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

CIVIL APPEAL NO. ABU 0036 & 0038 of 2018
(Lautoka High Court Action No.HBC 129 of 2009)

BETWEEN : **STEVEN GRANT PETHERICK**
Appellant

AND : **AUSSIE HOUSES INTERNATIONAL LIMITED**
1st Respondent

AND : **HAROLD JOHN HEELEY**
2nd Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Almeida Guneratne, JA

Counsel : **ABU 0036 OF 2018**
Mr A K Narayan and Ms N Samantha for Appellant
Mr J Sharma for the Respondents

ABU 0038 OF 2018
Mr J Sharma for the Appellant
Mr A K Narayan and Ms N Samantha for the Respondents

Date of Hearing : **5th May, 2022**

Date of Judgment : **27th May, 2022**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions arrived at by Guneratne JA.

Lecamwasam, JA

[2] I agree with the reasoning and the conclusions arrived at by Justice Guneratne.

Almeida Guneratne, JA

[3] At the hearing of this appeal a preliminary issue as to substitution of parties in place of the party named and cited in the main caption (*viz*) Steven Grant Petherick needed to be determined. The Court made order effecting the substitution sought in the summons dated 5th May, 2022 filed of record without any objection thereto, the Court itself being satisfied as regards the material required in law to effect such substitution.

[4] It is pertriment to note here that the substituted parties in the room of the deceased Steven Grant Petherick was/were the Trustees and Executors of the Estate of the said Steven Grant Petherick (SGP).

[5] The Court thought it fit to mention that fact in as much as an issue did arise in the case related to that fact.

[6] In the background of that initial record of facts the Court proceeds to deal with the substantive issues pertaining to this appeal.

Introduction

[7] This is a consolidated appeal against the judgment of the High Court dated 16th April, 2018.

[8] Since this is a consolidated appeal arising from the same cause of action in the High Court in Action No. HBC 129 of 2009, in order to avoid confusion and for ease of reference I shall refer to Mr. Steven Grant Pertherick as the plaintiff and Aussie Houses International Limited (an International Business Company) and Mr. Harold John Heeley (its Company Director) as the original 1st and 2nd Defendant respectively (despite the description of appearances appearing in the caption).

The essential material background facts

[9] I can do no better than reproduce below the material background facts which the learned High Court Judge set out:-

> *"13. The Plaintiff and the Defendant are both non-residents. On 19 June 2006, the Plaintiff (as purchaser) and the First Defendant (as vendor) entered into an agreement for the sale and purchase of a piece of land of Denarau Island which is comprised in Certificate of Title No. 35954 being Lot 15 on DP No.9047. The land is 1604 square meters in size. The Second Defendant executed the Agreement on behalf of the First Defendant as Director. Notably, the Plaintiff and the Defendant were represented by the same lawyer in the said dealing.*
>
> *14. At the same time they executed their Agreement, the Defendant had already started constructing a luxury water front residence on the property. The plaintiff did pay a deposit of well over a million dollars to their common solicitor's trust account. The plaintiff also made various other stipulated payments which, together with the deposit, added up to close to half the total purchase price. The balance of the purchase price was to be settled incrementally to construction work progress. The total monies that the Plaintiff has paid to the Defendant is NZD$2,297,862.00, inclusive of the deposit.*

15. The Defendant was obligated to complete construction within twelve months of the commencement date (i.e. from 19 June 2006). However, they did not do so.

16. The parties' Agreement gave some comfort to the Plaintiff by allowing him to lodge a caveat on the title. On 12 September 2006, the parties's common solicitor lodged a caveat for the Plaintiff. However, on 12 November 2008, the Defendant would lodge a section 110(1) (Land Transfer Act) application to the Registrar of Titles to remove the said caveat. The Registrar of Titles would send Notice of that application to the parties' former solicitors in December 2008.

17. As it turned out, the parties' former solicitor did obtain a Court Order to extend the said caveat. However, the caveat had been removed earlier that same day it was lodged for registration. A little more than a month after the removal of the caveat, the Defendant's new solicitors would issue a Notice of Rescission to the Plaintiff based on the Plaintiff's alleged failure to pay the balance of the purchase price. The said Notice stated categorically that the deposit, as well as all other sums paid by the Plaintiff, were forfeited to the Defendant. Furthermore, the Notice stated that the Defendant would be reselling the property and would sue the Plaintiff for any deficiency in the sale price.

