

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0004 OF 95S
(High Court Civil Action No. 427 of 1993)

BETWEEN:

FANUZA LIMITED
ZARIN KHAN
NUR ALI

APPELLANTS

A N D: MELVYN BLOOM
YVONNE BLOOM
LINLUCK NOMINEES LIMITED

RESPONDENTS

Dr. M. S. Sahu Khan for the Appellants
Mr. R. A. Smith for the Respondents

Date and Place of Hearing: 13 November 1996, Suva
Date of Delivery of Judgment: 15 November 1996

JUDGMENT OF THE COURT

This appeal is against the judgment of the High Court in favour of the respondents in a civil action in which they were the plaintiffs. The civil action concerned two companies, Nuvonne Hotel Ltd ("Nuvonne") and Linluck Nominees Ltd ("Linluck"), each of which owned and operated an hotel. Originally the first and second respondents owned shares in both companies. Some shares in both companies were also owned by another company, Fanuza Ltd ("Fanuza"); it is the first appellant and is wholly owned by the other two appellants. There was interlinking ownership of shares of Linluck, Fanuza and Nuvonne. By deed dated 4 October 1991 the

parties agreed to transfer the shares to one another so that the first and second respondents would own all the shares in Linluck and Fanuza would own all the shares in Nuvonne. The first and second respondents were resident outside Fiji, so that by virtue of section 11(1) of the Exchange Control Act (Cap.211) the agreed transfer of the shares to them and by them could be made only with the permission of the Minister for Finance, or the Reserve Bank of Fiji as his delegate pursuant to section 48 of the Reserve Bank of Fiji Act (Cap.210). The deed contained provisions for the transfer of the shares in escrow until permission was given by the Reserve Bank. The deed also provided for Fanuza to pay Linluck \$100,000 as part of the consideration for the transfer of the shares to it; a motor vehicle, the property of Linluck was to be transferred to Nuvonne.

At the conclusion of a pre-trial conference the parties' solicitors signed an agreement in the following terms:-

- "1. That they are bound by the deed made between them and dated 4 October 1991.
- 2. Fanuza has not transferred 5700 shares in Linluck to the Blooms pursuant to clause 2 [a] of the deed and has not paid Linluck \$100,000.00 pursuant to clause 2 [b] of the deed.
- 3. That the issues remaining for determination by the court are:-
 - [a] Was there any breach of the Exchange Control Act or Reserve Bank Act by any party to the deed and if there was what was the effect of such breach on the

transactions recorded in the deed?;

- [b] Has the deed "expired" and if so what is the significance of its expiry?*
- [c] Have the Plaintiffs been guilty of any laches or acquiescence and are they estopped from making claims or demands under the deed?*
- [d] Are the Plaintiffs entitled to the relief claimed in their statement of claim of 9 August 1993?*

In the statement of his reasons for giving judgment for the respondents Scott J. said that none of the defences other than that regarding the Exchange Control Act had been argued. He expressly referred to the fact that the defences of laches, expiry of the deed, contravention of public policy and estoppel were not argued. He said that he saw no merit in any of them. In respect of the question whether the Reserve Bank had given its permission for the things which the deed required to be done and which needed such permission, His Lordship noted that the evidence on it was mainly documentary and that he found himself unable to answer the question. However, he held that it was not necessary for the respondents to establish that permission was given. His Lordship then made certain orders giving rise to the present appeal.

The grounds of this appeal are as follows:

"1. THAT the learned trial Judge erred in law and in fact in ordering that the First Defendant do transfer 5,700 ordinary shares in Linluck Nominees Limited to the First and Second Plaintiffs to be held in esciour (sic) as provided in claim (sic) 2 (a) (i) of the deed pending receipt of the relevant Reserve

Bank permission and that \$100,000 be paid into Court pending Reserve Bank permission to pay the same out to the Third Respondent in as much as:

