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

CIVIL APPEAL NO: ABU/0054, 63 & 68/1998S
[High Court Civil Action No: HBC0073/1992]
[High Court Civil Action No: HBC0141/97L]

BETWEEN:

MOHAMMED AKHTAR
HAROON KHAN
MURRAY MERCHANT PACIFIC FINANCE
AND INVESTMENTS LIMITED

-Appellants-

AND:

JENNYNE GONZALEZ

-Respondent-

AND BETWEEN:

JENNYNE GONZALEZ

-Appellant-

AND

MOHAMMED AKHTAR
HAROON KHAN
MURRAY MERCHANT PACIFIC FINANCE
AND INVESTMENTS LIMITED

-Respondents-

Coram: Hon. Justice Ian Sheppard, Presiding Judge
Hon. Justice Sir Rodney Gallen, Justice of Appeal
Hon. Justice Robert Smellie, Justice of Appeal

Hearing: Friday 24th August 2002, Suva
Saturday 25th August 2002, Suva

Counsel: Mr. G. P. Shankar for the 1st Appellant
Mr. M. Maurice & S. D. Sahu Khan for the 2nd Appellant
Mr. M. Raza for the 3rd Appellant
Mr. B. C. Patel & C. B. Young for the Respondent

Date of Judgement: Friday 30th August, 2002

JUDGMENT OF SHEPPARD AND GALLEN JJA

The appeals brought by the parties in this matter raise a number of questions both of law and of fact. The appeals are from judgments of the High Court (Lyons J.), one dealing with liability and the other with damages and other relief. The judgment on liability was delivered on 26th June 1998 and that on damages on 28th August 1998.

In the action tried in the High Court Jennyne Gonzalez, the administratrix of the estate of her late father, Ignazio Gonzalez, succeeded in her causes of action for breach of contract against Mohammed Akhtar as the sole executor and trustee of the estate of Yar Mohammed. Additionally she succeeded in her causes of action for fraud, not only against Mohammed Akhtar, but also against Haroon Khan and Murray Merchant Pacific Finance and Investments Limited (hereinafter referred to as "Murray Merchant"). As against Mohammed Akhtar the learned judge refused Ms Gonzalez' claim for specific performance of the agreement upon which she had sued but in his judgment on damages awarded Ms Gonzalez $461,637.85 against each defendant not distinguishing in his calculations between the amount of damages payable to Ms Gonzalez in respect of her cause of action for breach of contract and those awarded against each of the defendants for fraud.

In this court all of the defendants have challenged the correctness of the judgments recovered against them and have also submitted that the amount of damages awarded was excessive and should be reduced. In her appeal Ms Gonzalez has challenged his Lordship's decision to refuse her specific performance of the contract. Alternatively, she says that the amount of damages awarded was inadequate and that the amount awarded her for her costs of the trial, $106,832.80, should be increased.

Ms Gonzalez' appeal is brought as a separate appeal and not by way of cross-appeal in the appeals brought by the defendants against the judgment directed to be entered against them. This has led to some confusion in the record before us and in the title given to some of the documents used in the appeal. We have endeavored to make the position clear in the title we have given to the proceedings in this judgment. In the interests of further clarification, we propose to refer to the defendant appellants either by name or as the 1st. 2nd or 3rd defendant as the case may be. Ms Gonzalez will either be referred to as the plaintiff or by her name. With that background in mind we propose to refer to the facts of the matter, to the principal findings of fact made by his Lordship and then, in a summary way, to the submissions which have been made and to some of the relevant legislation. Our conclusions in relation to the various submissions will then follow.

At all material times Yar Mohammed was the owner of freehold land in the District of Nadroga. The land comprised an area of slightly more than 101 acres. His Lordship described it as a "long, thin block going from high water mark towards

the interior." The block fronted the ocean and a white sandy beach. His Lordship said that an area of approximately 12 acres lying between high water mark and a tramline could be sub-divided from the remainder of the land. It is understandable that those involved in this case would have perceived the land, particularly the front 12 acres, as a desirable area on which to construct a resort.

The whole of the land was charged to the Fiji Development Bank ("the bank"). The charge was registered on 16th April 1982 which is also the date of the relevant certificate of title, No. 20817.

At all times relevant to these proceedings Mr. Gonzalez was a United States citizen and a resident of that country, but, as his Lordship noted, he had had some contact with Fiji "over the years".

On 25th September 1985 Yar Mohammed agreed to sell to Gonzalez the 12 acres of land situated between the high water mark and the tramline. The price was to be $90,000. The amount was to be paid in instalments and the whole amount was to be paid on or before 16th September 1990. The outstanding balance was to bear interest. Possession of the 12 acres was to be given on the date of the agreement, 25th September 1985. Time was said to be of the essence of the contract. Provision was made for the subdivision of the land into 2 allotments. The consent or approval of statutory authorities was to be obtained. There were some other terms and conditions of the agreement which need not be referred to.

