IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 62 of 1976

Between:

MACGREGOR INVESTMENTS LIMITED

Appellant

- and -

SHERATON HOTELS LIMITED

Respondent

Mr. S.M. Koya for the Appellant
Messrs. K.C. Ramrakha & E.S. Sharma for the Respondent

Date of Hearing : 14th March, 1977
Date of Judgment: 25th March, 1977

JUDGMENT OF HENRY J.A.

Appellant is the owner of hotel premises in Suva. In 1973 respondent entered into an agreement with appellant to purchase these premises and duly went into occupation and spent between $60,000 and $70,000 in completing partly finished work. A Fiji Company, called Hotel Hibiscus Limited, entered into arrangements with respondent to manage the said premises. Hotel Hibiscus Limited purchased furniture and other

Company called United Dominion Corporation Finance Limited drew 20 bills of exchange which were duly accepted by Hotel Hibiscus Limited "payable at Bank of New Zealand, Nadi, Fiji." When the parties were negotiating a settlement of the said Supreme Court actions an important matter was payment of these bills. I will refer to this later. However the parties considered they had mutually agreed on terms of settlement and a solicitor, Mr. Mitchell, who acted for appellant was instructed to draw up a deed of release. This was done and document was duly executed.

The Deed of Release recited the disputes and actions and then mutually released each party from all claims one against the other. Thirteen separate terms and conditions were then set out. All actions were discontinued and a caveat on the title was withdrawn. The parties to the deed were respectively called MacGregor and Sheraton. The provisions which are of special importance in this action are the following:-

5. MacGregor shall pay to Sheraton the sum of FJ$110,000 in the following manner ;

(a) The sum of FJ$55,000 by bank cheque on the signing hereof and upon the lodgment and advice of acceptance of the said withdrawal of Caveat by the Registrar of Titles.

(b) The balance of $55,000 to be paid on or before the expiration of six months from the date hereof free of interest forthe first three months and then at ten per centum per annum on any balance then remaining unpaid from the expiration of such three months period and to be secured by a first mortgage over the land more particularly described in Certificate of Title Volume 7531 and such mortgage to be guaranteed by the shareholders in MacGregor.

6. That on the execution hereof and payment of the said sum of $55,000 and handing over of a properly executed mortgage as referred to in 5(b) above Sheraton shall hand over possession of the said hotel/motel to MacGregor and hereby assigns to MacGregor all furniture, fittings, fixtures, equipment, floor coverings, curtains, lighting and all items whatsoever in, on or about the premises with the exception only of the stock referred to hereunder.

7. That on taking possession as referred to above MacGregor will assume all liability due to United Dominions Corporation Finance Limited of Auckland (hereinafter referred to as 'U.D.C.') in respect of 18 Bills of Exchange drawn in favour of U.D.C. by Sheraton and MacGregor undertakes to comply with any U.D.C. demands

sign any necessary documents in order to assume such liability and hereby indemnifies Sheraton from any claims or demands in respect of such Bills of Exchange.

8. That in taking possession as aforesaid MacGregor will also accept the debt due by Sheraton to Armstrong & Springhall Limited of Suva Fiji in respect of two Sweda cash registers.

10. That Sheraton hereby indemnifies and undertakes to indemnify MacGregor against all claims by third parties both present and future that my exist or may arise in respect of the occupation, possession, control and management of the subject hotel/motel by Sheraton and will further indemnify MacGregor in respect of all or any debts or liabilities owed or due by Sheraton with the exception only of the monies owing to U.D.C. and Armstrong and Springhall Limited.

In clause 7 the reference to 18 bills of exchange drawn in favour of United DominionnCorporation Finance Limited by respondent is not correct in more than one respect. There were in fact no such bills. There were 18 bills drawn by United Dominion Corporation Finance Limited and accepted by Hotel Hibiscus Limited payable as earlier stated.

The pleadings contained alternative claims and were amended more than once. There was a counter-claim alleging fraud in respect of the "alleged liability of respondent on the said Bills of Exchange."

