession" were meaningless, and the parties intended the tenancy of the Parade Café to continue in a seamless fashion. As there were particulars of a tenancy on the front page of the

initial Agreement, the defendants argue that the Variation Agreement would need to have expressly deleted details of that tenancy in order for the plaintiff to have a right to vacant possession. The defendant relies on cl 13.1 (set out above) and cl 3.1 of the Agreement. Clause 3.1 states that unless particulars of a tenancy are included in the Agreement, the property is sold with vacant possession. As particulars of a tenancy were included, the defendants argue therefore that there could not have been vacant possession, notwithstanding the words used in the Variation Agreement.

[44] The defendants cite para 23 of the Court of Appeal's judgment in *Fatac Ltd (in liquidation) v Commissioner of Inland Revenue* [2002] 3 NZLR 648, which states:

> "The first concerns the time at which the conditions referred to in cl 14 were to be assessed. Clause 14 invoked certain GST consequences "if this agreement relates to the sale of a tenanted property". Whether the property was to be regarded as "tenanted" for this purpose was a matter of contractual intention. The contractual intention had to be determined as at the date of the contract. However in our view the intention at the date of the contract was that the formula referred to in cl 14 would be applied to the property as at the date of settlement, not as at the date of the contract. A sale is primarily concerned with the property that is intended to pass. What matters is therefore whether this property was "tenanted" at the date of settlement."

[45] Counsel for the defendants also cites *Case W56* (2004) 21 NZTC 11,525 and *Case W57* (2004) 21 NZTC 11,539. *Case W56* is cited as a case where particulars of a tenancy were inserted into the Agreement for Sale and Purchase, and the sale was found to be the supply of a going concern in terms of the agreement. *Case W57* is cited as a case where the Agreement for Sale and Purchase omitted any reference to a tenancy, and it was found that the vendor was obliged to provide the purchaser with vacant possession on settlement. This is said to support the proposition that whether or not the tenancy box on the front page of the Agreement for Sale and Purchase is filled in is conclusive as to whether or not there is a tenancy for the purposes of cl 13.1 (the equivalent of which is cl 14.1 in these cases).

[46] However, the reference to *Case W56* appears to be incorrect. In that case the property was subject to a lease which continued after settlement, and it was found that the intention of the parties was that the sale was to be subject to the lease. However, no particulars of the tenancy were inserted into the agreement, so the

property was held not to be the supply of a going concern despite the parties' intention, as there was no agreement in writing as required by s 11(1)(c) of the GST Act – a former equivalent of s 11(1)(m)(i). In that case, Barber DCJ, referring to *Fatac*, states:

> "[63] Firstly, the judgment emphasised that whether or not the agreement related to the sale of a tenanted property was a matter of contractual intention as to what would happen at settlement ie did the parties intend that the agreement would relate to the sale of a tenanted property? Thus, cl 14 will not satisfy limb (c)(ii) of section 11(1) merely because the property is tenanted at settlement date if, in fact, the agreement provides for vacant possession.
>
> [64] Secondly, the parties' contractual intention is to be found in the terms of the document as applied to the contemporaneously known, objectively observable facts. However, to use the words of the Court of Appeal, "contemporaneous oral communications, subjective intentions, and post-contractual conduct" have no place in the context of determining whether there was an agreement in writing that the supply was of a going concern.
>
> [65] Thirdly, while the principle for determining contractual intention outlined in the previous paragraph applies to the interpretation of contracts in general, it is especially applicable in the context of the purpose of limb (c)(ii) of s 11(1) which was introduced to ensure that the nature of the supply is clearly understood by both parties. For limb (c)(ii) of s 11(1) to be satisfied, the agreement as to the supply being of a going concern must be "clear and unequivocal". The need to rely on oblique or debatable propositions on the construction of an agreement, for example, will count against there being an agreement in writing for the purposes of limb (c)(ii) of s 11(1)."

[47] *Case W57* was also a case where a commercial property was sold with a number of tenancies in existence on settlement, and the purchaser continued to lease the property to the same tenants following settlement. However, the Agreement for Sale and Purchase provided for vacant possession. In both *W56* and *W57* the fact that the written agreements provided for vacant possession meant that there was no agreement in writing for the supply of a going concern to fulfil the equivalents of s 11(1)(m)(i), despite the fact that in reality tenancies were continuing.

