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IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO.67 OF 1990
(Judicial Review No. 29 of 1989)

BETWEEN:

REDDYS ENTERPRISES LIMITED — Appellant

AND

THE GOVERNOR OF THE RESERVE BANK OF FIJI — Respondent

Mr. B. C. Patel — for the Appellant
Mr. M. J. Scott & G. E. Leung — for the Respondent

Date of Hearing: 28th August, 1992
Date of Delivery of Judgment: 14th DECEMBER, 1992

JUDGMENT OF THE COURT

This is an appeal from a decision of Mr. Justice Byrne, given on 29th November, 1990. The facts to which we believe it is necessary to refer fall within very small compass. Indeed, in the ultimate, we believe they raise for answer a very simple question, although that will take some explaining. The answer, perhaps, is not quite so simple.

The appellant, a company registered and carrying on business in Fiji, to which we will refer as 'the resident', was the owner of a hotel near Lautoka called the Tanoa Hotel. For reasons connected with the events which occurred in Fiji in May 1987, it was unable to obtain adaequate insurance in Fiji for the hotel.

It therefore sought cover overseas, and was able to obtain adequate insurance through its broker in England. This required the payment of the annual premium there. The resident applied for and obtained permission from the Commissioner of Insurance to take out this insurance, and it did so; it then sought the approval of the Reserve Bank of Fiji to forward the insurance premium to the London underwriters, and this was obtained (see generally record p.17).

The insurers were in fact ten or eleven underwriters who took the total risk in various proportions. The period of insurance was for one year from 20th November 1988, and the cover was then renewed; nothing turns on this. The policy, or a copy, was put in evidence. It is only necessary at this stage to state that the amount of cover, the premium, and all other references to sums of money were in Fijian dollars.

The Tanoa Hotel was destroyed by fire on 17th December, 1988. After protracted negotiations by the resident's brokers in London, a sum of $F5.1 million was agreed to be paid by the underwriters; 90% of this sum was to be paid by them in London. This was in May 1989.

On 22nd May 1989 the resident applied to the Governor of the Reserve Bank of Fiji "for permission under the Exchange Control Act" to invest the proceeds of the insurance off-shore, the reason being that the use of the money in Fiji had not been

decided upon, that a careful assessment of the future of tourism in Fiji would have to be made before any decision as to its optimum use could be ascertained, and that a period of about 24 months would be necessary to do this. During this period the money could earn an investment income of about 14% if placed on term deposit overseas, but only about half this if the same thing was done in Fiji. Hence the request.

By letter dated 8th June 1989, the Reserve Bank refused the request, and required the money to be "repatriated to Fiji." A fresh application was made by the resident on 15th June 1989. It was rejected on 20th June. The solicitors for the resident then sought permission from the Reserve Bank for the funds to remain off-shore for a period of one month while an "appeal" against the decision of the Governor of the Reserve Bank was made to the Minister. This was granted, and an appeal was lodged on 22nd August 1989. Whether any such appeal was competent or not is of no consequence. The only relevant matter is that the permission to retain the funds off shore was renewed up to 13th October, 1989. By letter dated that day the appeal was refused, and the resident was required to repatriate the funds to Fiji forthwith.

Thereafter, on 16th November, 1989 the resident applied to the High Court for orders in effect to nullify the decision of the Reserve Bank of 8th June and to require the Governor of the

Bank to grant permission to invest the moneys off-shore pending construction of a new hotel, "but not beyond 8 June 1991." The application set out the grounds upon which it was sought to set aside the decision of the Reserve Bank. They did not include a claim that the matter was one about which the Governor had no power to make a decision; however, this aspect was extensively argued at the hearing, and, subject to orders which we propose to make, does not pose any problem so far as the outcome of the appeal is concerned.

The submissions put to the learned Judge, and his decision, largely focused on the application of s.26 of the Exchange Control Act (Cap.211). That section is in the following terms:

> *"S.26.-(1) Except with the permission of the Minister, no person resident in Fiji who has a right (whether present or future and whether vested or contingent) to receive any specified currency, or to receive from a person resident outside Fiji a payment in Fiji currency, shall do, or refrain from doing, any act with intent to secure or shall do any act which involves, is in association with or is preparatory to any transactions securing-*
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> *(a) that the receipt by him of the whole or part of that currency or, as the case may be, of that payment in Fiji currency, is delayed; or*
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> *(b) that the currency or payment ceases, in whole or in part, to be receivable by him;*
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> *Provided that nothing in this subsection-*
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> *(i) shall, unless the Minister otherwise directs, impose on any person any obligation, in relation to any debt arising in the carrying on of any trade or business, to procure the payment thereof at an earlier time than is customary in the course of that trade or business; or*

(ii) shall, unless the Minister otherwise directs, prohibit any transfer to a person resident in Fiji and not elsewhere of any right to receive any specified currency or payment in Fiji currency.