18. The Plaintiff would then lodge an application for some interim injunctive Orders to restrain the Defendant from disposing of the property. These Orders were granted by Mr Justice Inoke."

Preliminary Question the High Court was requested to deal with at the commencement of the hearing before it.

[10] That was as to whether or not the plaintiff should recover all monies that he had paid pursuant to an unlawful agreement which failed to comply with Section 7 of the Land Sales Act and which is *ipso facto* unenforceable.

[11] I only wish to modify the facts as recounted by the learned High Court Judge (which I have referred to in paragraph [9]):

(a) by substituting Section 7 of the Land Sales Act where he refers to Section 7 of the Exchange Control Act at paragraph 13 of his Judgment (respectfully an oversight on the part of the Judge in that regard).

(b) by adding at the end of the last line in paragraph 13 of the learned Judge's judgment the words *"The money paid by the plaintiff for the transaction was to an account of the common solicitors of the parties*." (which stood as common ground and admitted at the hearing before this Court).

[12] The ensuing judgment (Ruling) of the High Court in response to the preliminary question referred to in paragraph [10] above was as follows (vide: page 21 of Vol.1 of the Copy Record).

> *"54. The Defendant would be unjustly enriched if he were allowed to retain all the monies paid by the Plaintiff pursuant to their unlawful Agreement as well the benefit of having to retain the property in question and all improvements thereon which they could always resell. Accordingly, the Plaintiff is entitled to an Order for full restitution of all the monies he had paid to the Defendant.*
>
> *55. I make no Order as to interest. Parties are to bear their own costs.*
>
> *56. As these issues were raised as preliminary points, I will adjourn the case to Monday 23 April 2018 at 10.30am to see if there are any subsisting matters to be dealt with or whether the parties will now withdraw their substantial claim and counter-claim."*

<u>The Notice and Grounds of Appeal against the said Judgment (Ruling) filed by the 1st and 2nd Defendant (vide: at pages 4 to 5 of Vol.1 of the Copy Record)</u>

[13] *"1. The Learned Judge erred in law in failing to follow the established principles applied and followed in Fiji with regard to recovery of money paid under an illegal contract/ transaction in opting to follow the English Supreme Court decision in* ***<u>Patel v Mirza</u>*** *(2017) AC 467.*

2. The Learned Judge erred in law and in fact that the parties were not in pari delicto on the erroneous basis that section 7 of the Land Sales Act placed "the burden on the non-resident vendor to seek and obtain the prior

written Ministerial consent" when in law on the proper construction the legislative provisions placed a joint obligation on both the vendor and the purchaser to obtain such consent with there being no misunderstanding by the Plaintiff (Respondent) as to this obligation on the facts and evidence before the Learned Judge.

3. *The Learned Judge erred in law and in fact in finding that the Appellant (Defendant) would be unjustly enriched "if he would have the benefit of keeping the land in question and the house he has constructed on it as well as keeping the more than NZD$2.5 million the Plaintiff (Respondent) has already paid when:*

    1. *The evidence was that-third party and not the Plaintiff (Respondent) had paid the money;*

    2. *The monies paid had been expanded in development and construction for the Plaintiff (Respondent);*

    3. *The house was incomplete and since deteriorated;*

    4. *There was no evidence before the Learned Judge as to the value of the deteriorated improvements and costs to complete;*

    5. *There was no evidence before the Learned Judge of escalation in value, if any, or the lucrative Denarau market or the ability for "an even greater profit.*

    4. *The Learned Judge erred in law and in fact in holding that an "Order for payment and restitution would return the parties to their previous positions and prevent unjust enrichment to the Defendant" when:*

        i. *this ignored the loss, detriment and disadvantage to the Defendant (Appellant) of such an order notwithstanding the Learned Judge's application of **Patel v Mirza** with regard to illegality;*

        ii. *failed to apply the ordinary principles for restitution of enunciated in **Patel v Mirza**;*

        iii. *failed to find that restitution was not possible.*

5. *The Learned Judge erred in misapplying the Defendant of change in position when:*

i. *having decided to follow Patel v Mirza, as to the non-relevance of illegality, he then erroneously proceeded to label the Defendant (Appellant) as a wrongdoer;*

ii. *having wrongly decided that the burden was on the Appellant (Defendants') to obtain the Ministerial consent;*

iii. *he misapplied the equitable maxim "he who seeks equity must come with clean hands" adversely to the Defendants when the principle was of equally or more aptly applicable to the Plaintiff (Respondent) in all the circumstances."*