This referred specifically to the 18 bills of exchange abovementioned. This charge of fraud was not pursued. The claim of respondent, so far as it is now relevant, was that there was an oral agreement not included in the deed. The statement of claim read:-

12. That prior to the execution of the Deed referred to in paragraph 3 hereof the parties agreed orally that in addition to the defendant paying the plaintiff the sum of $110,000.00 (ONE HUNDRED AND TEN THOUSAND DOLLARS) referred to in the said Deed the defendant would assume full responsibility and liability for all moneys payable or to become payable to United Dominion Corporation Finance Limited at Auckland in respect of the bills of exchange referred to above.

13. THAT clause 7 of the Deed refers to the said bills of exchange as having been drawn in favour of U.D.C. by Sheraton" that is by the plaintiff.

14. THAT the said clause does not correctly record the agreement made between the parties in that the bills of exchange to which the parties intended to refer were not drawn by the plaintiff but by Hotel Hibiscus Limited whose liability to U.D.C. was guaranteed by the plaintiff.

Rectification and a declaration of responsibility for the said bills of exchange were sought. A further alternative claim was made for the amount of the said bills. The learned judge ordered rectification by deleting the words "by Sheraton" and substituting the words "on Hotel Hibiscus Limited." This gave a correct description of the 18 bills of exchange and he thereupon gave judgment for rospondent for the amount of the said bills. If the learned judge was correct in ordering rectification so that clause 7 did describe the said bills then, subject to defences raised by counsel for appellant, respondent was entitled to recover judgment. There is no appeal against the correctness of the amount of the judgment. The only question is whether or not respondent was liable for that sum.

There is the clearest evidence that, when the parties were discussing the matters dealt with in Clause 7, they were discussing the actual bills of exchange drawn on Hotel Hibiscus Limited by United Dominion Corporation Finance Limited and accepted by Hotel Hibiscus and payable at the Bank of New Zealand at Nadi. The learned judge so found as a fact and this finding is fully supported by clear evidence. I do not propose to traverse that evidence. It follows that, when the solicitor reduced the terms to writing, he wrongly described the said bills. The mistake was either not noticed by the parties or they were under some misapprehension as to the proper description of the bills but they were not, as the learned judge found, under any mistake as to what bills were involved.

On this phase of the case then the only question is whether or not the learned judge was correct when he ordered that clause 7 be read as referring to the said bills.

Cheshire & Fitfoot's Law of Contract 9th Ed. states at p.221:-

> Equity in the exercise of its exclusive jurisdiction, has satisfactorily dealt with cases where, though the consent is undoubted and real it has by mistake been inaccurately expressed in a later instrument.
>
> "What you have got to find out is what intention was communicated by one side to the other and with what common intention and common agreement they made their bargain."

Lovell & Christmas v. Wall (1911) 104 L.T.85, 93. In the same case Cozens-Hardy M.R. Said:-

> "The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential."

So it is not the contract itself which is rectified but the incorrect manner in which the common intention has been expressed in the document.

The learned judge found that the common intention and common agreement was that appellant was to assume liability for the said bills of exchange and that they were wrongly described in the deed so he rectified that error by having the bills correctly described. That, in my respectful view, was a correct application of the law to facts amply proved. In my opinion the documents might also have been identified by extrinsic evidence. The learned judge correctly in my view came to a conclusion that each party intended to deal with the said 18 bills and had come to a common agreement that those were documents which they intended to be described in Clause 7 of deed of release. This disposes of the argument of counsel for appellant that there was uncertainty in the terms of the alleged oral agreement upon which rectification was sought. It also answers the claim of merger.

