PETER ERNEST JONES & ALGAR KEITH TOZER

v.

MARWICK GEORGE MATHIESON

[HIGH COURT, 1990 (Byrne J) 5 September]

Civil Jurisdiction

Exchange control- registration of foreign judgment- whether registration prohibited by failure to comply with the provisions of the Exchange Control Act (Cap 211) Section 11 (2).

The Defendant agreed to purchase shares in a New Zealand Company controlled by the Plaintiff. As the Defendant was resident in Fiji the Exchange Control Act specified that he required the consent of the Reserve Bank. He failed to obtain it and failed to complete the contract with the Plaintiff who then obtained judgment against him in New Zealand. When the Plaintiff applied to register this judgment in Fiji the Defendant argued that the judgment was not registrable on the ground of public policy, the provisions of the Exchange Control Act not having been complied with. Dismissing this argument and registering the judgment the High Court examined the provisions of the relevant legislation and HELD: that the failure to obtain the necessary consent was no defence to the Plaintiffs claim.

Cases cited:

Cecelia T. Jimenez v. Toberua Island Ltd (Companies Action No. 81/86)
Contract & Trading Co. (Southern) Ltd v. Barbey [1959] 3 All ER 846
Cummings v. London Bullion Co. Ltd [1952] 1 KB 327
MacGregor Investments Ltd v. Sheraton Hotels Ltd (fca rEPS 77) 248
New Zealand Shipping Co Ltd v. Societe des Ateliers et Chartiers de France [1919] A.C. 1
Rede v Farr (1817) 105 E.R. 1188
Shelley v. Paddock [1980] 1 All ER 1009

T. Seeto for the Plaintiffs
J. Singh for the Defendants

Application for registration of a foreign judgment in the High Court.

Byrne J:

This is an application made pursuant to Section 2 of The Reciprocal Enforcement of Judgments Act (Cap 39) to register a Judgment of Mr. Justice Fisher of the High Court of New Zealand dated the 12th day of October 1989 in favour of the Plaintiffs against the Defendants. The application is made in respect of the fourth Defendant only who is a resident of Fiji. Section 7 of the Act (Subsidiary Legislation) extends the scope of the Act to judgments obtained in Courts of various Commonwealth countries including New Zealand. The judgment No.

580/87 which is sought to be registered is the result of proceedings in the High Court of New Zealand in which the presiding Judge Mr. Justice Fisher found
A that the Defendant Marwick George Mathieson of Fiji and three other Defendants all of Auckland were in breach of a contract to buy shares in a New Zealand company from the Plaintiffs Peter Ernest Jones and Algar Keith Tozer.

The Judge held that the Plaintiffs are entitled to recover the sums of F$144,112.45 and the sum of F$10,318.97 for costs against Marwick George Mathieson and
B that the Defendant Marwick George Mathieson pay the Plaintiff Peter Ernest Jones F$110,703.49 and F$8,974.78 for costs and interest.

There are various affidavits before me filed on behalf of the parties, two on behalf of the Plaintiffs by Algar Keith Tozer the second Plaintiff and Derek Grant Collecutt an employee solicitor of the firm of Simpson Grierson Butler White, the New Zealand Solicitors for the Plaintiffs. Mr. Collecutt was junior
C counsel for the Plaintiffs in the High Court Action before Mr. Justice Fisher.

The Defendant Mathieson has filed an Affidavit in Reply dated the 8th day of March 1990 alleging among other things that the judgment sought to be registered in the High Court of Fiji is in breach of the Exchange Control Act Cap 211 and thus cannot be registered here on the ground of public policy. The affidavit of
D Derek Grant Collecutt is in reply to that of the Defendant Mathieson and asserts that the Defendant had accepted the jurisdiction of the High Court of New Zealand by taking certain steps in the summary judgment proceedings which preceded the final judgment now sought to be registered but did not raise the arguments referred to in his affidavit of 8th of March 1990 at the substantive trial.

E I have had the benefit of oral and written submissions by counsel for the Plaintiffs and Defendants and I shall refer to these in due course. First however to understand the submissions it is necessary to set out the facts leading to this application.