(2) Where a person has contravened the provisions of subsection (1) in relation to any specified currency or payment in Fiji currency, the Minister may give to him or to any other person who appears to the Minister to be in a position to give effect thereto (being a person in or resident in Fiji) such direction as appear to the Minister to be expedient for the purpose of obtaining or expediting the receipt of the currency or payment in question, and, without prejudice to the generality of the preceding provisions of this subsection, may direct that there shall be assigned to the Minister, or to such person as may be specified in the directions, the right to receive the currency or payment or enforce any security for the receipt thereof."

Before turning to the question of the operation of that section, and in order to reach a conclusion as to how this matter ought to be decided, we think it is appropriate to consider the following matters.

The contingent right to payment, or the "policy", was bought with Fiji currency in England; it provided for payment in Fiji currency. It had, however, no requirement as to where payment might be demanded or made; once the indebtedness under the policy arose it could be legally discharged by payment by underwriters in England.

So far as the evidence before the Court was concerned it was so discharged. There would, of course, be no law of Fiji that operated to require the underwriters to do otherwise. So that the payment of the proceeds could be and was made there.

The second matter is this. In granting consent to the resident to remit the insurance premiums to England, the Minister, via the Governor of the Reserve Bank, had not sought to ensure that the insurance policy contained any provision which would require that the payment of the proceeds of any claim must be made in Fiji, nor remitted to Fiji, nor had he imposed any requirement of this sort as a condition upon the grant of his consent. So the resident was entitled to receive them there.

The third matter is that it is not alleged that there was any delay in making payment under the policy once the amount had been settled, i.e. once the quantum of the debt was known, nor was there any delay in its receipt.

The fourth matter is that as a result of the payment of the proceeds the resident legitimately had Fiji currency in England.

The fifth matter is that the problem really arises in relation to what the resident wanted to do with its Fiji currency in England. It wanted to lend it to a non-resident for

a period of a year or two years or whatever. That is what it sought permission to do and was refused.

Subject to the matters we raise later herein, we mention that it does not seem to us to affect the legal position if the money had in fact been paid by the insurance company to a branch office of the resident in England or to an agent to hold on its behalf. The money would certainly be held in a bank or financial institution and be regarded as the resident's money, even if it were being held by the broker. Indeed, permission was given to the resident to hold the money in London as we have previously stated. So the position simply was that the resident by itself or its agent held Fiji currency in London and wanted to invest it.

Turning now to s.26, the question whether this section had any application at all in the circumstances of this case was the way the case was argued. It therefore is necessary for us to give our views as to the true interpretation to be given to this portion of the Exchange Control Act.

The section appears in PART IV - MISCELLANEOUS, with the section identification "Duty to collect certain debts." It clearly applies to a resident with a right to receive from a person resident outside Fiji a payment in Fiji currency. So it clearly operates upon a resident who has a <u>right</u>, the right to receive a payment in Fiji dollars. It then goes on to proscribe

any actions or activities of the resident that might or would delay the receipt of the moneys, i.e. the payment in Fiji currency, or from doing anything that abrogates the payment, i.e. that the payment ceases to be receivable by him. That is all very simple - the section comes down on a resident who is entitled to have Fiji dollars paid to him; he must not do anything that puts off the payment or destroys or cancels his right to receive the money.

The section, in other simple terms, refers to a debt owing to a Fiji resident. And that is exactly how the section is described: "Duty to collect certain debts." Those debts include a debt owing to a Fiji resident by a person resident outside Fiji and payable in Fjji currency. It also relates to other currencies. It hardly seems possible to suggest that the section was only intended to operate where other currencies were receivable by a resident "in Fiji". What gives the Act its extra-territorial operation is that it comes down on the resident, and affects his overseas credits so as to give effect to exchange control. We do not believe it should be restricted in this operation by reading the section down in the way that has been suggested.

The learned Judge was invited to hold, and did hold, that where s.26(1) refers to "payment in Fiji currency", it must be read as meaning "payment in Fiji" ; by putting this meaning on the words he reached the conclusion that by not repatriating the

money to Fiji for the reasons and in the way that we have described, the resident had done an act to secure or in association with securing that the receipt by him of the payment in Fiji currency "in Fiji" had been delayed, or that the payment had ceased to be receivable by him; hence it had contravened s.26(1).

We are unable to agree.

It is trite law that except in the most extraordinary circumstances, a statute will be read so as to give the same meaning to the same words or phrases that appear in different parts of it, even more so when they appear in the same subsection. Here, s.26(1) comes down on a resident who "is entitled to receive from a person resident outside Fiji a payment in Fiji currency"; it goes on to proscribe any action by that resident that would cause "that payment in Fiji currency" to be delayed or to become no longer payable. If the words are to be read as meaning "payment in Fiji currency in Fiji" then it follows that the section was only intended to operate upon debts payable in Fiji to a resident by a non-resident; to hold otherwise would be given different meanings to the same words in the same section.

