Neutral Citation no. [2008] NICh 1 | *Ref:* **MOR7033**

Judgment: approved by the Court for handing down | *Delivered:* **07/01/08**
*(subject to editorial corrections)**

2007 No. 50966

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

BETWEEN:

MAD PROJECTS LTD

Plaintiff;

-and-

SALVATORE LIBERANTE

Defendant.

_____

MORGAN J

Background

[1] By an agreement in writing made on 26 June 2006 the defendant granted to the plaintiff an option to buy the premises known as Speranza Restaurant situated at 16 - 19 Shaftesbury Square and 40 - 42 Kensington St Belfast. The purchase price for the property was stated to be £2,220,000 (inclusive of VAT). By a further agreement made on 28 December 2006 the parties agreed that the period for the exercise of the option should be extended to 26 February 2007 at the same price. By written notice dated 22 February 2007 the plaintiff exercised the option and now requires the defendant to specifically perform the agreement. The defendant denies that the plaintiff is entitled to have the agreement specifically performed and by a counterclaim says that the true agreement between the plaintiff and defendant was that the defendant granted to the plaintiff an option to purchase the premises at a consideration of £2,220,000 exclusive of VAT. The defendant claims rectification of the agreement in writing dated 26 June 2006 and a declaration that the purchase price of property is and was £2,220,000 exclusive of VAT. Mr Mark Orr QC and Mr Colmer appeared for the plaintiff and Mr Hanna QC and Mr Jonathan Dunlop appeared for the defendant. I am grateful to counsel for their helpful written and oral submissions.

[2] The parties have been able to produce an agreed statement of facts which I append to this judgment. There are 3 matters arising from the statement of facts about which there is some qualification and I will deal with these in the course of the judgment. I also heard evidence from Mr Brian Nixon who is a chartered surveyor and partner in Whelan Property Consultants.

The negotiations

[3] The defendant conducted a restaurant business from the subject premises fronting onto Shaftesbury Square Belfast for many years. Darren Fanning was employed by him as a restaurant manager from May 2001 until January 2006. Mr Fanning and his father are directors of the plaintiff company. In March 2006 the defendant and Darren Fanning met to discuss the possibility of the sale of the restaurant business. No figures were discussed at this meeting. It appears that Mr Nixon had been instructed by that time to market the restaurant and he had produced a brochure with a rental asking price of £160,000 per annum exclusive of any VAT which might be payable.

[4] In early April 2006 Mr Fanning and the defendant met with Mr Nixon in his office. Mr Nixon's evidence is that after some discussion a figure of £280,000 for fixtures and fittings and a figure of £130,000 per annum for rent were agreed in principle subject to Mr Fanning talking the matter over with his father. Mr Fanning also wanted to know the figure for outright purchase of property and a figure of £2.5 million was discussed. There was no discussion at this meeting about VAT.

[5] On 25 April 2006 there was a further meeting at Mr Nixon's office at which the defendant, Mr Fanning and his father were also present. Mr Nixon said that Mr Fanning's father appeared to be an experienced businessman with a number of business interests and there was no challenge to this. His evidence was that the rental figure of £130,000 per annum was agreed and that the figure for fixtures and fittings of £280,000 was agreed. There was discussion about an option to purchase the building for £2.5 million and it was agreed that if the option was exercised within six months of the commencement of the lease the figure for fixtures and fittings would be deducted leaving an amount payable of £2,220,000. There was no discussion about VAT at this meeting either.

[6] Mr Nixon said that he had been in practice as a Chartered Surveyor for 22 years. He said that in his experience when 2 businessmen were discussing the sale of bricks and mortar the discussions as to price were always net of VAT. If the transaction was exempt no VAT would be payable. If VAT was payable the purchaser would reclaim it as a business expense. He had never

known a situation where a price had been agreed as a round figure which included VAT. On or about 1 May 2006 Mr Nixon wrote to Mr Fanning setting out the terms of the agreement which had been reached. This letter contained the following term.