The agreement was formal in form. It was drawn up by a Solicitor, Mr. D. S. Naidu, who acted for both parties. His Lordship said that thereafter neither party "worked closely" with the solicitor "both preferring to go about completing the contract on their own and calling on professional help when required." His Lordship added, however, that "for all intents and purposes though Mr. Naidu was then the common solicitor for both parties".

Some time in 1988, Yar Mohammed decided to seek the services of his own independent solicitor. He retained Mr. Amjal Khan of Khan & Associates in Nadi. Again Mr. Khan noted that Gonzalez and Yar Mohammed went about matters on their own and only attended on the solicitor when they thought it necessary. At times both parties attended on Mr. Khan. Despite this Mr. Khan never thought of Gonzalez as his client.

On 11th of March 1988 a receiving order was made in the High Court against Yar Mohammed pursuant to the provisions of the Bankruptcy Act (Cap.48). During the hearing of the appeal Counsel for Yar Mohammed tendered without objection a copy of an order dated 26th May 1995 made by Sadal J. of the High Court whereby the receiving order was discharged.

As his Lordship said, by early 1990 it seemed that Gonzalez and Yar Moh'd had reached an impasse and progress on completing the contract had slowed. They both attended on Mr. Khan. Mr. Khan discussed the matter with them, and, after receiving the approval of Mr. Naidu, "struck" a further agreement. That, in

substance, provided for the construction of an access road before any further payment was made by Gonzalez. Gonzalez was to pay into Mr. Khan's trust account any moneys to be used for payment to the road builders and any such moneys were to be deducted from the purchase price, the roles of Mr. Khan and Mr. Naidu as solicitors for the parties were noted and payment of purchase moneys was to be "commenced" when the road was complete and Gonzalez then had possession of the land.

The agreement, his Lordship said, was further "refined" in April 1990. Mr. Khan reduced this further agreement to writing and had it signed by both parties. The document referred to begins with the words "It is hereby agreed further to the agreement of 25th September 1985 as follows: -..."

Clause 1 provided that it was agreed that the vendor should have the access road constructed "as per approved plan" as soon as possible commencing on 5 April 1990. Clause 2 provided that the vendor should comply with all the approval conditions of the subdivision and the vendor and purchaser should mutually appoint a contractor who should build the access road " as per plan". Clause 3 provided that the purchaser should pay into the trust account of Khan and Associates at Nadi the sum of $15,000 which was to be retained for payment to the builder of the access road.

By clause 4 it was agreed between the vendor and the purchaser that the access road marked on the plan should be straightened. Clause 5 provided that any balance after the payment of the builder was to be set off against the purchase price.

Clause 6 said that, upon completion of the construction of the road and upon approval of the access by the authorities, the total purchase price due together with all the interest as provided for in the original agreement would be paid into the trust account of Khan & Associates by the purchaser. The amount would be paid to the vendor after the title of the subject land was given to the purchaser. All costs and disbursements were payable by the vendor.

The agreement was dated in April 1990. It appears to have been signed although the copy in the record shows only vague signs of signatures. In needs to be observed at this point that the contract between the parties consisted of the original agreement made in 1985 and the variation of it made in April 1990. His Lordship said he was unable to decide the precise date of the 1990 agreement but added that it was generally agreed to be on or about 5th April 1990.

The subdivision was approved on 13th August 1990 subject to conditions imposed by the local authority. On 16th July 1990 the parties, as his Lordship said, "belatedly" applied for the Minister's approval pursuant to the Land Sales Act (Cap 137) S.6. The approval was granted on 16 October 1990 subject to compliance with conditions. These were that the vendor obtain clearance from the Commissioner of Inland Revenue, "who will ensure that necessary clearance is also

received from the Governor of the Reserve Bank." There was no evidence that the clearance referred to by the Minister from the Commissioner of Inland Revenue was ever obtained or that there was any clearance given by the Governor of the Reserve Bank. His Lordship found that no clearance from the Commissioner of Inland Revenue had been obtained.

On 13th December 1990 Gonzalez and Yar Mohammed made a further agreement. It was in writing and provided that Khan & Associates would continue as solicitors for Yar Mohammed. It also provided that Gonzalez was to deposit in their trust account a sum sufficient to satisfy the mortgagee (that is the Fiji Development Bank) within 14 days of 13th December 1990. Yar Mohammed was to have the surveyor register the final survey plan and satisfy the Inland Revenue requirement provided for in the Minister's consent.