We do not believe that the section was intended to have such a limited operation. The Act, so it seems to us, was intended to regulate dealings by residents with assets or

property or creditors which involved Fiji currency overseas. For example, s.9 of the Act is as follows:

> *"9(1) Except with the permission of the Minister, no person in or resident in Fiji shall make any payment to or for the credit of any person as consideration for or in association with-*
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> *(a) ...*
>
> *(b) the transfer to any person, or the creation in favour of any person, of a right (whether present or future, and whether vested or contingent) to receive a payment outside Fiji or to acquire property which is outside Fiji. (Amended by Legal Notice 112 of 1970; Act 24 of 1979, s.8.)*
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> *(2) Nothing in this section shall prohibit the making of any payment in accordance with the terms of a permission or consent granted under this Act."*

We shall come back to this section later, but we pause here to state that this is the very section pursuant to which the resident sought and was granted permission to remit the premium for the insurance policy to the brokers in England to enable the insurance to be effected there. It would be very difficult to suppose that when the resident had been given permission to receive a payment outside Fiji he acted in contravention of s.26 by not having a payment made in Fiji. Indeed, as the policy was effected in England and permitted payment in England, the insurers could probably have refused to discharge their indebtedness by payment elsewhere.

But leaving all these on one side, the section, s.26, was not intended to deal with the matter of payment in Fiji at all. It was intended to cover actions by a resident designed to put off payment of a debt payable in Fijian currency to it by a person resident outside Fiji. The fact of the matter is that the creditor, the resident, was paid Fijian dollars pursuant to his right to receive payment, and did nothing to delay the receipt of the money. The section is just not applicable in the circumstances. The real problem is whether, having been paid, the resident has a right to retain the moneys off-shore. Section 26 does not touch this situation.

Naturally enough it was never suggested that instructions from the resident to his insurer to pay the money to his agent in England amounted to a contravention of the section in some way. By payment the debt was discharged, and there was no delay or other reason why the section would apply.

Before the learned trial Judge it was submitted that the resident was in breach of ss.4 and 9 of the Exchange Control Act. Quite clearly neither of these sections apply. The learned Judge found against the Bank on these issues. We agree with his findings but not the reasons he gave for them. In so far as the payment of the insurance premium amounted to a payment by the resident to the credit of a person as consideration for the creation of a right to receive a payment

outside Fiji (the proceeds of the insurance), picking up the words of s.9 (1) (b), then the permission of the Minister had been received as required by the section. If the Minister did not see fit to impose any condition upon where the proceeds were to be received or transmitted, so be it.

We would point out that it was never suggested in the Court below, nor to us, that ss.7 or 8 of the Act might apply to the placing of the insurance proceeds by the resident upon term deposit in England or elsewhere off-shore, nor that any other investment of the money pending the hearing of these proceedings might contravene either of those provisions of the Act. We have looked at the terms of ss.7 and 8, and do not believe that they apply. We take the view that this whole matter has been so extensively considered and prepared that these sections were bound to have been looked at and a deliberate decision made not to raise them. We do not propose to permit any further consideration.

There was a further matter argued before the learned trial Judge that is no longer relevant in the light of our decision, but about which we are prepared to express our views. It was on a submission that the Governor of the Reserve Bank was not empowered to make a decision under s.26 and that any such decision was required to be made by the Board of the Reserve Bank. The learned Judge held to the contrary. In our opinion he was clearly right in doing so for the reasons which he gave.

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In this case we had no power, but that was because the section was not applicable.

The result is that there was, in the circumstances no requirement for the resident to seek the consent of the Minister pursuant to the provisions of ss.26, 4 or 9. Therefore any purported decision the Governor, or the Minister, made about the matter is nugatory. This obviates the need to consider any question of interfering with it, or deciding the matter of whether the Governor had given proper consideration to the granting or refusing of consent.

We would point out that whatever may be the legal position, the resident has in fact held the moneys in England since about May 1989. It sought permission to hold them there for 24 months. That period has long since expired. Instead of spending further time and money in litigation the parties might see fit to take some other course.

The order of the Court will be:

Appeal allowed. The order made on 29th November 1990 is set aside except the order for costs. For reasons that we have given we do not believe there is a need to make any further orders at this stage.

The parties may wish to consider what order for costs, if any, should be made, and if they cannot agree, to make

submissions. The fact is that there was no need to bring the proceedings at all; the appellant could have waited until the Bank took proceedings or threatened to do so. On the other hand the bank claimed a right to have the money repatriated, and was prepared to assert their claim before the Judge and on appeal.

We will make the order as set out above and stand the question of costs over generally with liberty to either party to restore the matter for further hearing on this aspect.

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Michael Scott
Judge of Appeal