[2010] UKPC 31
Privy Council Appeal No 0006 of 2010

JUDGMENT

National Transport Authority *v* Mauritius Secondary Industry Limited

From the Supreme Court of Mauritius

before

Lord Hope
Lord Walker
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT DELIVERED BY
Lord Walker
ON

13 December 2010

Heard on 25 October 2010

Appellant
Philip Baker QC
Rajeshsharma Ramloll
Miss Hui-Ling McCarthy
(Instructed by Royds LLP)

Respondent
Sir Hamid Moollan QC
Nandkishore Ramburn
Anwar Moollan
(Instructed by Simons Muirhead & Burton)

LORD WALKER :

1. The appellant National Transport Authority ("NTA"), the defendant at first instance, became the lessee of part of an office building at Cassis, Port Louis, under a lease agreement dated 8 February 2000. The lease was granted after a tender process overseen by the Central Tender Board ("CTB") a statutory body regulating public procurement established by the Central Tender Board Act 1994 (since repealed). The landlord who made the successful tender was Mauritius Secondary Industry Ltd ("MSI"), the respondent before the Board and the plaintiff at first instance. The relevant tender notice (with full particulars of NTA's requirement for office accommodation of about 3,000 square metres) was issued by CTB on 12 November 1998; MSI's tender (expressed in square feet, not square metres) was submitted on 25 November 1998; and after an inspection and appraisal by a government valuer MSI's tender was accepted by a letter dated 29 July 1999 from the officer in charge of NTA.

2. These dates are of some significance because in 1998 Mauritius introduced value added tax ("VAT"). The Value Added Tax Act 1998 ("the 1998 Act") came into force for preliminary purposes (such as registration of taxable persons) on 1 July 1998, and it came fully into force on the appointed day, 7 September 1998. So VAT was very much a novelty in Mauritius when the tender notice was issued. MSI was registered under Part IV of the 1998 Act very promptly, on the appointed day itself. But some of the evidence given at first instance suggests that at the material time some officials and businessmen had not yet fully understood the scheme and implications of the new tax.

3. The rent proposed in MSI's tender was "Rs15/- per [sq] ft per month, indexed at inflation rate every two years, not to exceed 10%". The acceptance letter stated that the government valuer had assessed the net rental surface area at 31,707 sq ft. These were the figures used in the lease to produce (clause 1.1) a monthly rental of Rs 475,605, although for some unexplained reason the inflation limit was specified (clause 1.4) at 20%. Neither the lease, nor any earlier document produced in evidence in the proceedings, made any reference to VAT. There was some rather confused evidence about oral exchanges before the lease was entered into; the judge's findings on these are considered below.

4. That is, in brief summary, the background to the single issue that arises on this appeal: given (as explained below) that MSI was a taxable person and the letting was a taxable supply for VAT purposes, was the monthly rent of Rs 475,605 inclusive, or exclusive, of VAT? That issue depends ultimately on the terms of the contract made between the parties. In the English case of *Lancaster v Bird* (1998) 73Con LR 22, 26, Chadwick LJ referred to two earlier first-instance cases as illustrating

> "What might be thought to be self-evident, that the question whether or not the price for a building contract is inclusive or exclusive of value added tax must turn on the terms of the particular contract."

The same principle applies to a contract for letting immovable property. But where the written contract is completely silent, the court must examine the characteristics of the VAT charge which is the subject matter of the dispute. In terms of the Code Civil (Article 1158) it must look for "le sens qui convient le plus à la matière du contrat."

5. It is common ground that the 1998 Act is modelled on the Value Added Tax Act 1994 of the United Kingdom ("the 1994 UK Act"). The 1994 UK Act consolidated legislation originally introduced as the Finance Act 1972, after the United Kingdom first joined the European Economic Community. Since then its VAT legislation has had the effect of transposing into domestic law the provisions of successive Community Directives, and in particular (since 2006) Directive 2006/112/EC. The 1998 Act does not however reproduce every feature of the United Kingdom legislation. In particular, it provides for "the grant, assignment or surrender of any interest in or right over land" to be a supply of goods (section 4 and Third Schedule, para 2). This is in contrast to the complicated provisions about land transactions introduced into the United Kingdom legislation in 1989 (see *Wynn Realisations Ltd (in administration) v Vogue Holdings Inc* [1999] STC 524, 526.

