

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

CIVIL APPEAL NO. ABU0030OF 2000S

(High Court Civil Action No. HBC164 of 1999/L)

BETWEEN:

TREVOR ROBERT GALLAGHER

First Appellant

AND:

NADI CONTRACTORS LIMITED

Second Appellant

AND:

ALLAN CHARLES NEWHAM

Respondent

Coram:

Eichelbaum, JA
Smellie, JA
Ellis, JA

Hearing:

Wednesday, 7th May 2003, Suva

Counsel:

Mr. C.B. Young for the Appellants
Mr. Alexander H. Silvester and Mr. B. Singh for the Respondent

Date of Judgment: Friday, 16th May, 2003

JUDGMENT OF THE COURT

This is an application for leave to appeal to the Supreme Court from a judgment of this Court delivered on 15th November 2002. In that judgment the Court upheld the decision of Madraiwiwi J. declaring a certain deed of trust dated 2 June 1990 to be valid and legal. The applicant in its notice of motion for leave claims that this Court was wrong in its interpretation of s.11(1) of the Exchange Control Act Cap.211 by holding that the

section only applied to a legal interest as opposed to an equitable interest in a security to be transferred and thereby holding the deed of trust was lawful without the permission of the Minister having been obtained and invites this Court to certify the following question for the Supreme Court:

“Was the Court of Appeal correct in drawing a distinction between legal and equitable interests in a security to be transferred for the purposes of s.11(1) of the Exchange Control Act or does the section require permission of the Minister to transfer legal as well as equitable interest in such security?”

It is accepted that pursuant to section 122 of the Constitution this Court can only grant leave if it considers the question to be of significant public importance. The application contends it is because of the importance of exchange control to the economy of Fiji and the decision validates the creation of equitable interests in securities where the Minister’s consent has not been obtained.

The relevant facts are not in dispute and were stated in this Court’s decision as follows:

“Nadi Contractors Limited was incorporated in Fiji on 26 September 1979. Its shares were held as to 19,999 by Romark Pty Ltd. of Sydney (“Romark”) and as to one by the first appellant (“Gallagher”). The respondent (“Newham”) was the beneficial owner of 50% of the shares in Romark, the other 50% being held by Gallagher. At the relevant time, Gallagher was a resident of Fiji, Newham was a resident and citizen of Australia. Nuffield Engineering Pty Ltd. (“Nuffield”) was a company in which the shares were held by Newham and his family trust.

In 1990 Romark transferred all its 19,999 shares in Nadi as to 14,999 to Gallagher and as to 5,000 to his wife Shirley Gladys Gallagher.

The declaration of trust, the subject of the proceedings, is dated 2 June. It was prepared by solicitors in Australia. It is executed by Gallagher as a deed. The preamble and the first clause provides:

“To Allan Charles Newham

With reference to the share referred to in the schedule hereto in NADI CONTRACTORS LIMITED, (herein called “the said share”), which at your request I hold in my name IN CONFIRM that the purchase money for the said share is to be provided by you out of your own moneys AND I ALSO CONFIRM AND DECLARE THAT:

1. I hold the said share and all dividends to accrue upon or in respect of it upon trust for you and I agree to transfer pay and deal with the said share and such dividends in such manner as you shall from time to time in writing direct.”

The schedule to the deed refers to 10,000 ordinary shares of \$1.00 fully paid in Nadi. The remaining 3 clauses of the deed are not relevant to the issues before the Court.”

Before Madraiwiwi J. and this Court the applicant relied on s.11(1) of the Act which prohibits the transfer of shares to a transferee who is resident outside Fiji without the consent of the Minister. This Court followed its previous decision in Guisepppe Ruggerie and Others v. Bianco (CA ABY0061 of 1997) in holding that a deed of trust creating an equitable interest in shares was not a transfer of the shares. At the hearing the Court suggested the earlier transactions that is the subscription for shares in Nadi by Romark and the transfer of 10,000 shares by Romark to Gallagher on trust for Newham required the Minister’s consent which had not been obtained. However that was not pursued. To understand the way the case has developed it is convenient to set out s.10, s.11(1) and (2), s.20, s.22(2) and s.31 of the Act.

