

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Appeal No. ABU 0055 of 2014
(High Court Civil Action No. HBC 225 of 2012)

BETWEEN : **ALFAAZ ABDUL ROUF KHAN**
Appellant

AND : **YASIN ALI**
NAZREEN NISHA
Respondents

Coram : **Calanchini, P**
Jameel, JA
Seneviratne, JA

Counsel : **Mr. K. Vuataki for the Appellant**
Mr. A. K. Narayan for the Respondents

Date of Hearing : **1 February 2017**

Date of Judgment : **23 February 2017**

JUDGMENT

Calanchini, P

[1] I have read the draft judgment of Jameel JA and agree that the appeal should be allowed and I also agree with her proposed orders.

Jameel, JA

A. Introduction

[2] This is an appeal from the judgment of the learned Judge of the High Court delivered on 23 May 2014, summarily dismissing the Statement of Claim, under the provisions of Order 33 r.7 of the High Court Rules 1988, and ordering the Appellant to pay the Respondents costs summarily assessed at \$1000.

B. The Factual Matrix

[3] The Appellant wanted to buy shares in a Company named Chicken Bites Limited ('CBL') which was incorporated in Fiji. He could not buy them in his name as he was not a citizen of Fiji at the time. The shares were therefore bought in the name of the Respondents, with monies advanced by the Appellant.

[4] The Appellant claims that the shares were held in trust for him by the Respondents, and for this purpose relies on two Trust Deeds. The Respondents claim that they purchased shares in CBL in their names, although the Appellant financed the purchase of the shares.

[5] When the Appellant acquired Fiji citizenship, he requested the Respondents to transfer the shares to him in accordance with the undertakings in the Trust Deeds. The Respondents refused to do so.

C. The Proceedings in, and the findings of the High Court

[6] The Appellant (who was the Plaintiff in the original application), instituted action by Writ of Summons dated 22 October 2012, and in his Statement of Claim, sought *inter-alia*, the following reliefs-

1. A declaration that the Respondents held the shares of Chicken Bites Limited in trust for the Appellant.

2. An order by way of injunction directing the Respondents to transfer to the Appellant, the shares held by them.

[7] On 22 March 2013, the Respondents filed Summons and Affidavit under Order 18 r.1 of the High Court Rules for striking out of the action, and for Trial on a Preliminary issue under Order 33.r.7 of the High Court Rules 1988.

[8] This appeal is from the judgment of the High Court having considered and allowed the application of the Respondents under Order 33 r.7 of the High Court Rules 1988, thereby having dismissed the action on a preliminary issue.

[9] The Learned Judge of the High Court found that the Appellant was in breach of Sections 4(1) and 16 of the Foreign Investment Act 1999 (the Act), and that Section 4(1) impliedly prohibited the execution of Trust Deeds.

D. The Grounds of Appeal as set out in the Pleadings

1. The Learned Judge erred in law and fact in holding that section 4(1) of the Foreign Investment Act impliedly prohibits the execution of the trust deeds by the Appellant/ Plaintiff as the deed allows the Appellant to carry on the business without the Foreign Investment Certificate ;
2. The Learned Judge erred in law and fact in holding that the deed allowed the Appellant/Plaintiff to carry on business in Fiji as the business was owned and operated by the limited liability company Chicken Bites Limited;
3. The Learned Judge erred in law and the application on the same in determining this action under Order 33 of the *High Court Rules 1988* without the trial and the factual issues between the parties needed to be determined by a trial before any conclusive findings could have been made on the interpretation of 4(1) of the Foreign Investment Act.

4. The Learned Judge erred in law and fact in holding that the trust deeds were tainted with illegality and therefore unenforceable and that the examination of all the evidence is not required to determine the action.
5. The Learned Judge erred in law and fact in dismissing the Appellant/ Appellant's action in the High Court on the determination of a preliminary issue only.

[10] The question for this court is whether the Foreign Investment Act impliedly prohibits the execution of Trust Deeds.

[11] In order to arrive at the finding that section 4(1) of the Foreign Investment Act 'impliedly prohibits' the execution of Trust Deeds, the High Court relied on the case of **Datt v Blue Shield (Pacific) Insurance Ltd** [2002] FJHC 284; HBC 0417.1997 (14 March 2002), and the principles laid down by Devlin J in **St John Shipping Corporation v Joseph Rank Ltd** (1957) 1 Q B 267 at 288.

[12] In the case of **Datt v Blue Shield (Pacific) Insurance** (supra) there was no doubt that the Plaintiff performed the services of an agent, and the Defendant company denied liability on the basis of the absence of a license.