- (a) The whole agreement in question was unlawful, invalid null and void as it was entered into in breach of the Exchange Control Act and the Reserve Bank Act and laws relating thereto and/or it was contrary to Public Policy and/or unlawful and illegal under the Common Law particularly, as regards compounding of felony and/or misdemeanour and/or statutory breaches.
- (b) The Respondents could not provide the consideration expressed in the said deed pertaining to the transfer of certain shares in the Third Respondent company and one Nuvonne Hotel Limited and both the companies having their registered office in Fiji and incorporated in Fiji in as much as the Respondents were not lawfully the holders of the relevant shares in the Companies and the whole purported transaction referred to in the said deed and/or the purported (sic) share holding of the Respondents in the said 2 companies were tainted with illegally (sic) particularly having regard to the Exchange Control Act and the Reserve Bank Act and the laws relating thereto.
- (c) The respondents had not compiled (sic) with the initial requirement of the Reserve Bank of Fiji when they were required to bring certain funds from outside Fiji as regards the shareholding in the said companies and which the respondents failed to do.
- (d) That the effect of the Orders so made would breach the provision

of the Exchange Control Act and the Reserve Bank Act and the laws relating thereto.

2. THAT the learned trial Judge erred in law and in fact is not dismissing the claims and action of the Respondents when the Respondents failed to satisfy the Court that the Reserve Bank approval had been granted to the transaction in question.

3. THAT the learned trial Judge erred in law and in fact is (sic) not holding that the Respondents were guilty of laches and acquiescence and they were estopped from making any claims and/or demands under the said Deed in question.

4. THAT the learned trial Judge erred in law and in fact is not holding that the Respondents did not comply with the terms and conditions of the said Deed and the said Deed was rescinded and the Respondents accepted the rescission of the said deed and therefore no rights and/or liabilities arose thereunder.

5. THAT the findings and verdict of the learned trial Judge are unreasonable and cannot be supported having regard to the evidence as a whole in as much as:-

- (a) There was evidence to support the Appellants' contention contained in the statement of defence.
- (b) There was no evidence to support the Respondents' contentions contained in the statement of claim.
- (c) The learned trial Judge made no findings of fact on the relevant issues involved for adjudication."

Grounds 3 and 4 were not argued by Dr Sahu Khan. So far as Ground 1 is concerned, his argument concentrated on the terms of the deed itself and the effects of His Lordship's orders; it did not encompass the matters raised in paragraphs (b) and (c). In respect of Ground 5 he concentrated his argument on the evidence relating to the terms in which the Reserve Bank gave its permission for transfer of the shares

and the significance of the facts which he asserted were established by that evidence.

Dr Sahu Khan also developed an argument related to illegality which was outside the grounds of appeal. We permitted him to do so because a court is bound to take notice of any illegality which comes to its attention, even if neither party has raised the issue (Belvoir Finance Co. Ltd. v Harold G. Cole & Co. Ltd. [1969] 2 All E.R. 904 at 908). His argument was that, even if the deed was not illegal de initio, the contract became illegal once any of its terms was performed, notwithstanding that the acts done by way of such performance were not proscribed. In this case they were transfer of the motor vehicle by Linluck to Nuvonne.

So far as is relevant in this appeal, sections 11(1) and (4) and 35(1) and (3) of the Exchange Control Act are as follows:-

"11.-(1) Except with the permission of the Minister, a security registered in Fiji shall not be transferred, and a security not so registered shall not be transferred in Fiji, unless, in either case, the following requirements are fulfilled, that is to say:-

- (a) neither the transferor nor the person, if any, for whom he is a nominee is resident outside Fiji; and
- (b) the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and that of the person, if any, for whom he is nominee; and

(c) neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and

(d) except where the security is registered in Fiji otherwise than in subsidiary register, the Minister is satisfied that the requirements of paragraph (c) are fulfilled:

...

(4) For the purpose of this section, a company incorporated in Fiji shall be deemed to be resident outside Fiji, if it is controlled by any person resident, or by any company incorporated, outside Fiji."

"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.

.....

(3) The provisions of the Fourth Schedule shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding up of companies, and proceedings under deeds of arrangement or trust deeds for behoof of creditors."

Paragraphs 2 and 4 of the Fourth Schedule referred to in section 35(3) reads:-

"2. Nothing in this Act shall be construed as preventing the payment by any person of any sum into any court in Fiji but the provisions of Part III shall apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside Fiji.