Section 10:

“10. – (1) Except with the permission of the Minister, no person shall in Fiji issue any security or, whether in Fiji or elsewhere, issue any security which is registered or to be registered in Fiji, unless the following requirements are fulfilled, that is to say:-

- (a) *neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Fiji, and*
- (b) *the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.*

(2) *The subscription of the memorandum of association of a company to be formed under the Companies Act, by a person resident outside Fiji, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Minister, be invalid in so far as it would, on registration of the memorandum, have the effect of making him a member of or shareholder in the company, so, however, that this provision shall not render invalid the incorporation of the company; and, if, by virtue of this subsection, the number of the subscribers of the memorandum who, on its registration, become members of the company is less than the minimum number required to subscribe the memorandum, the provisions of the said Act relating to the carrying on of business of a company the number of whose members is reduced below the legal minimum shall apply to the company as if the number of its members had been to reduced."*

Section 11(1) and (2):-

"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, or whom he is a nominee; and*
- (d) *neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and*
- (c) *except where the security is registered in Fiji otherwise that in subsidiary register, the Minister is satisfied that the requirements of paragraph (c) are fulfilled:*

Provided that -

- (i) *neither the transferee nor his agent shall be deemed to have committed an offence by reason only that the requirements of paragraph (a) were not fulfilled unless the transferee or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled; and*
- (ii) *neither the transferor nor his agent shall be deemed to have committed an offence by reason only that any of the requirements of paragraphs (c) and (d) have not been fulfilled unless, in the case of a non-fulfilment of the requirements of paragraph (c), the transferor or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled.*

(2) *Except with the permission of the Minister, a security not registered in Fiji shall not be transferred outside Fiji, if either the transferor or the transferee, or the person, if any, for whom the transferor or transferee is or is to be a nominee, is resident in Fiji."*

Section 20:

"20. – (1) The title of any person to a security for which he has given value on a transfer thereof, and the title of all persons claiming through or under him, shall, notwithstanding that the transfer, or any previous transfer, or the issue of the security, was, by reason of the residence of any person concerned other than the first-mentioned person, prohibited by the provisions of this Act relating to the transfer or issue of securities, be valid, unless the first-mentioned person had notice of the facts by reason of which it was prohibited.

(2) Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the competent authority, and the said acts shall have effect accordingly.

- (3) *Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act."*

Section 22(2):

22.- (2) For the purposes of any provision of the Part prohibiting the transfer of securities, a person shall be deemed to transfer a security, if he executes any instrument of transfer thereof, whether effective or not, and shall be deemed to transfer it at the place where he executes the instrument."

Section 31:

"31- (1) Except with the permission of the Minister, no person resident in Fiji shall settle any property, otherwise than by will, so as to confer an interest in the property on a person who, at the time of the settlement, is resident outside Fiji, or shall exercise, otherwise than by will, any power of appointment, whether created by will or otherwise, in favour of a person who, at the time of the exercise of the power, is resident outside Fiji.

- (2) *A settlement or exercise of a power of appointment shall not be invalid by reason that it is prohibited by this section, except so far as it purports to confer any interest on any person who, at the time of the settlement or the exercise of the power, is resident outside Fiji.*
- (3) *Subsections (2) and (3) of section 20 shall apply in relation to a settlement or the exercise of a power of appointment prohibited by this section as they apply in relation to a transfer prohibited by this Act or a security.*
- (4) *For the purpose of this section –*
- (a) *any reference to settling property includes a reference to the making of any disposition, covenant, agreement or arrangement whereby the property becomes subject to a trust, or (in the case of a resettlement) to a different trust; and*