The first named Plaintiff Peter Ernest Jones was the sole beneficial owner of 100 shares in the company called Acorn Promotions (NZ) Limited. ("Acorn NZ").
F The second named Plaintiff Algar Keith Tozer was the Accountant to Mr. Jones and to comply with the company law requirements of New Zealand had the legal but not beneficial title to one of the 100 Acorn (NZ) shares. The only asset of Acorn (NZ) was the entire beneficial interest in shares of Acorn Corporation (Fiji) Limited which in turn owned a tourist train business in Fiji called the "Coral Coast Railway". The first named Plaintiff Peter Ernest Jones incurred
G considerable capital outlay in setting up the Coral Coast Railway and had borrowed from the Bank of New Zealand and the Reserve Bank of Fiji. The loan from the Reserve Bank of Fiji had to be repaid by 28th February, 1987. Mr. Jones therefore had to pursue fresh equity capital to repay this loan. To that end he had preliminary discussions with two independent businessmen in Australia but when it became apparent that the present Defendants were themselves interested in equity participation Mr. Jones dropped the Australian negotiations.

There were plans to form a larger venture called Trans Pacific Holdings. An agreement for sale and purchase of the Acorn (NZ) shares by the four Defendants was drawn up in Auckland, New Zealand by Auckland solicitors. This was duly signed by the Plaintiffs and the Defendants on 21st of November 1986.

The document provided for the purchase of Acorn (NZ) shares for NZ$825,000 of which $75,000 was to be paid as a deposit. The balance of $750,000 was to be satisfied by one of two alternatives. The first alternative was that the balance of $750,000 would be paid in cash. The second was that at the election of the purchasers a public company could be formed and by way of satisfaction of the balance of the purchase price the vendor Mr. Jones would receive $450,000 fully paid up $1 shares and only the residue of $300,000 in cash on settlement.

Three months were to elapse before settlement date after the initial signing on the 21st of November 1986. One of the Defendants Mr. Chatfield visited Fiji during this period to look into broader proposals for a public company but found the market conditions here were not conducive and therefore the idea of the public company not viable. This was intimated to Mr. Jones who resisted the idea as he needed further equity capital. There was no resolution of the differences between the parties which culminated in the Plaintiffs issuing summary judgment proceedings against the Defendants for $750,000. These were defended successfully by the Defendants and the matter later proceeded to a full hearing in which Mr. Justice Fisher found all Defendants to be in breach of the agreement to purchase shares in Acorn Promotions (NZ) Limited and awarded damages and costs to the Plaintiffs accordingly. I now turn to the various submissions made to me.

According to the Plaintiffs, both of whom I should state are residents of New Zealand, there are what are termed three threshold issues to be decided in favour of the Plaintiffs before the judgment of the New Zealand High Court can be registered here. These are:

(a) Does Section 3 (2) (f) of the Reciprocal Enforcement of Judgments Act (Cap 39) prohibit the registration of the New Zealand judgment (hereinafter called "the judgment") on the grounds of public policy where the provisions of the Exchange Control Act (Cap 211) are not complied with by the transferee, in this case the Defendant, Mathieson?

(b) Was the Heads of Agreement for sale and purchase of shares in Acorn Promotions (NZ) Limited signed by the Plaintiffs and Defendants on 21st of November 1986 a valid contract?

(c) Is Marwick George Mathieson estopped from raising any defences?

On the other hand Mr. Singh for the Defendant argues that there is only one such issue, namely whether reasons of public policy would have precluded the High

Court of Fiji from entertaining an action for enforcement against the Defendant of the contract found to exist by Mr. Justice Fisher in New Zealand.

A To understand these submissions it is necessary to set out the relevant legislation. Section 3(2)(f) of the Reciprocal Enforcement of Judgments Act reads thus:

> "No judgment shall be ordered to be registered under this Section if -
>
> (f) the judgment was in respect of a cause of action which
> B for reasons of public policy or for some other similar reason could not have been entertained by the registering court."

