IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 21 OF 1992
(High Court Civil Action No. 301 of 1990)

BETWEEN:

VINOD KUMAR RAMANLAL PATEL — APPELLANT

-and-

FIRST PACIFIC MORTGAGE LIMITED — RESPONDENT

Dr Sahu Khan for the Appellant
Mr V Kapadia for the Respondent

Date of Hearing : 8 November 1993
Date of Delivery of Judgment : 11 November 1993

JUDGMENT OF THE COURT

On 19 June 1990 judgment was entered in the Supreme Court of Queensland for the Respondent against the Appellant for A$256,885.89, being the amount claimed to be owing under a contract entered into in Queensland.

On 17 August 1990 an order was made by Byrne J for the registration of that judgment in the High Court of Fiji.

The Appellant then applied for the order of registration to be set aside and for stay of execution and enforcement proceedings in respect of the judgment. On 20 August 1991

Jayaratne J declined to set aside the registration and the present appeal is from that decision.

On behalf of the Appellant four grounds of appeal have been argued, and we deal with these in turn :

1. The original application for registration was dated and filed on 3 August 1990, and was accompanied by the affidavit of Robert Andrew Smith which was sworn on 1 August 1990. It was argued that the affidavit was defective and ought not to have been received by the Judge. Reference was made to the decision of Conolly J in Hattan v Bilham 10 N.Z.L.R. 256. That was the case of a motion on summons for leave to defend an action on a promissory note. The affidavit in support was sworn the day before the issue of the summons. Conolly J declined to read the affidavit and as there was then nothing to support the summons, he dismissed it.

It was argued that, on the basis of that decision, the affidavit ought not to have been received.

If that decision was correct then it would mean that in any matter commenced by summons or motion which was required to be supported by affidavit, the affidavit could not be sworn until after the summons or motion was filed. This would produce an absurd situation and, if that is the effect of the decision in

Hattan v Bilham then we expressly decline to follow it. In practice the supporting affidavit will almost always need to be sworn before the summons or motion is filed, and we can see no objection to that procedure.

It was argued further under this ground that, as the number of the action was inserted on the affidavit after it was filed, this amounted to an alteration to the affidavit in contravention of Order 41 rule 7 of the High Court Rules and so, for this reason also, the affidavit should not have been received. Order 41 r.7 applies, however, only to alterations made in the body of the affidavit and that was not what occurred here.

We are not prepared to uphold this ground of appeal.

2. Grounds 2 and 4 in the notice of Appeal were argued together. They were based on the contention that there ought not to have been registration of the judgment because of the provisions of the Exchange Control Act Cap. 211. This contention was advanced under two heads:

(a) Reference was made first to s 35 (1) of the Exchange Control Act which provides:

> *"35 (1) It shall be an implied condition in any contract that, where, by virtue of this Act, 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 or 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 Act or for any other reason."*

It was argued that the Appellant had made it clear before entering into the contract that he was aware of the provisions of the Exchange Control Act and the requirement that the consent of the Minister would be needed for sending money out of Fiji. He had accordingly specified that any liability he may have under the contract must be satisfied out of properties in Brisbane. He had accordingly required a clause in the contract in these terms:

> *"The Guarantor agrees and declares that any proceedings in respect of any cause of action arising hereunder may be instituted, heard and determined by a court of competent jurisdiction at Brisbane and that such court shall possess territorial jurisdiction to hear and determine any such proceedings."*

The contention was that the parties had intended a contract enforceable only in Queensland, and that the Respondent was now seeking to enforce it in Fiji by a back door method.

The clause in the contract which we have set out does not, however, have the effect contended for it. It does no more than to make the law of Queensland the law of the contract. It was acknowledged on behalf of the Appellant that judgment was

properly given by the Supreme Court of Queensland. We can see no basis on which it can be said that such a judgment, properly obtained, may not be registered in Fiji.

(b) The further argument advanced was that the registration ought to be set aside on the basis of public policy. This argument depended on the provisions of s 6 (1) of the Foreign Judgments (Reciprocal Enforcements) Act Cap. 40 which sets out the circumstances in which a foreign judgment may be set aside. Para (v) of s 6(1) provides that registration of the judgment shall be set aside if the registering court is satisfied -

> *"(v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court."*

What may happen when the time comes for the Respondent to enforce the judgment is a matter upon which this Court is unable to speculate. It may be that, if the consent of the Minister is sought, some issue as to public policy could arise, but this is a matter which we are not able to determine now.

Accordingly, the matters advanced under grounds 2 and 4 cannot succeed.

3. This ground of appeal arises out of some confusion between the Reciprocal Enforcement of Judgments Act, Cap. 39, and the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 40. The

former is confined to judgments of the High Court in England, or Ireland, or in the Court of Session in Scotland. The latter relates to judgments of courts in a number of other countries which, by Proclamation, include the Supreme Court of Queensland.

Notwithstanding that these two Acts are made to apply to different jurisdictions their provisions have not been kept distinct from each other. Order 71 of the High Court Rules provides that the Reciprocal Enforcement of Judgments Rules made under the Reciprocal Enforcement of Judgments Act, Cap. 39, shall apply, with necessary modifications, to proceedings under the Foreign Judgments (Reciprocal Enforcements) Act, Cap. 40.

Rule 4 of the Reciprocal Enforcement of Judgments Rules specifies that the summons for leave to register a judgment shall be intituled, "In the matter of the Reciprocal Enforcement of Judgments Act ...." It was for this reason that the summons in the present case was intituled in that way.

We are bound to say that a "necessary modification" could well have been made so as to show an intitulement under the more appropriate Act, but we can see no possibility of their having been any misunderstanding or miscarriage of justice as between

the parties and we are not prepared to uphold this ground of appeal.

The appeal is dismissed with costs.

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Mr Justice Michael M Helsham
President Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Sir Gordon Ward
Justice of Appeal