Yar Mohammed was to meet all the relevant authorities' requirements and have the "approvals done" as soon as possible. He understood that subdivision costs were his responsibility and was satisfied with the moneys "already expected and costs paid to solicitors." The agreement of 13th December 1990 was signed and witnessed.

A further agreement was made on 16th March 1991. This was in writing and signed by the 2 parties. Importantly it provided that Yar Mohammed would "bring" the Inland Revenue clearance within 2 weeks of the agreement, "It was his duty since December 1990 as per time given". After referring to this agreement his

Lordship said that it was a fair inference to draw that the $500 payable under the agreement was to come from the moneys held in the trust account. He also said that Yar Mohammed did not obtain the consent of the Commissioner of Inland Revenue.

On 27th August 1991 Gonzalez lodged a caveat on the title of the land claiming an estate or interest as equitable owner by virtue of the sale and purchase agreement between the Caveator and Caveatee dated 25th September 1985. No mention was made of the later agreements, which varied the original agreement. At that stage the title was still in one certificate and the caveat claimed an estate or interest as to an area of 12 acres. The caveat contained the usual statement that it forbade the registration of any dealing with the land until the caveat was withdrawn by the caveator (Gonzalez) or by order of the Supreme Court or until after the lapse of 21 days from the date of service of notice by the caveatee (Yar Mohammed) at the address which was provided.

Mr. Gonzalez died on 23rd May 1992. Ms Gonzalez obtained a grant of letters of administration of his estate in the United States the following year. These were resealed in the High Court of Fiji on 15 September 1994. In the meantime, the original certificate of title was replaced by two new certificates of title, numbered respectively 27071 and 27072. Each was dated 13th January 1993.

The 12 acres of land had become lot 2 in the subdivision that had been effected and comprised the land in certificate of title No. 27072.

Before Gonzalez died Mr. Khan, acting on Yar Mohammed's authority, transferred his file to other solicitors, Koya & Co. Transferred also were trust moneys amounting to $114,800 being the moneys paid previously by Mr. Gonzalez less costs and disbursements. His Lordship said that in accordance with the conditions under which these moneys were originally paid the cheque should have been paid to Mr. Koya's trust account, he then being the solicitor of Yar Mohammed's "choosing".

On 26th September 1991 Koya & Co. wrote to Mr. Naidu calling on Gonzalez to settle within 21 days. The letter proported to make time of the essence of the agreement. On 9 January 1992 Yar Mohammed through Mr. Koya, rescinded the contract. On 22nd January 1992 Naidu said that it was Yar Mohammed who was unable to complete the contract as he had not satisfied the Minister's consent. He had not obtained the clearance of the Commissioner of Inland Revenue.

Gonzalez then commenced proceedings for specific performance or damages for breach of contract. On 23rd January 1992 the Registrar of Titles sent a notice to Gonzalez that unless he obtained an order of the High Court within 21 days the caveat would be removed. On 11 March 1992 Gonzalez applied for an order that the caveat remain. This was granted on that day to be heard inter partes on 27 March 1992. On 27 March 1992 Sadal J. ordered that the caveat be extended until further order of the court. The order was registered on the certificate of title on the 27th March 1992.

Mr. Koya died in 1993. In February 1994 notice was filed in the Court that Messers Sahu Khan and Sahu Khan were henceforth acting for Yar Mohammed. The Khans had taken instructions in or about December 1993. Early in 1994 Mr. E. Ray Holden who subsequently became the principal shareholder of Murray Merchant came to Fiji. Mr. Holden was also a citizen of the United States and resident there. He was alerted to the subject land and the possibility of purchasing it. He was interested in the whole 101 acres. This caused Yar Mohammed and Mr. Holden to seek the advice of Sir Vijay Singh.

Sir Vijay wrote to the Fiji Development Bank on 17th February 1994. He was aware of the litigation between Gonzalez and Yar Mohammed. The bank said that it could not sell the land to Mr. Holden but foreshadowed that it was likely that it would carry out a mortgagee sale at which Mr. Holden could tender. On 10 & 14 June 1994 by advertisement in the daily newspapers it called for tenders. Mr. Holden through his companies, Five Star Holdings Inc and Capital Investments Limited, submitted tenders for $250,100, and $271,000 respectively. Mr. Holden paid the 5% deposit as prescribed for both companies. He nominated Sir Vijay Singh as his 'attorney in Fiji' and his local 'point of contact'. His Lordship noted that the tenders offered were somewhat less than what Mr. Holden and Mr. Yar Mohammed had agreed upon when consulting with Sir Vijay Singh. There a price of $300,000 was discussed.