The Notice and Grounds of Appeal against the said Judgment (Ruling) filed by the Plaintiff (*vide*: at pages 8 to 9 of Vol.1 of the Copy Record)

[14] *"1.* ***THAT*** *the Learned Justice Anare Tuilevuka erred in law and in fact in finding and/or holding (at para 20 – page 8 of the Ruling) that ". . .section 7 – consent was not even sought, let alone obtained, prior to the parties' Agreement" and elsewhere in his Ruling, when evidence was produced on such Minister's Consent by Annexure HJH – 13 of the Affidavit of Harold John Heeley sworn on 27th March, 2014 and filed in the Lautoka High Court on 03 April, 2014 and by other evidence produce before the Honorable High Court.*

2. ***THAT*** *the Learned Justice Anare Tuilevuka erred in law in failing to make a determination of Prayer 2 of the Defendants' Summons to Amend the Defence and for Trial of a Preliminary Point dated 4th March, 2014 which required 'there be a trial on the preliminary point as to whether the contract/transaction being the subject matter of the proceedings is illegal, null and void and unenforceable due to non-compliance with the provision of Land Sales Act.'*

3. ***THAT*** *the Learned Justice Anare Tuilevuka erred in law in failing to give reasons for holding that section 7 – consent was not even sought, let alone obtained, prior to the parties' Agreement.*

4. ***THE*** *Appellant/Original Plaintiff reserves the right to include or amend the grounds of appeal appearing herein able on the receipt of the records of the proceedings before the Learned Judge of the High Court.*

5. *Such further and other orders as this Honorable Court may deem just."*

Initial Reflections on the Grounds of Appeal urged by the parties in the two appeals in the light of the submissions made by Counsel (both written and oral).

[15] Having perused the said grounds I could not see any averment that has put in issue the learned Judge's finding that the transaction in issue was illegal, although Mr Prasad for the 1st and 2nd Defendant submitted that, there being "*an application*" for the transaction before the Minister, the request of "*prior consent*" as envisaged by Section 7 of the Lands Sales Act was therefore satisfied, if I understood him correctly.

[16] Mr Narayan for the plaintiff, in my assessment appeared to refrain from meeting that submission directly save as to draw Court's attention to the date of the application made to the Minister and the date on which consent was obtained though not satisfying "*prior consent*" there being (in effect) at least subsequent approval/consent.

The contention that the moneys paid by the plaintiff cannot be recovered by his estate for it has been paid to the Company

[17] This argument should shock any Court's conscience.

Questions that arise in the wake of that submission

[18] So, would it be open to the argument that "*loss lies where it falls*?" That, the estate of the plaintiff (deceased) through its trustees and executors should not be able to recover the moneys so paid by the plaintiff?

[19] Learned Counsel Mr. Sharma could not point to any principle or authority to support that contention.

[20] For that reason I reject that argument.

The Resulting Position and Determination

[21] In the result, the finding of the High Court on illegality of the transaction not being canvassed as a ground of appeal by either party (conceded by both Counsel but attempting to obliquely in their submissions to bring that issue into the fold) which attempts I am not prepared to respond and/or subscribe to for it would amount to "*re-inventing the wheel."*

[22] Thus, Mr Narayan's submissions on the case of ***Patel v Mizra*** [2017] AC 467 and other cases cited stand bereft of any impact (*viz*: the Fijian case law) on the central issue.

And what is that central issue?

[23] That is, where the illegality of a Sale and Purchase transaction as envisaged in Section 7 of the Land Sales Act is not (directly) put in issue, whether the moneys paid by a party to the transaction (the plaintiff) to the credit of a common solicitors account in pursuance of that transaction could be recovered by the trustees and executors of his estate.

[24] My considered view on that issue is that, it could be recovered sans consideration and the effect thereof of concepts such as "*in pari delicto*" and "*exturpi causa*". Indeed, it could be recovered on considerations of equity on the application of the concepts of unjust enrichment and *restitutio in integrum*.

Application of the doctrine of unjust enrichment

[25] Unjust enrichment means that no one should be unjustly enriched at the expense of another.

[26] It is not in dispute that the defendants have constructed a building with the moneys the deceased plaintiff paid. The issue therefore is, the transaction being rendered illegal, whether the trustees and executors of the deceased plaintiff's estate could recover the moneys so paid.