6. For present purposes the most relevant provisions of the 1998 Act are those which set out the general scheme of VAT, and define or explain its essential terms: "taxable person" in section 1, "supply" in section 4, the charging provisions in sections 9 and 10, and "value" of taxable supplies in section 12. The most crucial of these provisions are as follows:

> "9. Charge to value added tax
>
> > (1) VAT shall be charged on any supply of goods or services made in Mauritius, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
> >
> > (2) VAT on any taxable supply is a liability of the person making the supply and becomes due at the time of supply.
>
> . . .

10. Rate of VAT

VAT shall be charged at the rate specified in the Fourth Schedule [10% at the material time] and shall be charged –

(a) on any taxable supply by reference to the value of the supply as determined under section 12 . . .

12. Value of taxable supplies

(1) For the purposes of this Act, the value of any taxable supply made by a taxable person shall, subject to the other provisions of this Act, be determined in accordance with the provisions of this section.

(2) If the supply is for a consideration in money, its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration."

The corresponding provisions in the 1994 UK Act are section 4(1) (read with section 1(1)), section 1(2), section 2(1) and section 19(1) and (2) respectively.

7. In considering these provisions there are two interlocking points to be borne in mind. First, it is the person making the supply who is liable for VAT on the value of the supply that he makes. The ultimate burden of the tax falls on the consumer, but he is not personally liable for it to the Commissioner for Value Added Tax. The ultimate burden falls on the consumer simply because he is not acquiring it as a taxable person for use in a business of his own, and so there is no question of his passing on the burden by making supplies and obtaining a credit under section 21 of the 1998 Act. In this case MSI was a taxable person making a taxable supply in the course of its business, and NTA was in the position of the consumer. NTA was not liable for VAT to the Commissioner. Nor was it liable for VAT to MSI, except so far as the consideration which MSI was entitled to receive from NAT expressly excluded, or simply had to be treated as including, that VAT. This point was explained by Chadwick LJ in *Lancaster v Bird* (1998) 73 Con LR 22, 26, in a passage immediately following that already quoted:

"Normally of course it will be made clear expressly. It is in the interests of the builder who will be receiving the price to make it clear because, as between the builder and the Commissioners for Customs and Excise,

> the provisions now found in section 19(1) and (2) of the Value Added Tax Act 1994 require the recipient to account for value added tax on the basis that the consideration that he receives is such amount as equals the value of the goods or services provided plus value added tax. So if the builder fails to make it plain to the employer that he is stipulating for payment of value added tax in addition to the contract price, he will be left to account to the Revenue for the value added tax out of what he receives."

That applies, mutatis mutandis, to the present case.

8. Secondly, the provisions of section 12(1) and (2) are important because they explain how to ascertain the value of a supply, which is the amount on which VAT is to be charged at the appropriate rate (10% of the material time). Its effect can be stated by the formula S + 1/10S = C, where S is the value of the supply and C is the consideration. That is the case whether the supplier stipulates for an inclusive price (say Rs110,000) or for a basic price (say Rs100,000) "plus VAT". In either case the total consideration that the customer pays is Rs110,000, and so long as the rate of VAT remains at 10%, the formula embodied in section 12(2) produces the correct result. The function of section 12(2) is not to define "consideration". The amount of the consideration is to be found by ascertaining the total that the customer actually pays for the supply. Then one must work back through the formula (recasting it, for simplicity, as S = 10/11 C) to find the amount on which VAT is payable at 10%.

9. It is now appropriate to return to the facts of MSI's claim against NTA. The lease agreement dated 28 February 2000 was for a term of three years from 16 January 2000, with an option to renew for further periods of two years. The lease was renewed for two years from 16 January 2003 "on the same terms and conditions as the existing agreement" and there is therefore a total of five years' monthly instalments of VAT at stake. On 6 March 2000 MSI put in a rent invoice claiming Rs 713,407.50 for half of January and the whole of February 2000, together with VAT of Rs 71,340.75, making a total of Rs 784,748.25. This was not paid and correspondence ensued. NTA referred the matter to CTB, which in June 2000 took the view that the rent must be treated as inclusive of VAT. MSI commenced proceedings against NTA on 23 February 2001 and the case was heard by Peeroo J on 7 October 2004.