...

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 Minister 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 Minister is satisfied that adequate provision has been made therefor by rules of court for the purposes specified under paragraph 3."

We shall deal first with Ground 1, then with the additional argument regarding illegality and finally with Grounds 2 and 5 together.

Ground 1

There is no doubt that the transfer of the shares to the respondents for which the deed provided required the permission of the Minister or the Reserve Bank to be obtained pursuant to section 11 of the Act before they were undertaken. In order to decide whether a statutory provision is intended

to prohibit the making of a particular contract or only its performance, it is necessary to consider the whole of the statutory context of the provision (St. John Shipping Corp. v. Joseph Rank Ltd. [1957] 1 Q.B. 267). Section 35 of the Act implicitly recognises that a contract to do things which under the Act it would be illegal to do without statutory permission is not void for illegality unless the parties intend to do those things without first obtaining that statutory permission. His Lordship found that the performance of the obligations under the deed was intended to be dependent on the necessary statutory permission having been obtained.

Dr Sahu Khan has submitted that that finding was wrong. He referred to the fact that the deed provided for the transfer to take place on the date on which the deed was executed. On that date, 4 October 1991, the permission of the Reserve Bank, conditional or unconditional, had not been given. However, the deed also contained express provision for the shares and share transfers to be held in escrow until the permission was obtained. The provision for their transfer on the date of the deed has to be interpreted in the context of the whole deed. When so interpreted it is clear that it did not provide for the transfer to take place before the Reserve Bank gave its permission. Accordingly it did not make the deed illegal for breach of the Exchange Control Act.

Dr Sahu Khan submitted further that the provision for payment of \$100,000 by Fanuza to Linluck rendered the deed

illegal. The deed provided for payment in three instalments, on 24 December 1991, 24 March 1992 and 23 December 1992 respectively. The obligation to make the payments was not expressed as being subject to permission being given by the Reserve Bank. Mr Smith submitted that, as at the time when the deed was executed Linluck was resident in Fiji for the purposes of the Exchange Control Act and would remain so until the shares in that company held by Fanuza were transferred to the respondents, no provision for Reserve Bank permission was required. We do not agree. It seems that Linluck probably was resident in Fiji for the purposes of the Act when the deed was executed. But the deed provided for the shares to be transferred on the date of execution; if that occurred, Linluck would be resident outside Fiji by virtue of section 11(4) of the Exchange Control Act before the dates on which the instalments of the \$100,000 were to be paid.

The parties were in agreement, we understand, that, if Linluck was resident outside Fiji when the payments had to be made, the Reserve Bank's permission for them to be made had to be obtained. Certainly their arguments were presented on that basis. In our view section 35 of the Exchange Control Act is designed expressly for such a situation. It is an implied condition of the deed that its term providing for payment of the \$100,000 is not to be performed unless and until the Reserve Bank gives its permission for it. We are satisfied, therefore, that His Lordship did not err in finding that the performance of any obligations under the deed for

which Reserve Bank permission was required was intended to be dependent on permission having been obtained. The deed was not illegal by reason of its terms. Accordingly, the appeal does not succeed on Ground 1.

The Additional Argument regarding Illegality

Essentially Dr Sahu Khan's argument was that, if performance of a term of a contract is illegal without statutory permission for it having been obtained and if no such permission has been obtained, the performance of any other term of the contract renders the contract illegal, even though no statutory permission is required for the performance of that other term. He sought to rely on two decisions of this Court, Ramdin v Pyara Singh (1977) 23 F.L.R. 128 and Phalad v Sukhraj (Civil Appeal No. 43 of 1978; unreported; 8 December 1978). In the first of those cases the appellant, having contracted to buy a Crown lease, lent money to the respondent in consideration of being let into possession of the land before consent for the transfer of the lease had been given by the Director of Lands. The court held that the agreement to make the loan was illegal. In Phalad the appellant made an agreement with the respondent to buy a native lease from him. Consent of the Native Land Trust Board was required for transfer of the lease. Before the consent had been given, the appellant took possession of the land. The statute made it illegal to deal with the land "in any ... manner whatsoever" without the Board's consent. The court

held that, as possession had been completely parted with to the purchaser and immediate rights and liabilities created in respect of that exclusive possession, there had been "substantial implementation" of the agreement for sale and that constituted a dealing with the land for which consent had been required.