Counsel for appellant addressed argument before this Court seeking to sever from the deed of release those provisions which referred to the furniture and chattels and claimed that the oral agreement alleged was void for uncertainty. Although, in my opinion, the rectification earlier referred to is an answer it is necessary to deal further with the submissions made in relation to consideration. It will be noticed that Clause 5 provides for a consideration of $110,000. By Clause 6, on the performance of Clause 5, the furniture and chattels are assigned. It was claimed that this was a complete contract for the sale of the

furniture and chattels. This is clearly not so. Clause 6 does no more than fix the time when property passes. Clause 7 goes on to say that upon possession being taken liability will be assumed for the bills therein described. It is all part of the consideration for the mutual releases in respect of the matters earlier recited. Clause 8 is to the same effect. By Clause 10 respondent indemnified appellant with the "exception only of the monies owing to U.D.C. and Armstrong and Springhall." This again confirms that liability under the bills continued as provided for in Clause 7. The deed must be read as a whole. The separately expressed considerations are part of the whole consideration for all matters contained in the deed.

It was contended that since, as was admitted in evidence, Hotel Hibiscuss Limited, did not at the date of the action owe any money for the purchase of the furniture, and chattels and had received all moneys owed to it by plaintiff, the plaintiff had no cause of action. This contention was further put in this form namely, that it was established that, as respondent had paid the purchase price for the furniture, it was not concerned about payment of the said bills. This, in my view, is irrelevant. The terms of purchase between respondent and Hotel Hibiscus Limited are not known and are irrelevant. Until the bills were paid Hotel Hibiscus Limited was still liable on the respective due dates to pay the person who presented them. Whatever the position might be with

third parties, appellant agreed in a deed with respondent, to assume that liability of Hotel Hibiscus Limited. Appellant was proved to be in breach of that agreement with respondent. Appellant cannot pray in its aid dealings between respondent and Hotel Hibiscus Limited. They are not known except that no debt now remains between these two parties. It is not known what the position would be when appellant did meet the liability under the bills. So far as concerns appellant the dealings between respondent and Hotel Hibiscus Limited are res inter alios acta. This ground fails.

The bargain between appellant and respondent has now been correctly expressed so that it gives effect to their common intention in relation to the liability assumed by appellant. It is to assume the liability of Hotel Hibiscus Limited to pay the said bills. This, so it seems to me, means that appellant must provide funds to meet each bill as it falls due for payment at the Bank of New Zealand at Nadi. Clause 7 is silent on the procedure necessary for this but that may be a matter for appellant to arrange. Counsel for appellant contends that the obligation under clause 7, without saying how it will be performed, must necessarily result in a breach of the Exchange Control Ordinance (Cap.186). The essence of the argument is that any payment made can only be made with the intention that the funds will become the property of an overseas company, namely, the drawer of the bills, United Dominion

Corporation Finance Limited. Reliance was placed on Section 7.

Section 7 provides that, without the consent of the Central Monetary Authority no person shall :-

(a) make any payment to or for the credit of a person resident outside the schedule territories; or

(b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident out side the schedule territories; or

(c) place any sum to the credit of any person resident outside the scheduled territories:

"Schedule territories" now means Fiji. So Section 7 prohibits any such transaction with a person outside Fiji. Section 7 refers to payments or the placing of credit. It is the act of so doing that is prohibited. Clause 7 is a contract which necessarily involves, so it appears, to do acts which will, at the time of doing them, then be in breach of Section 7.

Section 35(1) provides as follows:

35. (1) It shall be an implied condition in any contract that, where by virtue of this Ordinance the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission of consent is given or is not required:

> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Ordinance or for any other reason.

In my opinion Section 35(1) applies to the contract evidenced by Clause 7. This throws the obligation on appellant to get the necessary consent. Appellant cannot refuse to apply for consent and then say, since it elected not to make performance in a legal manner, the contract is illegal and it is absolved from performance. Appellant would be taking advantage of a state of affairs which it has itself produced. The law does not allow that. In New Zealand Shipping Company Limited v. Societe des Ateliers et Chartiers de France (1919), A.C.1; 1918-19 All E.R. (reprint) 552 Lord Finlay L.C. said:-

> "It is principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by the case of Rede v. Fair (1817) 6 M & S 121, 105 E.R. 1188."