- (b) *a person shall be deemed to have an interest in property if he has any beneficial interest therein, whether present or future, and whether vested or contingent, or falls within a limited class of persons in whose favour a discretion or power in respect of the property is exerciseable; and*
- (c) *the expression "will" includes any testamentary disposition."*

From ss.10 and 11 it can be seen that they may catch the earlier transactions referred to and how in s.11(1) the word "transfer" is used and how that is expanded in s.20(2) to cover an unregistered transfer. What is significant for present purposes is the provisions of s.31. Mr Silvester claims this section was not referred to either before Madraiwiwi J. or this Court in November nor referred to in the applicant's written submissions. Mr Young drew our attention to it and submitted it caught the deed of trust in this case irrespective of s.11. Mr Silvester's response to this was that the present transaction was not a "settlement" in equity. Mr Young replied by saying it was a transaction within s.31(4). Mr Silvester has since filed a further submission conceding that there is substance in Mr Young's submission. It is unnecessary for us to decide the matter, but we are satisfied that this issue so raised is one of significant public importance and should be resolved in the Supreme Court as otherwise the two Court of Appeal decisions will remain in doubt on an important fiscal matter.

We record that this Court refused leave to appeal in Ruggiero's case: Mediterranean Island Resort Ltd.v. Bianco[1999] FJCA 26 but there too there was no reference to s.31 or suggestion that the Court had proceeded per incuriam.

A final matter must now be referred to. Following the decision in the High Court the Minister gave approval to the transfer of the 10,000 shares by Gallagher to Newham, this consent was then withdrawn pending the appeal but we understand was renewed after the November decision of this Court. Newham is proceeding with steps to enforce the transfer. Mr Silvester submitted that because consent was now forthcoming the question of the deed's validity had become moot. In our view it cannot be said with certainty that the Minister's decisions are the same as validation under s.20. This Court does not know if the Minister would have validated the Deed if the High Court or this Court had held the Deed illegal. If the Supreme Court decides the Deed illegal it will still be open to Newham to apply to the Minister to validate the Deed. We therefore conclude that the question is not moot.

Because of the way this case had developed the question proposed by the applicant must be varied. We certify the following question:

"Was the Court of Appeal correct in holding the Deed of Trust dated 2 June 1990 was valid and legal as it did not require the Minister's consent under the Exchange Control Act, Cap.211?"

The applicant also applied for a stay of the effect of the Court's judgment if leave to appeal was granted. The evidence before us is that Newham is currently taking steps to enforce the transfer of the 10,000 shares. Such a transfer could render the applicant's possible success before the Supreme Court nugatory. The power to grant a stay conferred

stay when the interests of justice so require and dicta to the effect that exceptional circumstance must be shown impose an unwarranted limitation of the discretion. For example see Philip Morris v. Liggett & Myers [1977] 2 NZLR 41.

In our view a stay must be granted to do justice between the parties. A stay is granted on the terms sought.

Formal Orders:

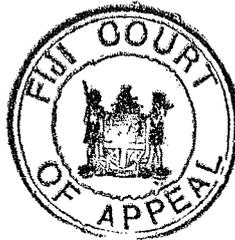
1. The Court certifies that the following question is of significant public importance:

“Was the Court of Appeal correct in holding the Deed of Trust dated 2 June 1990 was valid and legal as it did not require the Minister’s consent under the Exchange Control Act, Cap. 211?”

and grants leave to appeal to the Supreme Court on that question.

2. Order that execution and all further proceedings on the judgment of this Court delivered on 15 November 2002 be stayed pending determination of the appeal.
3. The respondent is entitled to costs which we fix at \$500 plus disbursements to be fixed by the Registrar if they cannot be agreed.

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Eichelbaum, JA



Robert Smellie
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Gallen, JA
SMELLIE

A. D. Ellis
.....
Ellis, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellants
Messrs. Babu Singh and Associates, Nadi for the Respondent