[48] Counsel for the plaintiff argued that these cases do not in fact support the defendant's legal arguments. In *Fatac* it was held that the contractual intention as to GST is to be determined looking at the written agreement and, in a limited way, to the surrounding objective facts:

> "[24] The second point concerns the scope of the evidence to which the Court can resort for the purpose of determining the parties' GST intentions. The

> Authority devoted a good deal of time to the parties' negotiations, subjective intentions, and post-contract conduct. Hansen J confined his analysis to the terms of the document as applied to the contemporaneously known facts.
>
> [25] We agree with Hansen J's approach. It is true that as Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 (HL) and Boat Park Ltd v Hutchinson [1999] 2 NZLR 74 (CA) illustrate, the Court can draw upon extrinsic evidence of objective matters that must have been within the mutual contemplation of the parties. We accept that in this case the factual setting in which the agreement for sale and purchase was to be interpreted included the original licence agreement of 30 April 1991, the physical features of the land, the access to it, the quarry within it, the proportion of land still subject to potential quarrying, and other objectively observable facts that must have been known to both parties at the time.
>
> [26] We have been unable to find anything further that could legitimately assist in the interpretation of the agreement. Quite apart from the parole evidence rule, s 11(1)(c)(ii) is intended to remove room for argument on the matter by requiring the parties to record their GST intentions in the document itself. The whole point of s 11(1)(c)(ii) would be subverted if the inquiry could wander off into contemporaneous oral communications, subjective intentions, and post-contract conduct."

[49] This was upheld in Case *W56* and *Case W57*. In *Case W57* it was stated:

> "[34] The decision of the Court of Appeal in *Fatac* inherently excludes the use of extrinsic evidence (ie extrinsic to the relevant Agreement for Sale and Purchase), because of the objective of the statutory provision…
>
> [35] On that basis, it is clear that in the present case there is no unequivocal statement of the GST intentions of the parties within the document itself."

[50] Before me, counsel for the defendant, Ms. Harley, endeavoured to point to evidence to support the proposition that the Agreement should be read as being a supply of the property and chattels subject to a tenancy, notwithstanding that the Variation Agreement explicitly entitled the plaintiff to vacant possession. The contested nature of these factual matters, however, which relate to the state of mind of the parties to the contract, makes the defendants' application for summary judgment clearly inappropriate.

[51] Turning to the plaintiff's application for summary judgment, it would also appear that this factual evidence advanced by Ms. Harley does little to assist the defendants. This is because, as established in *Fatac* and the following cases, s

11(1)(m)(i) (and its former equivalent s 11(1)(c)(i)) requires the contractual intention that the supply be of a going concern for GST purposes to be in writing, and to be clear on the face of the contract itself. This was reiterated in *Fatac* at paragraphs 78 and 79:

> "[78] Finally, we accept Mr Beck's submission that the history and wording of s 11(1)(c)(ii) of the Goods and Services Tax Act indicates a legislative desire for certainty. The introduction of a requirement that the supply be "agreed by the supplier and the recipient, in writing, to be the supply of a going concern" was remedial. Its implied purpose was to remove the confusion and uncertainty that tended to occur before its introduction, the purchaser seeking an input tax credit, and the vendor seeking to resist an output tax debit.
>
> [79] In the present case the vendor has attempted to transfer the dissension and uncertainty that preceded the legislation from an argument over the supply of a going concern to an equivalent argument over the question whether the parties had agreed on that point in writing. In our view, "agreed by the supplier and the recipient in writing" is to be interpreted as requiring agreement in clear and unequivocal terms. Had it been the intention of these parties that the taxable activity be transferred as a going concern for GST purposes, nothing would have been easier than to say so simply, directly, and expressly. The fact that on the alternative argument Fatac is forced to traverse a series of oblique and debatable arguments counts against the proposition that there was any qualifying agreement for the purposes of s 11(1)(c). We agree with Hansen J that there was no agreement in writing for that purpose."

[52] *Case W56* and *Case W57* were both cases where the properties were in fact sold with continuing tenancies, but both written Sale Agreements provided for vacant possession. In those circumstances, following the approach in *Fatac*, it was held that the requirements of the equivalent of s 11(1)(m)(i) were not fulfilled. This appears to directly support the plaintiff's rather than the defendants' case here.

[53] Turning back to the Agreement here, it was varied to provide for vacant possession and this occurred at the time of supply on 2 July 2007 when the deposit was paid. As I have noted, in the "Tenancies" section on the front page of the Agreement, a lease to the AJ & JE Cockburn Partnership was specified with an expiry date of 23 May 2007. However the Variation Agreement entered into on 2 July 2007 required that settlement be with vacant possession and I am satisfied that the plain meaning of these words is clear. Therefore while the Property was tenanted on the date of supply (being 2 July 2007), it was agreed that it would not be tenanted

on the date of settlement. The authorities make clear that in determining whether there is an agreement in writing under the Auckland District Law Society standard form agreement (and the Agreement here is in this form) the relevant question is whether the property in question was to be tenanted as at the *date of settlement* – *Fatac*.