In our view neither of those two decisions affords support for Dr Sahu Khan's argument. In both cases acts were done which themselves constituted breaches of the relevant statute. Section 35 of the Act clearly envisages that the performance of some terms of a contract may require Reserve Bank's consent but that the performance of other terms may not. It may be that, where the performance of any of those other terms is so closely related to the performance of the term for which consent is required, the performance of that other term before consent is given is illegal. But that is not the situation with which we are concerned here and we therefore express no concluded view on the matter, which was not fully argued before us. In the present case the parties chose to execute a deed in respect of their agreement. The usual rule that for obligations in a contract to be binding consideration must to be given for the performance of those obligations does not apply to deeds. The provision in the deed for the transfer of the motor vehicle is not in terms that the acts required to be done by the parties are to be done in consideration for the transfer of shares or the payment of the \$100,000. The appeal cannot, therefore,

succeed on Dr Sahu Khan's additional argument relating to illegality.

Ground 2 and 5

Grounds 2 and 5 are concerned with the facts and His Lordship's inability to reach a conclusion in respect of some of them. The evidence of most concern in this appeal is that relating to consent given by the Reserve Bank for the transfer of the shares and whether it was given conditionally. Although the second and third appellants and the first respondent gave oral evidence at some length, little of their evidence was addressed to that matter. Almost all the evidence in respect of it consisted of letters written by officers or employees of the Reserve Bank between 7 May 1992 and 25 October 1993.

From the Reserve Bank letters it is clear that the respondents sought permission of the Reserve Bank for the transfer of the shares and had had discussions and exchanged correspondence about the matter over some period before 7 May 1992. It appears that, when the first and second respondents first bought shares in the two companies, they sought and obtained Reserve Bank permission to do so on condition that they brought \$200,000 into Fiji and used it to reduce a loan made to them in Fiji by a bank. It appears also that at that stage the companies, or one of them, was deemed to be resident outside Fiji because of its shareholders but that, with a

change of shareholders, it became a company resident in Fiji and that the respondents and the Reserve Bank then discussed whether the requirement that \$200,000 should be brought into Fiji should be revoked. In any event the Reserve Bank in its letter of 7 May 1992 gave the respondents permission in principle to acquire the shares (as provided for in the deed) and stated that formal permission would be granted when they provided it with bank confirmation of receipt of \$200,000 in Fiji. The Reserve Bank noted that, with the share transfer, Linluck would be "100% non-resident controlled".

It appears likely, therefore, that permission for the transfer of the shares was to be given on condition that the \$200,000 was brought into Fiji. On 22 June 1992 the Reserve Bank extended the time for the respondents to bring the money in until a court case they were "currently initiating against [their] business associates" was decided. There is no evidence what was the case referred to; the civil action in which the judgment under appeal was given was commenced on 10 August 1993. Be that as it may, the next letter from the Reserve Bank which is in evidence is dated 5 February 1993. Indeed there are two letters bearing that date, both addressed to the first respondent. Mr Smith relied heavily on one of them in support of a contention that on that date the Reserve Bank gave the respondents unconditional permission to acquire the shares. Certainly that letter is expressed in terms of granting formal approval for that acquisition and no conditions are imposed by it or referred to in it. However,

the writer states that the letter is "further to our letter of even date". In that other letter formal approval for acquisition of the shares is given on condition that documentary evidence be provided that consideration for the purchase of the shares was "sourced from net sales proceeds of your shareholding" in Nuvonne. Approval was also given for the respondents "to temporarily hold" bringing \$200,000 into Fiji pending the outcome of "the legal action" against their former business associates. In the letter written later that day and relied on by Mr Smith the writer confirms that the respondents had provided the required documentary evidence. On 23 October 1993 and 25 October 1993 the Reserve Bank wrote to the bank which provided the loan to the respondents informing it that, if the court case was "not over" by 31 December 1993, the respondents would have to bring the \$200,000 into Fiji.