[27] In **Pavey v. Matthews** [1987] 162 CLR 221, P had requested building work and had received all the work for which she had asked. For want of writing the builders had no action in contract. The High Court of Australia allowed them to recover the reasonable value of their work.

The Analogy I seek to draw with that judicial thinking

[28] In comparison with the thinking of that decision, here is a case where the contract was held to be illegal (and therefore no action lying in contract) but where the defendants have received moneys from the plaintiff on that illegal transaction. The said moneys were moneys had and received and lying in the hands of the defendants.

[29] I proceed to examine that question on the basis that such a claim constitutes an enrichment (though not specifically claimed but impliedly based on the concept of unjust enrichment (the basis on which the learned Judge proceeded and held).

[30] To deal first with the question of enrichment, I have already expressed my view that there is in the hands of the defendants moneys paid by the plaintiff.

[31] An action for money had and received is but one of several actions where a plaintiff had paid money to a defendant (a) under a mistake or (b) for a consideration which had wholly failed.

[32] The instant case compares with (b) above, the gist of this kind of claim being that a defendant, the circumstances of the case, is obliged by ties of nature justice and equity to return the money.

[33] As the learned academic authority, Fifoot on the history and sources of the common law opined, the single criterion to be taken into consideration was the unfair advantage

accruing to a defendant at the expense of the plaintiff (vide: **The History and Sources of the Common Law**, p.598).

The link between unjust enrichment and money had and received

[34] Lord Wright emphasized that Lord Mansfield had held that the law implies a debt or obligation as a creation of the law just as much as an obligation created in tort. (vide: **Moses v. Macferland** referred to in Fifoot's work at page 1008 (*ibid*).

The Roman Law action of *condictio indebiti* and the analogy with money paid on a transaction that is held to be illegal

[35] Lord Mansfield's exposition of the principles of the English action for money had and received (supra) compares with the Roman principles evolved in regard to the action *condictio indebiti* (that is an action by which a person who has paid money to another by mistake can recover it).

[36] I hold that the same would hold good where a person has paid money on a transaction which later is held to be illegal.

The Code of Justinian

[37] **The Merriam – Webster Unbridged Dictionary** in tracing the history and etymology of the word *condictio* – refers to the great **Emperor Justinian's Code of Law** which describes the concept as "*any claim for restitution or to prevent unjust enrichment*."

Re – the Concept of Restitutio in Integrum (RII) as a remedy

[38] RII, meaning, return to the original position is used to describe the remedy of rescission of a contract (transaction) where the objective is to return the parties to the position they would have been in, if the contract had never existed.

[39] It does not need an exercise of semantics to say that where a transaction (contract) is held to be illegal, then in fact and in law there was never a contract in existence.

[40] Thus, the remedy of RII makes its appearance as the remedy based upon the principle of unjust enrichment for the plaintiff claimant to vindicate a restitutionary claim against the defendant who has been unjustly enriched.

Nature of such a claim

[41] Writing on the nature of such a claim Peter Dirks on Unjust Enrichment points out that, the law of restitution is the law of gain-based recovery, just as the law of compensation in the law of loss-based recovery (as in tort) (Peter Dirks, 2nd edition, Oxford University Pres, 2004).

Final Reflections and Comments

[42] Before I part with this Judgment I could not resist the need to mention the fact that, the English common law of money had and received strikes a common chord with the Civil Law (Roman-Dutch law as interpreted in South Africa and Sri Lanka) the concept of "*Condictio Indebiti*" (as a cause of action lying in a quasi-contractual context).

[43] It is that Romanesque jurisprudential architecture which the learned Judge of the High Court struck in his judgment, which I condone *in toto*.

Conclusion

[44] For the aforesaid reasons, I proceed to propose the following orders:-

Orders of Court:

1) *Both appeals are dismissed and the Judgment (Ruling) of the High Court is affirmed.*

2) *The application on behalf of the defendants (Respondents) to re-hear the matter is refused.*

3) *In the circumstances of the matters urged in this matter (the two appeals), no order is made as to costs.*

4) *The Registrar of this Court is directed to send this judgment to the High Court of Lautoka for further steps (if any) in view of the learned High Court Judge's Order at paragraph 56 of his judgment referred to in paragraph [12] of this judgment.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL