

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

At 19/1/96
GA: 1

IN THE MATTER of the Declaratory
Judgements Act 1908

BETWEEN PACIFIC RESORT &
VILLAS LIMITED a
company incorporated at
Rarotonga

Applicant

AND DANIELLE
HOLDINGS LIMITED
a company incorporated at
Rarotonga

First Respondent

AND PACIFIC HOLDINGS
LIMITED a company
incorporated at Rarotonga

Second Respondent

DATE OF HEARING: 3 December 1996 (N.Z.)

COUNSEL: Mr A.M. Manarangi for Applicant

Mr M. C. Mitchell for First Respondent

Mr B.J. Gibson for Second Respondent

DATE OF
REASONS FOR JUDGEMENT: *30 January 1997*

REASONS FOR JUDGEMENT OF QUILLIAM C.J.

The First Respondent (Danielle) and the Second Respondent (Pacific) have been carrying on separate businesses as the owners and operators of tourist accommodation and ancillary facilities in Rarotonga. The shareholders of these companies agreed to amalgamate the two businesses and for that purpose to sell their shares to a new company formed for the purpose, namely the applicant Pacific Resort & Villas Ltd (PRV). Most of the shareholders agreed to accept payment for their shares in the form of shares in PRV, but some wished to

be paid, in whole or in part, in cash. PRV accordingly arranged to obtain an advance from the ANZ Bank in order to meet those cash payments. The agreement entered into among the parties provided that security for the advance by the bank would be given by guarantees by specified shareholders, cross guarantees by and between the three companies, and certain mortgages and debentures.

The parties recognised in advance that the transaction may be in contravention of s.62 of the Companies Act 1955, which provides that:

“(1) ... it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company.... “

An application was accordingly made under the Declaratory Judgements Act 1908 for declarations as to whether securities offered by Danielle and Pacific were for the purchase of shares in those companies, and if so, whether the parties to the securities were entitled to relief pursuant to s.6 of the Illegal Contracts Act 1987.

The application came before me on 3 December 1996 (N.Z. time) and, after hearing counsel, and it having been acknowledged by counsel that the securities were in contravention of s.62 of the Companies Act, I decided that there should be relief granted under the Illegal Contracts Act so as to validate the Securities.

The matter has some unusual features and I therefore undertook to give my reasons in writing, which I now do.

There was, as already stated, no dispute that the securities were in contravention of s.62 of the Companies Act and ordinarily this may well suggest that there should be no relief from the invalidity. Also, it must be rarely that the Illegal Contracts Act is invoked in advance rather than after the discovery of invalidity once the contract had been in operation.

I have no doubt that there is power for the Court to make a declaration in anticipation of a contract coming into operation. This is expressly provided for in the Declaratory Judgements Act which provides a procedure to enable people wishing to enter into a contract to satisfy themselves that it is proper to do so.

While it is less clear that the Court has power to validate in advance a contract which has not yet been executed I consider that this may still occur.

Section 6 of the Illegal Contracts Act, so far as is material, provides:

“6. Court may grant relief - (1) Notwithstanding the provisions of Section 5, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to -

- (a) Any party to an illegal contract; or
- (b) Any party to a contract who is disqualified from enforcing it by reasons of the commission of an illegal act in the course of its performance; or,
- (c) Any person claiming through or under any such party -

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just

(2) An application under subsection (1) may be made by -

- (a) Any person to whom the Court may grant relief pursuant to subsection (1);
- (b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under sub-section (1), the Court shall have regard to -

- (a) The conduct of the parties: and,
- (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and,
- (c) Such other matters as it thinks proper; but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.”

Whether or not s.6 can apply to a party to a proposed, rather than an executed, contract, it is clear that it applied to “any other person where it is material for that person to know whether relief will be granted.... “ The person most materially affected by the proposed transaction would appear to be the bank. It cannot be said that the transaction would be to the detriment or disadvantage of the shareholders who are basically exchanging shares in one company for the equivalent shares in another. The bank, however, could well be apprehensive as to whether the securities to be given for its loan would be enforceable. I think it is entitled to know in advance that it has the protection of a declaration of validity.

It should be observed that it would be possible for the parties to conclude their contract and then, upon the question of illegality being raised, to apply for relief. I can see no point in their being obliged to proceed in that way. It may well be thought that the more sensible and practicable course is for the doubts to be resolved in advance.

I am not aware of any authority precisely in point, but the decision of Eichelbaum J (as he then was) in Porirua Concrete Products Ltd v Reeve (1983) 1 BCR 512 offers at least some assistance.

A further matter to which counsel referred was the personal liability which might attach to the directors for having acted negligently or in breach of duty. Section 468 of the Companies Act enables the Court to grant relief in such a case. I find it difficult to believe that relief would be refused to directors who acted in pursuance of a declaration of validity already made by the Court. I do not consider the question of directors' liability can have any bearing on the declaration which has been sought in this case.

For the reasons given I have accordingly made the declaration that relief pursuant to the Illegal Contracts Act 1987 can be granted so as to validate the proposed contract.

No order as to costs has been sought.

William J.