Section 11(2) of the Exchange Control Act (Cap 211) reads as follows:

> C "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."

As will be seen later in this judgment I also consider that certain other sections of the Exchange Control Act bear on the question I have to decide.

D

Chitty on Contracts (26th Edition) says that the enforcement of contractual claims is in certain circumstances against public policy. The diversity of the fields with which public policy is concerned, and of the circumstances in which a contractual claim may be affected by it, combine to make this branch of the law of contract inevitably complex. The author suggests that much difficulty would be avoided, E if whenever a plea of illegality or public policy were raised as a defence to a contractual claim, the test were applied: Does public policy require that this claimant, in the circumstances which have occurred, should be refused relief to which he would otherwise have been entitled with respect to all or part of his claim?

F Over the past 30 years a number of cases have been decided involving Exchange Control Legislation both in England and Fiji where the Act is raised as a defence to non-enforceability of a contract on the grounds of public policy. Thus in Cummings v London Bullion Co. Ltd. [1952] 1 K.B. 327 at 335 Denning L.J. said this:

> G "I take it to be clear law that when a creditor comes to the courts to enforce a debt payable in a foreign currency the creditor is entitled to be put into as good a position as if the debtor had done his duty under the contract and had paid the debt in the foreign currency without the intervention of the courts."

In the same case Somervell L.J. referred to the English Exchange Control Act, 1947 of which our own Exchange Control Act is the counter-part. Section 33(1) of the English Act provided that where by virtue of the Act the permission or

consent of the Treasury was at the time of the contract required for the performance of any term thereof it should be an implied condition of the contract that that term should not be performed except in so far as that permission or consent was given or was not required. The Fiji equivalent of Section 33(1) is Section 35(1) of the Exchange Control Act Cap 211. The English Act also contained a schedule similar to the Fourth Schedule of our own Act. Section 2 of the Fourth Schedule of the Fiji Act reads as follows:

> "Nothing in this Act shall be construed as preventing the payment by any person of any sum into any court in Fiji but the provisions of Part III shall apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside Fiji."

Section 4(1) of the Fourth Schedule of the Fiji Act reads as follows:

> "In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Minister and of that permission not having been given or having been revoked."

The High Court is a prescribed Court under the Act.

Paragraph 4(1) of Schedule Four of the English Act is in almost identical terms to Section 2 of the Fourth Schedule of the Fiji Act.

Paragraph 4(2) of the English Act reads:

> (2) "No Court shall be prescribed for the purpose of this paragraph, unless the Minister is satisfied that adequate provision has been made therefor by rules of court for the purposes specified under paragraph 3,"

Somervell L.J. described paragraph 4 of Schedule Four as important and went on at page 334 to say:

> "These provisions disclose the purpose of the Act. Parties are free to make contracts, or at any rate certain contracts, of which this is one, on terms the fulfilment of which, or some of which, require permission under the Act. That term cannot be performed unless or until permission is given. The effect of the provisions with regard to payment into and out of court are more simple if one considers a case where the prohibited payment is in sterling. The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action."

This passage was cited with approval by Viscount Simonds in Contract & Trading Co. (Southern) Ltd. v. Barbey [1959] 3 All E.R. 84S at 849-50. In that case the

Respondents were foreigners and the holders in due course of three Bills of Exchange of which the Appellants, an English company, were acceptors and which were dishonoured on presentation. The Appellants did not dispute that, apart from the fact of the Exchange Control Act of 1947, they would be liable to pay the amount due on the bill's claimed by the Respondents. No permission of the Treasury to make payment had been obtained by the Appellants. It was held that the Respondents were entitled to judgment since their claim was not to be defeated by the fact that the Treasury's permission to pay had not been given.

In Fiji, the Court of Appeal in MacGregor Investments Limited v. Sheraton Hotels Limited, FCA Reps 77/248 held that under the then Fiji Exchange Control Ordinance (Cap 186) the obtaining of consent is the obligation of the transferee or party who is obliged to seek consent. At page 13 of the judgment Henry J.A. said:

> "The Appellant cannot refuse to apply for consent and then say, since it elected not to make performance in a legal manner, the contract is illegal and it is absolved from performance. Appellant would be taking advantage of a state of affairs which it has itself produced."