[54] And, the clear legal position is that, whether or not vacant possession was in fact provided in the present case, or was even intended to be provided, is irrelevant to whether the writing requirement in s 11(1)(m)(i) is fulfilled. In my view, this requirement of 11(1)(m)(i) clearly fails to be met in this case, and GST on the transaction is payable at the rate of 12.5 per cent. The defendants' contention that the Variation did not override the details of the tenancy provided in the original Agreement is to ignore the Variation and its effect. The defendant endeavours to argue also that the clause in the Variation Agreement providing for "vacant possession" on settlement is merely a "contractual misdescription". However, even if this contention is accepted, and the parties had in fact intended to transfer the property subject to a tenancy, this cannot amount to a defence here to the plaintiff's claim. On the contrary, it must be accepted that the parties failed to record any such intention in clear and unequivocal terms in the Agreement, as required by s. 11(1)(m)(i): *Fatac*. The parties' contractual intentions are to be found in the terms of the Agreement itself, which are at best uncertain if there was any validity in the defendant's reliance on "contractual misdescription".

[55] There was no rental apportionment made on settlement of the sale of the property, nor any mention of a tenant in the settlement statement issued by the defendants as vendors. Nor were any other documents presented to show the plaintiff was taking over a tenancy. And the actions of the plaintiff, Torta Holdings Limited and the first-named defendant (as Guarantor of the new lease) in granting and accepting a lease of the premises and the café chattels from 2 April 2008 to my mind clearly confirm that the plaintiff was acquiring the property with vacant possession. Settlement was to take place on 1 April 2008, as the contracts stated in clear and unequivocal terms *with vacant possession*. The obvious question arises that without this, how could the plaintiff as landlord have been able to grant an

entirely new lease to Torta Holdings Limited to commence from the next day as it did?

[56] Although the plaintiff's application before me is one for summary judgment and there are facts surrounding the Agreement which are contested, I do not have difficulty granting summary judgment in favour of the plaintiff. This is because in my view those contested facts are irrelevant to the issue at hand here, and I am satisfied that even accepting the facts as asserted by the defendants, they have no arguable defence to the plaintiff's claim in light of s 11 of the GST Act and the relevant authorities.

[57] While the matters of contested fact are not relevant on this application, I do note the defendants' allegations that the plaintiff's agents misled the defendants as to the true GST situation. That does not change the defendants' GST obligations. However, if this does prove to be the case, the defendants would be prima facie entitled to sue the plaintiff for damages arising from what is now the defendants' GST liability.

Interest

[58] The plaintiff claims judgment for interest on the GST component of the purchase price from the date on which the plaintiff would (but for the default of the defendants) have received payment of the GST credit. At this stage, however, the plaintiff only seeks a finding on liability with the issue of quantum to be determined when the relevant dates are known.

[59] Counsel for the defendants disputes the plaintiff's claim to interest on the GST, on the basis that no debt is owed by the defendants to the plaintiff. However, the fact remains that until the defendants issue a proper and accurate GST tax invoice, the plaintiff is unable to lodge a correct GST return, and so the plaintiff has been deprived of the use of any GST tax refund to which it is entitled by the defendants' failure to issue a correct invoice.

[60] Interest is not limited to debt sums. In the circumstances I find that the plaintiff is entitled to interest here. Leave is reserved for counsel to approach the Court on issues as to the rate and quantum of this interest to be awarded.

Result

[61] For the reasons outlined above, the plaintiff's application for summary judgment against the defendant succeeds. An order is to follow for the delivery by the defendants to the plaintiff of an appropriate GST tax invoice. And in passing I note that the defendants are also liable for interest on this GST component of $555,555.56, for a period and at a rate yet to be determined by this Court.

[62] And it must necessarily follow therefore that the defendants' application for summary judgment here against the plaintiffs fails. I now dismiss that application.

Orders

[63] Given that the plaintiff's summary judgment application succeeds; the following orders are now made:

(a) The defendants are within ten (10) working days of the date of this judgment to deliver to the plaintiff in the correct statutory form and in compliance with clause 12.2 of the Agreement a GST invoice specifying GST on this transaction as $555,555.56 and the purchase price net of GST as $4,444,444.44;

(b) The defendants as the unsuccessful parties here are to pay the plaintiff's costs on both summary judgment applications calculated on a Category 2B basis together with disbursements as fixed by the Registrar.

Associate Judge D.I. Gendall