His Lordship was referring to the failure of a building contractor to proceed with construction work with due diligence. Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd. (1952) 2 All E.R. 497 was a case concerned with a contract subject to the granting of a Brazilian export licence. It was held that, to be relieved from liability, the party bound to obtain the goods must show it had made every reasonable effort to obtain the

licence. I reviewed the authorities in Mulvena v. Kelman (1965) N.Z.L.R. 656. The principle has been reviewed in many New Zealand cases since and it is clear that the party bound must take all reasonable steps to comply with the condition.

However, in the event of default of performance respondent has a right of action to recover its loss. This is what the present action is. The fourth schedule to the Ordinance provides for legal proceedings. Section 4 of the Schedule provides:-

> 4.(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Central Monetary Authority and of that permission not having been given or having been revoked.
>
> (2) No court shall be prescribed for the purpose of this paragraph unless the Central Monetary Authority is satisfied that adequate provision has been made therefore by rules of court for the purposes specified under the last preceding paragraph.

The Supreme Court of Suva is a competent court within the Ordinance. That has not been challenged.

These provisions, with only immaterial alterations, are a re-production of a similar provisions in the Exchange Control Act 1947 (10 and 11 Geo. VI C.14). They were considered in Contract and Trading Co. (Southern) Ltd. v. Barbey & Others (1960) A.C. 244; (1959) 1 All E.R. 846.

Respondents in that case carried on business and were resident outside the "scheduled territories." They were the holders in due course of bills which were dishonoured on presentation in England. The House of Lords (Lord Keith of Avonholm dissenting) held that respondents were entitled to judgment since a debt due under a bill of exchange was a debt to which the legislation applied and therefore recovery in the High Court was not to be defeated by the fact Treasury's permission has not been given. In my respectful judgment this decision ought to be followed in Fiji. The reasons of their Lordships applies equally to the legislation in this Country. A similar result had earlier been reached by the Court of Appeal in England in Cummings v. London Bullion Co. Ltd. (1952) 1 K.B. ; (1952) 1 All E.R. 383.

I would dismiss the appeal with costs.

(Sgd.) T. Henry
Judge of Appeal

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Civil Jurisdiction

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BETWEEN:

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Appellant

- and -

SHERATON HOTELS LIMITED

Respondent

S.M. Koya for the Appellant
K.C. Ramrakha & E.S. Sharma for the Respondent.

Date of Hearing: 14th March, 1977
Delivery of Judgment: 25th March, 1977

JUDGMENT OF MARSACK J.A.

The facts in this case are extremely complicated and I have found it difficult to set them out in logical order in my mind. I have, after mature consideration come to the conclusion that they have been correctly and adequately dealt with in the judgment of Sir Trevor Henry. It is I think clear that, as between the parties to the Deed on which this

action is based, the appellants have received all that was to come to them under that document, including all the chattels enumerated in clause 6 of the Deed. Therefore the respondents had a clear right, under the Deed, to insist on the discharge of all financial obligations undertaken by the appellants, including those set out in clause 7 of the Deed. Full performance of covenants by one party to a deed calls - in the absence of special circumstances - for full performance by the other party. Accordingly, leaving on one side for the moment any possible effect of the Exchange control Ordinance, the respondents were fully entitled to judgment in their favour for the sum fixed in the Court below.

On the question of the possible effect on the transaction of the provisions of the Exchange Control Ordinance, I am in full agreement with what is said on that subject by my brother Henry in his judgment. Consequently I concur, for the reasons given, that the appeal must be dismissed with costs.

(Sgd.) C.C. Marsack
Judge of Appeal

Suva,
25th March, 1977

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Civil Jurisdiction
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Between:

MACGREGOR INVESTMENTS LIMITED

Appellant
(Original Defendant)

- and -

SHERATON HOTELS LIMITED

Respondent
(Original Plaintiff)

S.M. Koya for the Appellant
K.C. Ramrakha & E.S. Sharama for the Respondent

Date of Hearing: 14th March, 1977
Date of Judgment: 25th March, 1977

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the Judgment of Henry J.A. in this appeal. I fully agree with his reasoning and conclusions and have nothing to add.

All members of the Court being of the same opinion the appeal is dismissed with costs.

(Sgd.) T.J. Gould
Vice President