> "An option agreed to purchase the premises within the first six months at a price of £2.5 million exclusive. Should this option be taken up the premium already paid of £280,000 will be deducted from the price to leave a net sum payable of £2,220,000 exclusive of VAT."

The first qualification to the statement of facts is that Mr Fanning has no recollection of receiving this letter.

The VAT treatment of land

[7] The grant of any interest in land is normally a VAT exempt supply by virtue of VAT Act 1994, Schedule 9 Group1. A business can opt to tax land in which case it must charge VAT on all future supplies it makes in relation to that land including the grants of leases and sales of freeholds unless the option has been revoked (VAT Act 1994, Schedule 10 Paragraph 3(2)). This most commonly occurs where the landowner carries out renovations to the premises. It is only by opting to tax the land that the owner can recover the VAT element of the renovation cost. As the brochure prepared by Mr Nixon stated the defendant had carried out extensive renovation works to the premises and on 20 June 2006 applied to exercise the option to tax which became effective from 30 May 2006. This constitutes a modest qualification to paragraph 28 of the statement of facts.

[8] If business assets are supplied as part of the transfer of the business as a going concern the transaction will normally be exempt from VAT. If, however, the business owner has exercised the option to tax land forming part of the business then VAT will be chargeable on the transfer of that land even if it is transferred as part of the business being transferred as a going concern unless the transferee of the business also opts to tax the land and he gives written notification to HMRC and he notifies the transferor that his option to tax will not be disapplied (VAT (Special Provisions) Order 1995, article 5).

The solicitors become involved

[9] The parties instructed their respective solicitors and on 28 April 2006 the solicitors for the plaintiff raised commercial property standard enquiries relating to the sale of the business and the proposed lease. These included inquiries in relation to the issue of VAT including an inquiry as to whether it

was expected that the transaction could be treated as a transfer of a business as a going concern. The solicitors for the defendant responded that they were seeking advice from their accountants. On 24 May 2006 the solicitors for the defendant respondent that they expected the sale of the business and goodwill to be treated as a transfer of the business as a going concern but pointed out that an election to waive exemption had been made and VAT would, therefore, be charged on the occupational lease rentals. This was incorporated into the business sale agreement on 31 May 2006 and on 1 June 2006 the plaintiff went into occupation of the premises paying the first quarter's rent plus VAT together with £280,000 with no VAT in respect of the goodwill.

[10] On 5 June 2006 the first draft option agreement was produced by the defendant's solicitors and furnished to the plaintiff's solicitors. Clause 2 of the first schedule provided for a purchase price of £2,220,000 (plus VAT). On 12 June 2006 the solicitors for the plaintiff put a line through clause 2 and re-placed it with a rider at the back of the agreement which provided that the purchase price was £2,220,000 (exclusive of VAT). A drafting note was also added at clause 2 asking whether VAT would be payable and requesting a certificate of registration for VAT and acknowledgement of the option to waive the exemption if that was so.

[11] On 14 June 2006 the defendant, Mr Nixon and a solicitor assisting the partner who had carriage of the transaction in the defendant's solicitors office met to review the option agreement. The handwritten note of that meeting prepared by the solicitor assisting the partner reads "No VAT. On rent only". It is clear to me that the solicitor with carriage of this matter for the defendant understood this note to mean that no VAT would be payable in respect of the option and on 19 June 2006 he returned the travelling draft to the plaintiff's solicitors inserting the words "no VAT" beside clause 2 of the first schedule. On receipt of this travelling draft the solicitor for the plaintiff then further amended the rider to provide that the purchase price was £2,220,000 (*inclusive* of VAT).

[12] The option and lease were then executed on behalf of the plaintiff and returned to the defendant's solicitors on 27 June 2006. They were then returned to the plaintiff solicitors duly executed on 28 June 2006. The lease, of course, continued to expressly reflect the fact that VAT was payable on the rent.