Scott J. stated in his judgment that he was "not in a position to judge whether in fact the Reserve Bank had ... given blanket clearance to what was agreed by the parties". Having examined the evidence ourselves we are not able to say that he should have come to any firm conclusion on that question; Mr Smith has not convinced us that we should do so. Dr Sahu Khan has submitted that the onus of proving that unconditional permission was given by the Reserve Bank rested on the respondents; as the onus was not discharged, His Lordship should have found that performance of the contract after 31 December 1993 would be illegal, because of lack of

Reserve Bank permission for it, and that the contract became unenforceable. We accept the reasoning in the first part of the submission, relating to the onus of proof. But we cannot accept the reasoning in the second part, relating to unenforceability.

The deed always envisaged the need for Reserve Bank approval of the performance of some of its terms. No time was set for the obtaining of the approval, although the fact that the deed provided that the transfer of shares was to take place on the day on which the deed was executed, indicates an intention on the part of both parties that the obligations imposed would be performed expeditiously, if necessary by transfer in escrow. In fact Clause N in the preamble to the deed provided that "the parties hereto are desirous of satisfying all terms and conditions as soon as practicable". Fanuza did not discharge its obligation to transfer the shares in escrow expeditiously. Indeed it still has not done so. It cannot, therefore, now complain that the respondents failed to obtain, expeditiously or otherwise, the Reserve Bank's unconditional consent or failed to meet, expeditiously or otherwise, any conditions of the consent. Neither failure constituted a breach of the Exchange Control Act; nor did it render the contract unenforceable.

The situation now is that the contract contained in the deed has been partly performed but that it cannot be fully performed without the consent of the Reserve Bank. It never

could be; that was the situation from the start and has remained unchanged throughout. It remains so still. Fanuza was obliged to transfer expeditiously its shares in Linluck in escrow pending Reserve Bank permission for their complete transfer to the first and second respondents being obtained. His Lordship was clearly right to order Fanuza to discharge that obligation without any further delay.

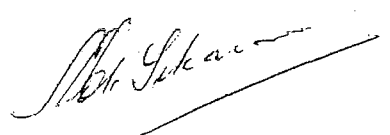
So far as the payment of the \$100,000 is concerned, it was to be made in consideration of transfer of the shares in Nuvonne by the respondents to the appellants. Again they were required to transfer them in escrow, pending Reserve Bank permission being given for their complete transfer. It is not in dispute that the shares were transferred in escrow. Dr Sahu Khan submits that the \$100,000 is not payable until the transfer is completed and so the order for payment into court could not properly be made. He also submitted that without Reserve Bank consent the payment would be illegal. We note that all three dates set in the deed for payment of the instalments have long passed. A debt arose on each of those dates when the payment was not made. Although it might have been illegal to make the payments to Linluck in the absence of Reserve Bank consent, paragraph 2 of the Fourth Schedule authorises the making of an order for the payment of the debt into court. The debt was payable at least from the commencement of the civil action; accordingly His Lordship had the power to make the order which he did for \$100,000 to be paid into court and we are satisfied that he did not err in

fact or in law in doing so.

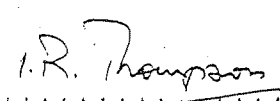
Mr. Smith, in his written submissions, stated that he would apply for an order varying Scott J's order so that the shares would be transferred to the first and second respondents and not be held in escrow, and the \$100,000 paid directly to Linluck. However, he did not give notice of his intention to make that application, as required by rule 19 of the Court of Appeal Rules. In all the circumstances we are not willing to consider the application.

The appeal does not succeed on Grounds 2 and 5.

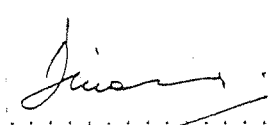
Accordingly the appeal is dismissed. The appellants are to pay the respondents' costs of the appeal.



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Sir Moti Tikaram
President Fiji Court of Appeal



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Mr. Justice I. R. Thompson
Judge of Appeal



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Mr. Justice J. D. Dillon
Judge of Appeal