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IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0061 OF 1997S
(High Court Civil Action No. HBC0285 of 1995/L)

BETWEEN:

MEDITERRANEAN ISLAND RESORT LIMITED

Appellant

AND:

ALESSANDRO BIANCO

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice M. D. Scott, Justice of Appeal

Hearing: Monday, 22 February 1999, Suva

Counsel: Dr. Sahu Khan for the Appellant
Mr. C. B. Young for the Respondent

Date of Judgment: Thursday, 11 March 1999

JUDGMENT OF THE COURT

There are two applications before the Court. The first is for leave to appeal to the Supreme Court against this Court's judgment of 7 October 1998 dismissing an appeal against the judgment of the High Court of 12 September 1997 which awarded the respondent $100,000, being the sum he paid for 10,000 shares in Mediterranean Island Resort Ltd, the appellant. The other application was for a stay of execution, but this was not served and was adjourned sine die. Although the appeal was brought in the names of Guiseppe and Taeko Ruggiero as well, they were found not liable by the High Court and the action against them was dismissed. Their names should no longer appear on these proceedings. There was also judgment for payment of a further $8,200 which was not contested.

The Respondent was at all material times resident outside Fiji when the contract for his purchase of the shares was made. He was employed as Island Manager of the appellant's resort

for 3 years. For personal reasons he wished to return to his homeland (Italy) and resigned shortly after taking up this employment. About a year later his solicitors wrote to the Company rescinding the contract for the purchase of the shares (a certificate for which had been completed in his name), alleging that their issue contravened the Exchange Control Act (Cap 211). Section 10 (1) forbade any person to issue any security (which incudes shares) to a non-Fiji resident without the permission of the Minister, which had not been obtained. He claimed repayment of the $100,000 paid, alleging total failure of consideration because the share issue was invalid. On receipt of this letter the Company attempted to remedy the omission by applying under s.20(2) which allows the Minister to issue a certificate validating any prohibited acts purporting to affect the issue of a security.

This court held that the Minister's prior permission under s.10(1) of the Act was a pre-condition of a valid issue; and that any subsequent validation under s.20(2) could not avail the Company because the respondent had rescinded the contract before it was given. In any event it held that the letter relied on as validation did not constitute such in terms of s.20(2). In response to a submission that the parties were "in pari delicto ", the Court considered that s.10(1) cast the duty of obtaining consent on the issuer of the shares, so that the respondent was not debarred from recovery. The Court rejected an argument that the transaction was illegal. It also dismissed a submission of illegality under s.7(b), which was not raised in the High Court.

The appellant wishes to challenge all these conclusions in the proposed appeal, and we understood Mr Young to accept that it could put forward an arguable case, but beyond this we are not concerned with its merits. The application for leave is made in accordance with s.122(2)(a) of the 1997Constitution stipulating that an appeal may not be brought from a final judgment of this Court unless it gives leave to appeal on a question certified by it to be of significant public

importance. While most questions relating to statutory interpretation can be of public importance, Counsel were unable to refer to any authority discussing the meaning of "significant" in this context.

In Dr. Sahu Khan's submission any question on the meaning of the Exchange Control Act is itself a matter of significant public importance, having regard to the wide impact of that legislation on foreign investment in Fiji and its concern with the flow of currency in and out of the country. But this is only a bare assertion. In such a matter, where the Court can have problems about drawing inferences based only on common knowledge, it would have been assisted by affidavit evidence about the operation of the provisions under review, and of their effects on the commercial and financial community and on the public at large.

Mr Young referred us to Rich v Christchurch Girls' High School Board of Governors (No.2) [1974] 1 NZLR 21, a decision of the Court of Appeal dealing with leave to appeal to the Privy Council, which could be granted only if the question were of great general or public importance. While accepting that the question of law raised was important, the majority of the Court said at p.25.

> *"The question is, however, whether it is in reality a matter of such great general or public importance that the appellant, in the public or general interest rather than in her own, ought to be given the opportunity of challenging the decision of this Court. From the point of view of the public interest there is much to be said for allowing the decision of this Court to stand, qualified as that decision is as being one given on a particular set of facts....."*

while the President added (at p.26) :

> *"But in the long run, it seems to me that whether any of the issues likely to arise on an appeal to the Privy Council is of great general or public importance is largely a matter of opinion",*

and he referred to comments in an earlier decision that it involved a question of degree," where differences between even impartial individual opinions are certain to arise."

We find these remarks helpful, and note that Court's concern also about the absence of affidavit evidence to assist it.

Dr Sahu Khan's submission that s.10(1) did not in terms require consent prior to issue of the shares could raise a matter of significant public importance if that section stood in its own; but s.20 (2) affording the power of validation provides a remedy for its omission, so that the effect of the Court's decision, even if it is mistaken, is likely to be limited only to those who do not receive validation, or (as in this case) where a contract to issue is rescinded before it is validated. Such an event will be rare, leading us to conclude that the questions involving s.10(1) and s.20(2) are not of importance beyond the situation of the appellant and a few others who might find themselves similarly placed. These comments apply also to the argument that the rescission was ineffectual once the contract had been validated. Nor can we see any wider impact on the public of this Court's refusal to accept the appellants's submission that the parties were "in pari delicto"; or from its view that the onus of ensuring that there was compliance with s.10(1) rested on the person issuing the security. In fact we think there could not be an arguable case on that point. As to the question of whether the letter relied on by the appellants as constituting validation under s.20(2) satisfied requirements, of that section, this was very much a matter peculiar to these proceedings, affecting the parties only and has no wider implications of any significance.

The attempt to bring in the implied condition imposed by s.35(1) does not, with respect, seem to take matters any further for the appellant. That condition is directed at exonerating from performance those terms in a contract for which consent is not given. As this Court observed, the initial contract between the parties was lawful, but consent had to be obtained before the shares could be issued. The appellant went ahead and performed the contract by an illegal issue and s.35 cannot relieve it of the consequences of giving this illusory consideration for the money paid by the respondent. However, once again we see any decision on s.35 (1) as one limited to the dispute between those parties in the circumstances disclosed by the evidence and it can have no wider impact.

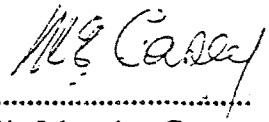
This brings us to the final matter raised by Dr Sahu Khan, namely the effect on the transaction of s.7(b) of the Act, forbidding without permission of the Minister any payment in Fiji to a person resident in Fiji by order or on behalf of a person resident outside Fiji (emphasis added). This was an additional ground advanced for the first time on appeal, and in rejecting it the Court pointed out that the words underlined were not apt to cover a payment made directly by a non-resident. The record of pleadings and evidence given in the High Court establish that the payment of $100,000 was made directly by the respondent to the appellant and there is no suggestion that it was either by his order or on his behalf. This point is plainly unarguable, and should not be the subject of an appeal to the Supreme Court.

For the foregoing reasons the application for leave to appeal must be dismissed.

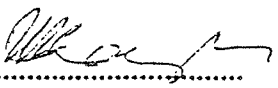
Result:

1. Application for leave to appeal to the Supreme Court is dismissed.

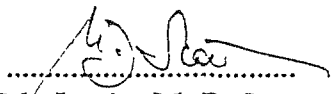
2. Respondent to have costs of $750 to cover his costs and disbursements.



Sir Maurice Casey
Presiding Judge



Sir Mari Kapi
Justice of Appeal



Mr Justice M. D. Scott
Justice of Appeal

Solicitors:

Messrs. Sahu Khan & Sahu Khan, Ba for the Appellant
Messrs. Young & Associates, Suva for the Respondent

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