[13] On the evening of 12 April 2007 Mr Nixon telephoned Darren Fanning and told him that VAT was payable on the purchase monies. The third qualification to the statement of facts is that Mr Fanning contends that this was the first occasion on which he was informed that VAT would be payable. Once it became clear that there was a requirement upon the defendant to pay VAT in respect of the option there was an attempt between the parties to see

whether the issue could be avoided by transferring the property as part of a business being transferred as a going concern. The plaintiff discussed this with its funder but apparently the funder was not happy to proceed in that way. Accordingly the plaintiff exercised the option and has issued these proceedings requiring the defendant to transfer the premises at a figure of £1,889,361.70 plus VAT or £2,220,000 inclusive of VAT. Since the plaintiff will be able to reclaim the VAT the saving to it will be approximately £330,638.

[14] On 13 April 2007 the defendant sent a letter to Darren Fanning in which he apologised for the error made by his solicitor but pointed out that the figure agreed was £2,220,000 and not £1,889,361.71. The plaintiff's solicitors responded on 17 April 2007 indicating that their client had completed the transaction in accordance with the terms of the contract and stating that the funder would not be content for the transaction to be treated as VAT exclusive post completion. That letter did not deny that the agreed figure was in fact £2,220,000.

The law

[15] All of the discussion and correspondence between the solicitors was subject to contract and it is agreed that prior to the execution of the option in June 2006 there was no legally enforceable agreement between the parties. The Court of Appeal in England concluded in Jocelyne v Nissen [1970] 2 QB 86 that it was not necessary to find a concluded contract antecedent to the agreement. The court has jurisdiction to rectify an agreement if there was a common continuing intention in regard to a particular provision of the agreement, but an outward expression of accord and convincing proof that the concluded instrument did not represent the parties' common intention where required. This decision is strong persuasive authority in this jurisdiction and I have no reason to doubt that it is correct.

[16] A claim for rectification can arise where the terms of the document do not accord with the true agreement between the parties. A party seeking rectification must produce "strong, irrefragable evidence" (see Snell's Equity (31st edition) at paragraph 14-10 and the cases therein cited). There must be a literal disparity between the language of the agreement and that of the instrument.

Conclusion

[17] I am satisfied that the promoters of the plaintiff company, Mr Fanning and his father, agreed at Mr Nixon's office on 25 April 2006 to pay a sum of £2,220,000 if the plaintiff chose to exercise the option to purchase the subject property. I am satisfied that VAT was not discussed at this meeting because in a business transaction of this nature VAT is neutral in that either the transaction is exempt or the purchasing party can reclaim the VAT as a

business expense. This is to be contrasted with a transaction involving a consumer (see Tony Cox (Dismantlers) Ltd v Jim 5 Ltd (1997) 13 Const LJ 209). I consider that this common intention of the parties was expressed in the presence of Mr Nixon at his office and recorded by him in his letter to Mr Fanning of 1 May 2006.

[19] This clear common intention of the parties was the basis upon which their solicitors proceeded in order to prepare the final agreement. I consider that it is clear from the statement of facts and the documents that the defendant's solicitor inaccurately concluded on the basis of the attendance note of 14 June 2006 that VAT would not be payable on receipt of the purchase monies and that this mistake constituted the basis upon which both parties proceeded to draw up the final terms. There is no evidence before me that either party contemplated at that time a reduction in the effective purchase price by something over £330,000. The insertion of the term "*inclusive* of VAT" some days before the execution of the final agreement reflected a common error, induced by the defendant's solicitor, that this was an exempt transaction rather than a transaction in which the purchaser would have to reclaim the VAT.

[19] I consider, therefore, that the written instrument does not represent the true agreement between the parties which was that the figure of £2,220,000 should be *exclusive* of VAT. Accordingly I rectify the agreement in writing dated 26 June 2006 as sought in the counterclaim. I further declare that the purchase price of the property is and was £2,220,000 exclusive of VAT and that all references to the purchase price of the property in the agreement and the supplemental agreement should be construed accordingly.