10. MSI called two witnesses, Mr Ramtoola, a director of the plaintiff company, and Mr Kinoo, the government valuer who had inspected and appraised the premises. NTA called Mr Jhummun, one of its administrative officers. Mr Ramtoola gave the following evidence in chief (Record p32, ll 17-27),

"A: Now, the Valuation Office gave its clearance to the Central Tender Board that the [rent] which was determined was a fair one.

Q: Was that Rs15 per sq ft, inclusive or exclusive of VAT?

A: In our mind, it was exclusive of VAT, My Lady.

Q: In the mind of the Valuation Office, was it inclusive or exclusive of VAT as far as you know, when you talked to them?

A: It was exclusive of VAT.

Q: That was at all times for entering into this agreement the view that Rs15 per sq ft were exclusive of VAT?

A: That's correct, My Lady."

But in re-examination his evidence was that VAT had not been discussed either with NTA (p45, l.30 – p46 l.3) or with the valuer (p47 ll.6-17). So it is hard to see how Mr Ramtoola could possibly have known what was in the mind of the Valuation Office.

11. The evidence of Mr Kinoo, the valuer, took a rather similar course. In chief, he agreed with a blatantly leading question that any VAT was to be "paid thereon" – that is, apparently, paid on top of the rent (p48, ll 20-22). But he had already agreed (p48, ll 6-9) that he did not address himself to the question of VAT at all, and in cross-examination (p49, ll 11-16) he agreed that VAT was not something as to which his department enquired, and that there had been no enquiry in this case.

12. The judge handed down a reserved judgment on 3 March 2005, dismissing MSI's claim with costs. She carefully considered the oral and documentary evidence and concluded, in relation to the valuer's visit, that "VAT was not an issue that was brought up and considered, and that the question whether the plaintiff company was VAT registered or not was not canvassed either." As to a suggestion that MSI had been misinformed that NTA was exempt from VAT, she observed "that it has not been established by the plaintiff company by way of cogent evidence that there was such an exchange of information before the bid was made or at least before the contract was signed." (There may have been some confusion about what was meant by 'exempt'; as already mentioned, NTA was not a taxable person but the practical consequence was that it did not make taxable supplies and so could not pass on VAT which it paid). The judge's general and most important conclusion on the facts was

that "the evidence on record shows clearly that there was no mention of VAT at all throughout the negotiation of the contract."

13. The judge referred to two English authorities, *Lancaster v Bird* already mentioned and *Hostgilt Ltd v Megahart Ltd* [1999] STC 141. In the latter case (concerning a "VAT excluded" clause in a contract) the deputy judge said, at p145,

> "This construction is, of course, only possible because there is express reference, albeit rather badly drafted, as to how VAT is proposed to be dealt with. If there were no mention at all of VAT then the sums quoted would simply be the consideration for the purchase and it would be a matter for the vendor to sort out the VAT liability on his own."

She also (at p143) went through the exercise described in para 8 above, but with more complicated fractions because in that case the VAT rate was 17.5 per cent.

14. Following that guidance, Peeroo J concluded that under both lease agreements MSI had no claim on NTA for any further payment in respect of VAT. In the Board's opinion Peeroo J's judgment was considered, thorough, and clearly right. The only criticism that could be made of her conduct of the case was that she allowed counsel to get away with too many leading questions in examination in chief and re-examination. However the Court of Appeal (Yeung Sik Yuen CJ and Angoh J) reversed her decision in a reserved judgment handed down on 5 June 2009.