[13] The finding of the Learned Judge of the High Court in paragraph 13.16 of the judgment that, the "Appellant had commenced to operate the restaurant", is erroneous because the restriction in section 4(1) of the Act, is in respect of "carrying on a business", and not the "operation" of a business. In any event, this finding was arrived at in the absence of oral evidence at a trial. Thus the reliance on the principles enunciated in the case of **Datt v Blue Shield (Pacific) Insurance** (supra) is erroneous.

E. The Law Applicable - The Foreign Investment Act

[14] The Long Title of the Foreign Investment Act provides that it is to "facilitate and regulate foreign investment".

“Foreign Investor” is defined as follows-

“foreign investor” means an enterprise, other than a national enterprise, engaged or intending to be engaged in carrying on business in a relevant activity in the Fiji Islands;

“National enterprise” as amended by the Foreign Investment (Amendment) Act 2004, is defined as follows:-

"national enterprise" means-

(a) the State or an authority of the State including a government entity as described in the Public Enterprise Act, 1996;

(b) an enterprise in which, to the extent that the enterprise is *constituted* by a corporation, company, trust, partnership or association or body of persons whether corporate or unincorporate or by a natural person or natural persons: the corporation, company, trust, partnership or association or body of persons whether corporate or unincorporate is constituted or operating under the laws of the Fiji Islands and *wholly owned by a Fiji citizen or Fiji citizens or the natural person or each of the natural persons is a Fiji citizen.* *(emphasis added).*

F. Analysis

[15] In this case, a fundamental fact which ought to have been established by evidence was not before the High Court, prior to it concluding that the Trust Deeds amounted to a breach of section 4(1) of the Foreign Investment Act. Therefore there can be no final determination that the Appellant was “carrying on business” in terms of section 4(1) of the Foreign Investment Act, until validity of the Trust Deeds has been first determined. Accordingly, the Learned Judge of the High Court was in error when he concluded that the Appellant was ‘carrying on businesses’ of CBL in breach of section 4(1) of the Foreign Investment Act.

- [16] In the case of **St. John Shipping Corporation v Joseph Rank Ltd** (supra), the ship-owner overloaded his ship, and its master was fined under the merchant shipping legislation. The owner of some goods on the ship argued that the carriage of contract in respect of the goods had been performed in an illegal way, and there was therefore no liability to pay the freight. Devlin J rejected this argument, holding that the contract of carriage, as made or as performed, was not prohibited by the legislation. The legislation prohibited overloading, not contracts of carriage.
- [17] Similarly, in this case too, the Foreign Investment Act provides that a 'foreign investor must not carry on business' without a Certificate. It does not prohibit the execution of a Trust Deed. What has to be considered is not what acts the statute prohibits, but what contract, if any, it prohibits.
- [18] If the Act does not prohibit either expressly or by necessary implication, a particular type of contract, the court must interpret the provisions of the statute, in order to determine the consequences of the Contract. In such a situation, the court ought to not allow the defendant to rely on his own complicity to avoid a contract.
- [19] In the case of **St. John Shipping Corporation v Joseph Rank Ltd** (supra) the Plaintiff was precluded from succeeding on the defence of illegality, because the question was whether the statute meant to prohibit the contract which is sued upon.
- [20] In any event, the execution of the Trust Deeds cannot be conceptually compared with a written contract for services, as was the case in the two cases referred to above. Therefore, they can be distinguished and are not binding on this court.
- [21] In this case the Respondents claim that they were the owners and shareholders of the business. If this be so, then CBL continues to be a 'national enterprise', and therefore section 4(1) of the Foreign Investment Act would not be engaged.

Section 4(1) of the Act, states as follows:-

(1) *A foreign investor must not* carry on business in a relevant activity in the Fiji Islands unless the Chief Executive has granted the foreign investor a Foreign Investment Certificate under this Part and the certificate remains in force”.(emphasis added).

- [22] It is significant that the words used in Section 4(1), as well as in Section 16 are, “must not”, and not, “shall not”, which indicates that the Act is regulatory and facilitative, and not penal and prohibitive in nature. The Act as a whole, reveals that non-compliance with the Act is curable, and that changes in the composition of ownership of the enterprise must be notified, in a timely manner to the regulator, to enable the regulatory process to be effective.
- [23] Despite the words ‘a foreign investor must not carry on a business’ in section 4(1), it is not a prohibition that is all pervasive with irremediable consequences. In fact, the consultative nature of the role of the Chief Executive under the Act makes it amply clear that it is not the intention of the legislature to prevent and prohibit non-Fiji nationals from having shares in local businesses.
- [24] It is a well-known rule of interpretation that if the words are plain and unambiguous, the need for interpretation or construction does not arise. In a situation such as this, it is the duty of court to give the words their ordinary meaning.
- [25] Thus the ordinary meaning of the words ‘carrying on business’ cannot be interpreted in a way that does violence to the scheme and object of the Act which, taken as a whole unequivocally points in one direction, namely “to facilitate and regulate”, foreign investment as provided for in the Long Title of the Act. Although the Long Title is not determinative of the specific words in the main text of an Act, it is but a shorthand reference to the general subject matter involved.
- [26] It is also important to consider Section 11(2) of the Foreign Investment Act which was not considered by the High Court. Section 11(2) covers situations in which there is a change in

either the shareholding or beneficial ownership of a national enterprise, and provides as follows-