His Lordship then quoted from the House of Lords decision in New Zealand Shipping Company Limited v. Societe des Ateliers et Chartiers de France [1919], AC 1 where Lord Finlay L.C. said:

> "It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by the case of Rede v. Farr (1817) 105 ER 1188."

His Lordship was referring to the failure of a shipbuilder to proceed with the construction of a ship with due diligence.

The Court of Appeal was concerned in MacGregor's case with a Deed of Release and certain Bills of Exchange drawn by Sheraton Hotels Limited in favour of MacGregor Investments Limited which were subsequently not honoured by MacGregor Investments Limited. They pleaded the Exchange Control Act as a defence but the Court of Appeal dismissed their defence.

Later in 1986 Rooney J. followed MacGregor's case in Cecilia T. Jimenez v. Toberua Island Limited, (Companies Action No. 81 of 1986). At page 12 of the judgment His Lordship said this:

> "Mr. Johnson submitted that the agreement between the parties was contrary to the Exchange Control Act. He cited Shelley v. Paddock [1980] 1 All ER 1009 in support. I do not think that that case is of assistance to the respondent, but, in any event, reliance by a debtor on the Exchange Control Act as a defence has been tried before in Fiji. Assuming, that the agreement under (4) above is illegal in that it contravenes the Exchange Control Act, Cap. 211, such a state of affairs has been brought about by the failure of

> the debtor to obtain the consent of the appropriate authority to the transaction. No one is permitted to take advantage of his own wrong. In MacGregor Investment Limited v. Sheraton Hotels Limited (FCA Reps 77/248) the Court of Appeal refused to permit a debtor to rely on the Exchange Control Act as a defence to an action where the debtor was responsible for the failure to obtain the consent required by the Act."

A

Part 4 of the Exchange Control Act deals with securities which are defined as, inter alia, "stock, bonds, capital in any partnerships, notes (other than promissory notes) etc."

B

Section 11 says that except with the permission of the Minister a security registered in Fiji shall not be transferred unless various requirements are fulfilled. I have already quoted Section 11(2) on page 5 of this Judgment and need not repeat it.

C

In a rather ingenious submission Mr. Singh on behalf of the Defendant does not dispute that the cases that I have mentioned above are good law but says that they concern a factual situation which was never reached in this case. He argues that here the very essence of the contract was that it had to meet the Exchange Control requirements. It was a contract to sell offshore shares to an on-shore buyer. To perform the contract the Plaintiffs had to transfer the shares and the onus was on them to obtain Exchange Control permission which they did not. Therefore he argues the judgment cannot be registered here as to do so would be contrary to public policy.

D

Ingenious Mr. Singh's submission may be, but in my opinion it is also fallacious for at least three reasons. First it purports to assume that in the circumstances of this case Ministerial consent would not be given to pay for the shares out of Fiji as a matter of public policy. Secondly it ignores in my view the clear words of Section 11(2) of the Act. And thirdly it also ignores the existence of Sections 2 and 4 of the Fourth Schedule of the Act.

E

I shall now elaborate on these comments. In my judgment it was the responsibility of the Defendant to obtain the permission of Exchange Control for the purchase of shares in Acorn (NZ) Limited. This is borne out by reference to Mr. Mathieson's affidavit sworn on the 8th of March, 1990 in these proceedings. It is quite apparent to me from paragraphs 5 to 8 of his affidavit that he has known all along that it was his responsibility and not that of the Plaintiffs to obtain permission. Paragraph 5 of his affidavit reads thus:

F

G

> "I did not realise that it would have been preferable had the Heads of Agreement, whoever they bound (my emphasis) been expressly conditional on the availability of the approval of the Reserve bank of Fiji, but I was aware that both the said company and I were Fiji residents within the Exchange Control Act and that approval would have to be obtained."