15. The Court of Appeal noted that there were eight grounds of appeal. It considered that the first four raised issues of law, and the next four raised issues of fact. It appears to the Board that only two could really be described as issues of fact: the valuer's alleged acceptance that he recommended a rent exclusive of VAT, and NTA's alleged awareness (at some unspecified time) that the rent was exclusive of VAT. On these points the Court of Appeal did not clearly depart from any of the judge's findings of fact. It did refer to a letter dated 6 March 2000 (five weeks after the signing of the lease agreement) from a director of MSI referring to a conversation between MSI's accountant and NTA's financial officer. The date of the conversation is not specified but it seems likely that it occurred quite shortly before (or even on) 6 March 2000. It seems inherently improbable that it took place before the lease agreement was signed. It is no ground for disturbing the judge's finding that it had not been established by cogent evidence that there was any relevant exchange of information before the lease agreement was signed. There is therefore no reason to disturb her findings of fact.

16. As to the law, the Court of Appeal discussed the 1998 Act and saw it as an essential part of the structure of VAT that

> "It is the end user who usually meets the final payment of that tax."

The Court returned to the same point later in the judgment:

> "We are of the view that the facts highlighted above predominantly point towards the existence of an underlying agreement whereby VAT is ultimately borne by the end-user, namely [NTA]."

The facts to which the Court referred were (1) that the transaction was agreed to have been liable to VAT, (2) that MSI claimed VAT at the first opportunity, (3) that NTA's response was that NTA was not liable for VAT, (4) that NTA did not at once advance its case that the payment of rent must be inclusive of VAT and (5) that Mr Kinoo, the valuer, agreed that he did not address himself to VAT. The Board respectfully consider that these five points are no basis for the Court of Appeal's conclusion. Point (1) is neutral; point (2) shows no more than that MSI's accountant was aware of VAT, even if those of its staff involved in the negotiations were not; points (3) and (4) are neutral – VAT was a very new tax, and NTA (not being a taxable person) was naturally not as familiar with it as MSI; point (5) is consistent with the judge's most important finding of fact, that VAT was simply not thought about before the lease agreement was entered into.

17. The Board also respectfully considers that the Court of Appeal may have misunderstood the point about the ultimate burden of VAT falling on the consumer as end user. That is an important point about the structure of VAT as "fiscally neutral" as between different ways in which the manufacture, distribution and retail sale of products (or the supply of services) can be organised. But it results from the consumer's inability to obtain a credit and so to pass on the burden of VAT that he bears as part of the consideration paid by him to the supplier; not from his personal liability for the supplier's VAT as such, because there is no such liability.

18. In the Board's view the principle to be applied in Mauritius is the same as that clearly spelled out in the English authorities already referred to, which the Board accepts as correct. Moreover, VAT is a tax imposed throughout the European Union, and the same principle has been stated more than once by the Conseil d'Etat, for instance in *SA Mitsouki France* 28 July 1993, No. 62865:

> "Considérant que la taxe sur la valeur ajoutée dont est redevable un vendeur ou un prestataire de services est, comme les prélèvements de toute nature assis en addition à cette taxe, un élément qui grève le prix convenu avec le client et non un accessoire du prix; qu'en vertu des dispositions précitées, l'assiette de la taxe sur la valeur ajoutée est égale au prix convenu entre les parties, diminué notamment de la taxe exigible

> sur cette opération; que, par suite lorsqu'un assujetti réalise une affaire moyennant un prix convenu dans des conditions qui ne font pas apparaître que les parties seraient convenues d'ajouter au prix stipulé un supplément de prix égal à la taxe sur la valeur ajoutée applicable a l'opération, la taxe due au titre de cette affaire doit être assise sur une somme égale au prix stipulé diminué notamment du montant de ladite taxe."

19. For these reasons the Board allows the appeal, sets aside the order of the Court of Appeal, and restores the order of Peeroo J. The respondent must pay the costs in the Court of Appeal and before the Board. If MSI has paid VAT to the Commissioner for Value Added Tax on the basis that the total monthly consideration initially payable by NTA under the lease agreement was Rs523, 165.50 (that is, 110% of the rent stated in the lease) it may (subject to time limits) be able to recover the excess from the Commissioner (compare *Wynn Realisations* at p527 c-d). But that is not an issue for the Board, since the Commissioner is not a party to these proceedings, and the Board has heard no argument on the point.