“If, as a result of a change in the shareholding or beneficial ownership of a national enterprise that carries on business in a relevant activity in the Fiji Islands, the national enterprise becomes a foreign investor, it must, within 25 days of the change, apply for a certificate under this Part.” (emphasis added).

- [27] When sections 4(1) and 11 (2) of the Foreign Investment Act are taken in conjunction, two matters are clear. One is that, unless an enterprise transforms itself into a ‘foreign investor’ by virtue of a change in its shareholding, a national enterprise will not automatically fall into the definition of ‘foreign investor. The other is that, since section 11(2) provides for instances in which a change in the beneficial ownership occurs, there is no express, nor can there be construed an implied prohibition of the execution of a Trust Deed, under Section 4(1) of the Foreign Investment Act.
- [28] A basic principle of the doctrine of implied prohibition is that the power to regulate, and even impose fines for breach of the regulations, does not include the power to prohibit. In order to arrive at the true intent of the legislature as to the powers conferred by such language the court must have regard to the purpose for which the Foreign Investment Act was created.
- [29] There is no discernible intention of the legislature to exclude automatically or by default, a foreign enterprise from engaging in a specified activity in Fiji, provided there is compliance with prescribed procedures and conditions, and a valid Foreign Investment Certificate has been obtained.
- [30] Whether a statute prohibits a contract is always a matter of construction, turning on the particular provisions, the scope and purpose of the statute.
- [31] In this case, the nexus drawn by the High Court between section 4 (1) of the Act and the execution of the Trust Deeds, was erroneous in the light of the limited evidence that was before the High Court. The finding was also without consideration of the meaning of

section 11(2) of the Foreign Investment Act and the judgment of the High Court was therefore erroneous.

- [32] The conclusions reached by the High Court are based on the presumption that the mere execution of the Trust Deeds *ipso facto* gave automatic and immediate ownership of the shares in CBL to the Appellant. In view of the lack of evidence before it, the High Court erred in law in holding that the execution of the Trust Deeds allowed the Appellant to 'carry on' business in Fiji.
- [33] Therefore, I hold that the Foreign Investment Act does not impliedly or expressly prohibit the execution of Trust Deeds.
- [34] Since the Second, Third, Fourth and Fifth grounds of appeal are connected, they have been dealt with together. The Learned Judge of the High Court himself found that he could not hold that the Trust Deeds are illegal or invalid for failure to obtain prior approval from the Minister/Reserve Bank of Fiji, because retrospective approval could be given by the Minister under section 20(2) of the Exchange Control Act.
- [35] In view of this specific finding by the High Court, that the validity of the Trust Deeds is necessarily a matter to be determined after hearing the oral evidence, the Learned Judge ought to have heard the oral evidence of the parties without dismissing the action under Order 33, r.7 of the High Court Rules 1988.
- [36] Accordingly, until the validity of the Trust Deeds is first determined, it cannot be concluded that there has been a "change in the beneficial ownership" of the national enterprise, amounting to a breach of section 4(1) of the Foreign Investment Act.
- [37] In these circumstances, it was certainly not in the interest of justice to have dismissed the action under Order 33 r.7. The dismissal of the action under Order 33, r.7 of the High Court Rules 1988 is an error of law.

G. Conclusion

1. Until the validity of the Trust Deeds is determined; no findings can be arrived at as to the applicability of the Foreign Investment Act, to the facts of the case.
2. Section 4(1) of the Foreign Investment Act does not impliedly prohibit the execution of Trust Deeds.

Seneviratne, JA

[38] I agree with the reasoning and conclusions of Madam Justice Jameel JA.

H. The Orders of the Court are:

1. *The appeal is allowed.*
2. *The judgment of the High Court dated 23 May 2014 is set aside.*
3. *The High Court is directed to proceed with the trial of the action.*
4. *The Respondents are ordered to pay a sum of \$5,000.00 in total as costs to the Appellant within 30 days of this Judgment.*



W. Calanchini

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

F. Jameel

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Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL

L. Seneviratne

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Hon. Mr. Justice L. Seneviratne
JUSTICE OF APPEAL