Mr. Holden then decided to seek the involvement Mr. Yar Mohammed's solicitor in the pending litigation, Dr M. S. Sahu Khan. On 24 July 1994, Mr. Holden and Dr Khan spoke. Two letters were than written. On 26 July 1994 Dr Khan wrote to Mr. Holden confirming that he acted for Yar Mohammed. He said that Yar Mohammed was the registered proprietor of the land comprised in Lot 2 of the land in certificate of title No. 20817. He said that the land was subject to a mortgage (charge) in favour of the bank and that the sum of approximately $155,000 was owed to the bank. He said that there was a caveat registered in respect of the said land which had been registered on 27 August 1991. He said that once the bank was paid the amount due to it, it would transfer (not discharge) the mortgage (charge) to whoever "we" nominate. He said that it was important to note that the bank had received various tenders for the sale of the land by way of mortgagee sale. He said that "we" had been able to stop the acceptance of any tender by the bank and its solicitors until 27 July. He added, "By that date we have to confirm to them that their debts will be paid by us (that is you) on their transferring the mortgage to our nominee as aforesaid. That is the only way available to stop (then) accepting the tenders and to facilitate the process to have the said land sold to you. That is to have the mortgage transferred to the nominee. " Dr Khan said that the nominee would then be in a position to legally transfer the land to Mr. Holden at the price agreed upon and the land would be registered in his name free of all encumbrances and/or any caveat. He added that this would be done after the consent of the Minister of Lands under the Land Sales Act had been obtained. He said that he needed to have sum of $155,000 deposited in his firm's trust account that week. He said that he undertook that the funds would only be

used for the payment to the bank on their transferring the mortgage to "our nominee" who would transfer the land only to Mr. Holden subject to the above.

On 27 July 1994 Dr Khan wrote to the bank's solicitors and said that they confirmed what apparently had been said in their telephone conversation with a Mr. Patel that Mr. Holden had made arrangements to purchase the mortgage of the Fiji Development Bank. The letter said, " Accordingly, Please do not accept any tender."

His Lordship said that at this stage the bank called a halt to the tender process. He said that much correspondence followed. That is certainly demonstrated by the record that we have before us. He said that he would refer to some of that correspondence later, he added, "but, at this juncture it is sufficient to say that by the 27 July 1994 the plan was: -

(a) ***that all parties were aware of caveat 306645 and realised that it posed a stumbling block to Yar Moh'd selling the whole of the land (formerly CT20817 but by then CT2761 & CT7672) for $300,000 to Mr. Holden (or anyone else other than Gonzalez, for that matter).***

(b) ***So as to transfer the land of Holden free of "encumbrance and/or caveat" Mr. Holden was to produce the funds to pay to the FDB and thus enable the mortgage (charge) to be transferred to a person nominated by Messrs Sahu Khan & Sahu Khan.***

(c) ***After (b) above had been accomplished (the nominee then becoming mortgagee of the land), then the nominee/mortgagee would transfer the land to Mr. Holden. He would take the land minus the caveat. Mr. Gonzalez caveatable interest would thus be defeated."***

His Lordship added that the plan was put into effect.

Mr. Holden paid in excess of $300,000 into the Khan trust account. On 6 September 1994 Messers Sahu Khan & Sahu Khan wrote to the solicitors for the bank advising that the mortgage was to be transferred to one Haroon Khan of Ba, clerk. Mr. Haroon Khan is, of course, the second defendant. His Lordship said that the evidence would subsequently show that Haroon Khan was, at 6 September 1994, resident in the United States and had not been in Fiji, since 9 April 1992. He said that Haroon Khan was a warehouse manager in Sacramento, California.

His Lordship said that on 1 November 1994 a total sum of $160,709.89 was deposited in the bank's solicitors' trust account in consideration for the transfer of the mortgage, i.e. the notification. This was made up of $157,084.24 as payout of the mortgage debt and the balance as professional costs for the bank's solicitors. These moneys were paid from the Khan trust account ostensibly for and on behalf of Haroon Khan but in reality the moneys came from Mr. Holden.

By notice of demand dated 1 November 1994 Haroon Khan through his solicitors, the Khans, served notice of demand on Yar Mohammed under the mortgage which had only very recently been transferred to him. The balance said to be owing under the mortgage (at least according to the demand) was $285,000. His Lordship said that no evidence was led to explain the increase from $157,084.24 to $285,000 in less than one day. On 1st November 1994 Yar Mohammed signed an agreement to sell the whole land to Murray Merchant for $300,000. Murray Merchant was a company incorporated in 1992. Its then

shareholders were Dr. Khan, Haroon Khan, Mr. Holden and one Graeme Ferrier-Watson.

On 7 November 1994 Haroon Khan made a statutory declaration. He identified himself as the mortgagee named and described in the notification on the certificates of title. He said that the land the subject of those certificates of title was mortgaged by Yar Mohammed. He said that the moneys secured by the mortgage were $285,000 and $100 for costs. He referred to the registration of the mortgage and the demand which had been made. He declared that in exercise of the power of sale under the Land Transfer Act and the notification on the title to which he had referred, he had executed the transfer of the titles to Murray Merchant which he said was a company having its registered office at Ba, Fiji. He added that the Mortgagor had not made any payment in respect of the notification, that is the charge to the bank. He said that the sale was not advertised as the mortgagor consented to the mortgagee sale to Murray Merchant. The declaration is said to have been made on 7 November 1994 at Ba. It is witnessed by Dr Sahu Khan who is described as Commissioner for Oaths.

On 9 November 1994 Mr. Haroon Khan described as being of Ba executed the transfer to Murray Merchant. The certificate signed by Dr Khan on the transfer said that the signature "H. Khan" was made in his presence. He believed such signature was of the proper handwriting on the person described as Haroon Khan and he certified that the contents had been read over and explained by him, Dr Khan, to Mr. Haroon Khan in the Hindustani language. It was further said that Mr.

Haroon Khan appeared fully to understand the meaning and effect of the transfer. Dr Khan signed this certificate. His Lordship found that Mr. Haroon Khan was not in Fiji between the 1st and the 8th of November 1994. He said that he was most likely still residing in the United States and working as a warehouse manager. He added "But certainly he was not in Ba, Fiji, working as a clerk." That finding is challenged by the appellants. We shall come to the evidence on which it is based in due course.

His Lordship said that on 15 November 1994, Murray Merchant was registered as the owner of the land in the two certificates of title. Ms Gonzalez' caveat was cancelled notwithstanding the previous court order of 27 March 1992 extending the caveat until the matter came up for hearing. In the result Murray Merchant received a clear, unencumbered title. His Lordship said that he was curious that no transfer of the mortgage, i.e. notification, from the bank to Haroon Khan was noted on the title deed. This was clearly, so his Lordship said, a registrable document pursuant to the Land Transfer Act. He thought that another curious feature of what occurred was that Ms Gonzalez was given no notice of the dealings, that is the transfer of the mortgage and the subsequent transfer of the land. We do not understand why the requirements of the Land Transfer Act did not oblige the Registrar of Titles to notify Ms Gonzalez of the lodgment of the dealing and give her the requisite 21 days notice of his intention to register unless she took proceedings in the meantime. However his Lordship said that by 15 November 1994 Mr. Gonzalez, really Ms Gonzalez, had lost any right either under the caveat or the subsequent court order.

His Lordship also said that by that time it had become apparent that moneys transferred from Mr. Khan's Trust Account to that of Mr. Koya had 'disappeared'. His Lordship said that they had either been removed from Mr. Koya's Trust Account or improperly used without the authorisation of Yar Mohammed.

Yar Mohammed died in 1996. His Lordship said that para 29(a) of the defence of Yar Mohammed pleaded plene administravit, i.e. there was nothing left in the estate of Yar Mohammed, 'if in fact there ever was.' The words quoted are his Lordship's. In 1996, Holden and his son received transfers of shares in Murray Merchant from Dr Sahu Khan and Mr. Ferrier-Watson. His Lordship said Murray Merchant was desirous of developing a tourist resort on the land. He said that Ms Gonzalez had placed a further caveat on the land and that the fate of this would be considered at the end of the judgment.

Each of the parties lodged lengthy written submissions, dealing with the grounds of appeal which were relied upon. In the end we were left with two principal questions to consider. The first is whether the agreement of 25 September 1985 as varied by the parties in 1990 and 1991 is unenforceable because of illegality. The appellants claim that it is an illegal agreement because it was made in breach of the provisions of S.6 of the Land Sales Act. If that submission is upheld, that must be the end of the matter. The other submission was that his Lordship's finding of fraud against each of the appellants cannot be sustained. In the appellants' submission the evidence relied upon by Gonzalez revealed no

evidence or no sufficient evidence of fraud on the part of any of the appellants. We propose to consider the question of illegality first of all.

Section 6(1) of the Land Sales Act (Cap 137) provides that no non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or take on lease any land. The subsection contains a provision exempting from its operation purchases or leases of land not exceeding one acre in the aggregate. The Minister responsible for land matters may require any application for his consent to be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms whether by way of imposition of bond or otherwise upon which such consent is conditional. No appeal is to lie against a decision by the Minister responsible for land matters made under the section.

It is to be observed that there is no provision expressly avoiding any contract or agreement entered into in contravention of the section. But it is relevant, to refer to S.17 of the Act which deals with penalties. It is as follows:

> *17. Any person who wilfully contravenes the provisions of this Act or of any terms of any consent thereunder shall be guilty of an offence and liable on conviction to –*
>
> *(a) fine of one thousand dollars or of an amount equal to one-quarter of the purchase price or to total or partial forfeiture of any bond required by this Act or by any order made thereunder, whichever is the greater: or*
>
> *(b) imprisonment for a period not exceeding five years; or*
>
> *(c) both such fine or forfeiture and imprisonment.*

It is to be noted that the provisions of S.6 (1) of the Act make it unlawful to enter into a contract for the purchase of land without the "prior consent" in writing of the Minister. It is common ground that there was no prior consent to the agreement of 25 September 1985. The reason for this appears to have been that the solicitor then acting for the parties in the matter was unaware of the provisions of the Land Sales Act and therefore sought no consent to the making of the agreement. The learned judge held that there was not disclosed an intention by the legislature to invalidate contracts made in breach of the section. Otherwise, so his Lordship thought, the section would have said that any contract made in contravention of the section was to be void of no effect. Counsel for Ms Gonzalez supported that view.

Additionally, Counsel for the plaintiff relied on an alternative way of putting her case. He referred to the application for consent, which had been made to the Minister. It is dated 16 July 1990. It does not mention the agreement of 25 September 1985 nor for that matter, the variation of that agreement which was made in April 1990. What counsel said was that one should take the document signed by the parties in their solicitors' office on 13 December 1990 and treat it as a contract. We have earlier referred to that document. Counsel submitted that the document was prepared in furtherance of the consent granted by the Minister as was acknowledged in clause 3 thereof. Counsel said that that document coupled with the earlier application to the Minister constituted a sufficient note or memorandum in writing for the purposes of the Indemnity Guarantee and Bailment Act (Cap 232) and evidenced a new contract between Yar Mohammed and Gonzalez to purchase the land. Counsel said that the essential terms of the contract

comprised a new purchase price of $120,000 and a provision that settlement was to be within 60 days of payment of the purchase price into the trust account of the solicitor acting for the parties. He said that the application for consent signed on 16 July 1990 identified the land, the fact that the land was encumbered by the charge to the bank, the parties and the purchase price of $120,000. The promise was identified in both the application for consent and the document signed on 13 December 1990 after the Minister's consent was obtained.

What counsel is contending is that the application for consent coupled with the note of the agreement made on 13 December 1990 constituted a novation of the contract. Thus the earlier contract of 25 September 1985 as varied in April 1990 went by the board so that one looked only at the application for the Minister's consent and the document that came into existence on 13 December 1990.

We are not prepared to accept this submission. If there had been a novation of the contract, the document prepared in December 1990 would have been a very much more elaborate one. Moreover, although there was no mention of the agreement of 25 September 1985 as there was in the note made in April 1990, on the balance of probabilities the document of 13 December 1990 was intended to provide yet a further variation of the earlier agreement. It is true that the earlier agreement is not mentioned in the application for consent or in the document signed in December 1990. But there is no evidence that the parties intended to disregard the earlier agreement, and to start again.

Furthermore, the caveat itself refers only to the agreement of 25 September 1985. If there were anything in the submission, it would not help Ms Gonzalez because the caveat does not claim any estate or interest in the land arising from an agreement based on the application for consent and the document of 13 December 1990. In the result we reject the case attempted to be made by Ms Gonzalez based on there being a novation of the agreement in July – December 1990.

So the critical question is whether the agreement of 25 September 1985, varied as it was by the other agreements which were made in April 1990 December 1990 and March 1991 was illegal and unenforceable as a consequence of the operation of S.6 of the Land Sales Act. In the course of his judgment, his Lordship who, as mentioned, found the agreement enforceable, relied strongly on the decision of the High Court of Australia in Yango Pastoral Company Pty Limited v First Chicago Australia Limited (1978) 139 C.L.R. 410, particularly on the judgment of Mason J. The legislation in question in that case was s.8 of the Banking Act 1959 (Cth) which prohibits a body corporate from carrying on any banking business in Australia unless it is in possession of an authority to do so. The Act imposes a penalty of $10,000 for each day during which the contravention continues.

It is apparent that s.8 of the Banking Act in question in the Yango case is a quite different type of provision from that in question here. That is a matter referred to by Gibbs ACJ. in his judgment. He said (at 413) s.8 did not render it unlawful to borrow or lend money or give and take a mortgage supported by guarantees, to secure its repayment. So the contract in question was not to do anything which s.8

forbade. His Honour said that the principal question in the case was whether s.8, on its proper construction prohibited the making or performance of the contract. His Honour went on to say (at 413):

> ***"It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."***

His Honour referred to St John Shipping Corporation v. Joseph Rank Limited [1957] 1QB 267 at 286 where Devilin J. said that one must have regard to the language used and the scope and purpose of the statute. Gibbs ACJ said (at 414) that one consideration that had been regarded as important in a great many cases was whether the object of the statute – or one of its objects – was the protection of the public. He said that an antithesis was commonly suggested between an intention to protect the public and an intention to secure the revenue. He said that when the former intention appears the contract must be taken to be prohibited whereas if the intention is only to protect the revenue the statute will not be construed as imposing a prohibition on contracts. Gibbs ACJ added that the question whether the statute was passed for the protection of the public was one test of whether it was intended to vitiate a contract made in breach of its provisions but

that was not the only test. It would be incorrect in principle to allow one circumstance to override all other considerations in the interpretation of the statute.

In the course of his judgment Mason J. said (at 423):

> ***"The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains."***

His Honour went on to ask the question whether the statute expressly prohibited the making of the contract of loan. He said that the question must be answered in the negative. The section made no reference to contracts or transactions. That is why the Yango case was a very different type of case from the present. In the course of his submissions counsel for Ms Gonzalez relied on another decision of the High Court of Australia, Fitzgerald v F. J. Leonhardt Pty Limited (1997) 189 CLR 215. Counsel relied extensively on the judgment of Kirby J.(at 231-252). Again the legislation in that case is different from the legislation in question here. It is not helpful to make an analysis of the legislation in question but it was held that the manner of performance of the contract by a driller under the

Water Act 1992 (NT) did not turn the contract into one which was forbidden by the Act. The driller was not required to rely on any illegal act to establish his cause of action for the recovery of the money due to him so that the contract was enforceable. Furthermore, the contract could have been performed without any breach of the law by the driller if the landowner had obtained a licence. It was his obligation, not that of the driller, to obtain the licence. The effect of Kirby J.'s judgment was that the proper classification of the illegality was that it was committed incidentally in the course of the performance of the contract. It was neither the express purpose of the legislature nor the implied effect of the Act that such an incidental violation should deprive the driller of all remedies under its contract. Thus Kirby J.'s approach reveals starkly the substantial difference which there is between Fitzgerald's case and this one.

Section 6 (1) of the Land Sales Act here provides that no non-resident of Fiji shall without the prior consent in writing of the Minister responsible for land matters, make any contract to purchase or take on lease any land. Those words are clear and specific. They reveal an intention on the part of the legislature to require non-residents desirous of acquiring land in excess of an area of one acre to obtain the Minister's consent prior to entering into the contract. That is what the plain words of the statute say. The purpose and policy of the Act would appear to be to enable the Government of Fiji to determine which non-residents should be allowed to hold substantial areas of land and which should not. No criteria are provided for to guide the Minister. The Minister's discretion is complete so long as he is acting in the public interest. No appeal lies from his decision; see subsec (3). It is true the

Minister who gave consent to the present transaction in October 1990 took revenue matters into account but this does not turn the statute itself into a statute such as was mentioned by Gibbs ACJ in Yango. The policy of the Minister in question, or at least of the government at the time, may have been to concentrate on revenue matters, but the form of consent and the answers which were sought or the conditions which were imposed on the grant of consent can not control the meaning of the statute. It is expressed in clear terms and, in our opinion, its purpose is to protect Fiji from the acquisition of land by persons thought to be undesirable. At least that is one of its purposes. There are no doubt others but we can understand the extensive public policy reasons for the legislation in question.

It remains to consider the effect, if any, which S.17 may have. Counsel for Ms. Gonzalez submitted that the Act indicated in S.17 that there was to be no illegality of an agreement entered contrary to S.6 because of the provisions of the penalties in s.17. It is to be noted, however, that penalties will only apply if there is wilful contravention. If the contravention is not wilful, no penalty will be imposed and, if counsel for Ms. Gonzalez is correct, no other consequence for breach of the section would follow. It seems unlikely that the legislature would have intended that the section have no effective operation in what may be quite a substantial number of cases. No argument was addressed to us on the question of the meaning of wilfully in the context of the section and it is unnecessary to consider that matter but the fact that the legislature has used the word indicates that when it comes to penalties it intends that a clear distinction be drawn between those contraventions which are wilful and those which are not. But that, in our

opinion, does not affect the operation of S.6 which forbids the entry into a contract in any circumstances without the prior written consent of the Minister.

It is true that the legislature could have gone the extra step of providing in clear terms that any such contract was void and of no effect. It has not done so but it has made it clear that the contract entered into in contravention of the section is unlawful. In those circumstances it is difficult to see that there can be any conclusion other than that the contract is void and unenforceable.

In the course of the argument we were referred to the decision of Palmer J. in Hunter v. Agpar (1989) 35 FLR 180. That decision reaches the same conclusion about the meaning and effect of s.6 as we have done. Palmer J. held that s.6 was intended to ensure that the Minister's consent was obtained prior to the contract for the sale of the land being entered into and that consent given subsequently to the formation of the contract was void. We are in respectful agreement with that conclusion.

We note that it is 13 years since Palmer J. gave his decision. The case is reported. So far as we are aware, there has not been, until this case, any case challenging the correctness of Palmer J's conclusion. So the decision has stood the test of time. No doubt it has provided guidance to practitioners and others over the years. Even if we thought that the conclusion at which we have arrived were in any way doubtful (which we do not) we would have been most unwilling to disturb a

decision which has stood for so long in a most important area of the law, namely the law relating to the sale and purchase of land.

The defendants must therefore succeed on this point. What then are the consequences of our conclusion that the contract is unenforceable? The first conclusion must be that Ms Gonzalez' action for breach of the illegal contract must fail. She cannot sue upon it because it is unlawful. What then of her caveat? As mentioned, by the caveat Mr. Gonzalez claimed an estate or interest as equitable owner by virtue of the sale and purchase agreement between the caveator (Gonzalez) and the caveatee (Yar Mohammed) dated 25 September 1985. That is the only interest it seeks to protect. That contract being illegal and void, Gonzalez had no estate or interest under the contract in the land. The caveat was of no force or effect because there was no legal or equitable interest which it could protect. An application to remove the caveat from the register must have been successful.

That leaves the cause of action based on an alleged fraudulent conspiracy amongst the three appellants. At the outset we should say that we are not satisfied that the evidence called in the case reveals evidence of fraud on the part of the third defendant. It was suggested in argument that it was bound by the conduct of Dr Khan, its solicitor, but no action is brought against him whether for fraud or on the basis of any other cause of action. He is not a party to these proceedings. That does not mean that he may not himself be guilty of some fraudulent act or omission for which Murray Merchant and Mr. Holden may be responsible because he was their agent. But we are unable to say that that is the case. Mr. Holden merely

followed the advice which was given to him as to the way in which to overcome the effect of the caveat. His conduct could not be described as dishonest or fraudulent. Furthermore, unlike Mr. Haroon Khan, he gave evidence thus making himself available for cross-examination. Nothing in his evidence suggests that he himself was guilty of fraud.

However, there are aspects of the case brought against Yar Mohammed and Haroon Khan which we find disturbing. Understandably the evidence called in Ms Gonzalez' case was sparse. Mr. Gonzalez was dead. A case had to be made from the relevant documents in the case. These were mainly to be found in the correspondence. At the time the case came on for hearing Yar Mohammed was also dead and that explains why he himself could not give evidence.

His Lordship found that Haroon Khan was not in the jurisdiction when the statutory declaration earlier referred to was purportedly made by him. If he was not in the jurisdiction, the declaration was false. In the run of the hearing this court made it very clear that it was uneasy about this matter and could not understand why, if all was innocent, an explanation was not forthcoming. Because of our conclusions on illegality, we do not come to the question of fraud. But if the case based on fraud were alive, it would seem to us that the evidence of Haroon Khan's absence from the jurisdiction in 1994 would have required an explanation.

In the result, however, the appeals brought by all the defendants must be allowed. The orders made by Lyons J. must be set aside. In lieu thereof it should

be ordered that the proceedings brought by the Gonzalez should be dismissed as should Ms Gonzalez' appeal.

Before we come to the question of costs, there is one matter that we mention in passing. Gonzalez paid over approximately $120,000.00 to or for the benefit of Yar Mohammed. This, together with interest that may have accrued on it, has been lost to his estate. It may be that the pleadings as they are presently drawn would have supported an action for money had and received to recover this sum: cf. the decision of the High of Court Australia in Pavey & Matthews Pty Limited v. Paul (1987) 162 CLR 221. But no such action was pursued and we are unable to give effect to any such cause of action.

In the circumstances of this case bearing in mind the failure of various parties to fulfil their obligations one to another and the failure of one party to comply with orders of the court, we consider that all parties should bear their own costs in this court and the court below save in the case of the third defendant which should receive costs in this court and in the court below but because of its minimal involvement, we fix those costs at $750.00 in all.

Having regard to our conclusion, reference to sending a copy of this judgment to any body other than the Fiji Law Society is not called for.

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Hon. Justice Sheppard J.A
Presiding Judge

FIJI COURT OF APPEAL

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Hon. Justice Sir Rodney Gallen
Justice of Appeal

Solicitors:

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Messers. Sahu Khan & Sahu Khan, Ba for the 2nd Appellant
Messers. M. Raza & Associates, Suva for the 3rd Appellant
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