

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

CIVIL APPEAL NO. ABU0054 OF 1998S
CIVIL APPEAL NO. ABU0063 OF 1988S
CIVIL APPEAL NO. ABU0068 OF 1998S
 (High Court Civil Action No.HBC0073/1992L
 and HBC0141/1997L)

BETWEEN:

JENNYNE GONZALEZ

Appellant

AND:

MOHAMMED AKHTAR

First Respondent

HAROON KHAN

Second Respondent

MURRAY MERCHANT PACIFIC FINANCE
AND INVESTMENTS LIMITED

Third Respondent

Coram:

Reddy, P
 Smellie, JA
 Penlington, JA

Hearing:

Tuesday, 26th November 2002, Suva

Counsel:

Mr. C.B. Young for the Appellant
 Mr. G.P. Shankar for the First and Second Respondents
 No Appearance for the Third Respondent

Date of Judgment: Friday, 29th November 2002

JUDGMENT OF THE COURT

1. There was no appearance for or by the third respondent. Mr Young however produced an acknowledgement of service on M. Raza and Associates the solicitors on the record for the third respondent. In the circumstances we elected to proceed upon

counsel's undertaking to file an affidavit of service before Friday of this week.

2. This is an application for leave to appeal to the Supreme Court pursuant to Article 122(2)(a) of the Constitution. As is well known that provision provides that an appeal may not be brought from a final judgment of the Court of Appeal unless:

“(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance.”

3. The final judgment of the Court of Appeal in question is in the consolidated appeal ABU0054/63/68 of 1998S. The motion filed by the applicant (appellant) invited the Court to certify no fewer than 10 questions pursuant to the above Article of the Constitution which were framed as follows:

- “1. Is the 1985 Agreement in breach of s.6 of the Land Sales Act and unenforceable?*
- 2. Does s.6 render all contracts entered into prior to grant of consent by the Minister unlawful and unenforceable or does the section permit the making of a conditional contract?*
- 3. If s.6 permits a conditional contract is such contract conditional as to formation or as to performance?*
- 4. What is the effect, if any, of partial performance prior to consent:*
 - (a) on a contract conditional as to formation;*
 - (b) on a contract conditional as to performance;*
 - (c) on any other contract.*

5. *Did Parliament intend, by s.6, to deny remedy to all persons who breached the section irrespective of whether the breach was deliberate or incidental or did Parliament intend, by not providing for civil consequences of a breach, to leave that task to the Courts to determine, on particular facts of individual cases, whether the contract should be rendered unenforceable on grounds of public policy?*
6. *If the 1985 Agreement was not unenforceable for breach of s.6, are the Respondents guilty of land transfer fraud?*
7. *If the 1985 Agreement was unenforceable for breach of s.6 was there a new contract made in or about 13 December 1990 which was valid and enforceable against the First Respondent?*
8. *If the Appellant has an enforceable contract against the First Respondent should she be granted specific performance of it?*
9. *Should the First Respondent be allowed to rely on his own breach or non compliance of the conditions of consent to deny the Appellant an order for specific performance?*
10. *Should the Court not make an order for specific performance subject to the grant of the Minister's consent and if such consent is not granted then to award damages?*

4. We made it clear early in this hearing that we could not countenance that course. The central issue in the Court of Appeal judgments and the only one which we could properly certify is in relation to the correct interpretation of s.6 of the Land Sales Act (LSA)(Cap. 137). All else is of interest to the litigants but falls well short of the requirement of "significant public importance."

5. The judgment of the Court of Appeal reaches the same conclusions on the central issue as Palmer J. in Hunter v. Agpar 1989 (35) FLR 180 - a decision which has

stood for 13 years. Given those circumstances Mr Shankar for the 1st and 2nd respondents argued that the law is settled and no question of significant public importance arises.

6. After careful consideration, however, we have reached a contrary view. The affidavit of a senior conveyancing practitioner (Mr Anu Shiwabhai Patel) and the submissions from the bar by Mr Young persuade us that uncertainty persists as to whether strict compliance with s.6 of the LSA renders a contract for purchase of land by a non-resident void and unenforceable.

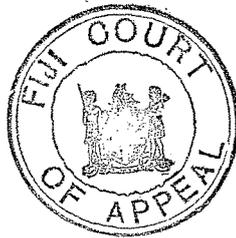
7. We were informed and can accept that the provision in question causes problems for foreign investors who either do not, or cannot be expected to, understand the public policy issues that lie behind the provision.

8. Of course this Court, (and indeed the Supreme Court) can only interpret the enactment as it stands. If it is inhibiting foreign investment or continuing to cause confusion amongst practitioners advising on land purchases by non residents the solution would appear to be amendment by the legislature.

9. In those circumstances a ruling from the highest Court in the Republic should put the matter to rest and if it be that this Court's judgment is upheld, perhaps the prospects of amendment by Parliament will be enhanced.

10. The question we certify to be of significant public importance is as follows:

Did the Court of Appeal in its judgments Civil No. ABU0054/63/68 in 1998S place the correct interpretation upon s.6 of the Land Sales Act (Cap.137) .



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Reddy, P

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Smellie, JA

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.....
Penlington, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellant
Messrs. G.P. Shankar and Company, Ba for the First and Second Respondents
Messrs. M. Raza and Associates, Suva for the Third Respondent