I need not quote paragraphs 6 and 7 but paragraph 8 reads thus:

> "Once I had satisfied myself that Reserve Bank approval was unavailable to me I decided that I should have nothing further to do with the action which had by that time been commenced in the High Court at Auckland. As a result it proceeded without my being represented."

Mr. Mathieson had exhibited to his affidavit a letter dated 17th of June 1987 from the Reserve Bank of Fiji which omitting the formal parts I now set out. It is addressed to Mr. Mathieson's present solicitors.

"TAILEVU DEVELOPMENTS LTD
W G MATHIESON
ACORN PROMOTION (NZ) LTD

Thank you for your letter dated 11 June 1987.

As requested, we confirm the following:-

(1) Mr. Peter Jones is regarded as non-resident for the purposes of Exchange Control Act and as non-resident does not require consent under the Exchange Control Act to sell his shares in Acorn Promotions (NZ) Ltd to non-residents as the Fiji Act has no jurisdiction over overseas incorporated companies.

(2) Mr. W G Mathieson is a resident of Fiji for the purposes of the Exchange Control Act and would require Exchange Control permission to buy shares in Acorn Promotions (NZ) Ltd. We see no reason why a Fiji resident should buy shares in Acorn Promotions (NZ) Ltd rather than Acorn Corporation (Fiji) Ltd.

Further we confirm that:-

(a) Failure to obtain any and all necessary permissions would constitute a breach of the Exchange Control Act 1952 and would amount to a violation of Fiji law.

(b) The authority of the Minister to grant approvals under the Act has been delegated to the Reserve Bank."

In the copy above of paragraph 5 I have emphasised the phrase "whoever they bound" deliberately and ask : Could Mr. Mathieson really be in any doubt whatever as to whom the Heads of Agreement bound? Certainly Mr. Justice Fisher had no doubt because at page 39 of his judgment he said this:

> "In his case there is nothing to rebut the normal assumption that a man is responsible for a written document which he signs."

To my mind it is obvious from the parts of his affidavit I have quoted that Mr. Mathieson realised at all times it was he and not the Plaintiffs who had to obtain Exchange Control permission and his attempt now to switch the onus on to the

Plaintiffs is in my judgment most implausible. Furthermore this accords with Section 11 (2) because it is he who is a resident of Fiji and one of the persons to whom the shares were to be transferred after payment in New Zealand for them.

A

I decline to hold, in view of the sections from the Act which I have mentioned, and the cases I have cited, that it is a matter of public policy that the judgment of the New Zealand High Court should not be registered here. To answer the question which Chitty asks and which I stated earlier in this judgment, in my view public policy requires that these Plaintiffs, in the circumstances which have occurred, should not be refused relief to which they would otherwise have been entitled with respect to their claim. In my view it would be contrary to public policy not to register the judgment, for to do so would allow the Defendant to avoid a contract and debt on which he had been held liable by a superior court in New Zealand.

B

In his final submission Mr. Singh argues that there is no rule of law in Fiji to the effect that anything that a party to foreign proceedings does or does not do in those proceedings in that foreign place, prevents his assertion in Fiji of any of the grounds upon which the High Court is enjoined by the Reciprocal Enforcement of Judgments Act against registration of a judgment obtained in those proceedings. I do not cavil at that but I say that equally the courts of Fiji should not be so myopic as to simply ignore the judgment of a superior court of such a foreign place. It seems to me that when it appears to a court in Fiji that a judgment is (a) correct in law and (b) further has never been appealed, both of which conditions apply to the judgment of Mr. Justice Fisher, unless it falls within the exceptions set out in Section 3 (2) of the Reciprocal Enforcement of Judgments Act, it is entitled to be registered here.

C

D

E

In view of the conclusions which I have reached on the Plaintiffs' first two submissions I find it unnecessary to consider the third as to estoppel.

I therefore order that the judgment of the High Court of New Zealand No. 580/87 be registered in this Court against the Defendant, Marwick George Mathieson and that he is to pay the Plaintiffs' costs to be taxed in default of agreement.

F

(Application granted.)

G