

MINAMI TAIHEIYU KAIHATSU KABUSHIKI KAISHA

v.

A

THE ATTORNEY-GENERAL

[HIGH COURT, 1998 (Scott J) 7 September]

Civil Jurisdiction

B *Land- illegal and unenforceable contract of sale subsequently approved by the Minister- when liability for stamp duty arises. Stamp Duties Act (Cap 205) Sections 5 (2) and 37 (1) (b).*

A transfer document was presented for stamping more than three months after it was executed with the result that the statutory fine was imposed. The vendor sought a declaration that the fine had been wrongly imposed. The High Court rejected the claim. It HELD: (1) that the liability for stamp duty arises at the time the document is executed and (2) that the failure to obtain the minister's consent to the dealing before-hand is irrelevant.

C Cases cited:

D *Hunter v Apgar* (1989) 35 FLR 180
IRC v DG Angus & Co (1889) 23 QBD 579

G.P. Lala for the Plaintiff
S. Kumar for the Defendant

E

Scott J:

On 1 August 1997 the Plaintiff Company entered into a contract to sell various properties to the Pacific Harbour Resort Co. On the same day a transfer form listing the 169 properties covered by the contract was also signed.

F Neither the vendor nor the purchaser was a resident in Fiji and therefore Sections 6 & 7 of the Land Sales Act (Cap 137) applied.

On 18 August 1997 Messrs. G.P. Lala wrote to the Minister of Lands seeking consent for the sale (Exhibit B to the second affidavit of Mrs. Anaseini Yalorarawa). It appears that copies of the transfer and titles were attached to the letter together with an application for consent form but not a copy of the contract (Exhibit A page 21 to the second affidavit).

G It will be noted at this stage that the contract was both illegal and unenforceable, the consent of the Minister not having been beforehand obtained (Land Sales Act - Section 6 & 7 and *Hunter v Apgar* (1989) 35 FLR 180.

On 14 October 1997 the Minister gave his consent to the sale and required the transfer of the titles to be completed within three months (Exhibit C to

the second affidavit).

Unfortunately, certain of the original titles had been lost and therefore provisional titles were applied for. By the time these were forthcoming the three months had expired.

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On 4 February 1998 the transfer document was presented for stamping by Mrs. Yalorarawa at the office of the Commissioner of Stamp Duties. It was pointed out by the counter clerk that the Minister's consent had expired. At this point there is a dispute as to whether Mrs. Yalorarawa was told that since the consent had expired the transfer could not be accepted for stamping or whether she was told that registration of the transfer could not be effected after the expiry of the consent. I do not think that resolution of this dispute is necessary for resolution of the central issue before me and there is no argument that after her conversation at the Stamp Duties Office Mrs. Yalorarawa took the transfer document back to the Offices of Messrs. G.P. Lala.

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On the same day, 4 February 1998, Messrs. G.P. Lala wrote to the Minister this time requesting him to extend the three months period specified in his consent of 14 October 1997 for a further three months. On 9 February the Minister agreed and on the same day Mrs. Yalorarawa once more returned to the Commissioner's Office where the transfer document was again presented for stamping.

D

The rates of stamp duty are set out in the Schedule to the Stamp Duties Act (Cap 205) and the amount of duty payable on a transfer of land following sale is \$2.00 for every \$100.00 of the purchase price. The consideration as set out in the presentation slip (Exhibit E to the second affidavit) was F\$4,545,454.55 and the duty charged was \$90,910.00. It is what, however, was charged in addition which has given rise to this Action.

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Under Section 37 (1)(b) of the Stamp Duties Act an unstamped document within the Schedule which is first presented for stamping more than three months after execution incurs a fine of 50% of the amount of duty payable, such fine being at least \$4.00. Mr. Jagdishwar Narayan, who was Commissioner of Stamp Duties at the time, took the view that since the transfer was dated 1 August 1997 the three months period had been exceeded. He therefore imposed a fine of \$45,455.00. On 18 March 1998 after representations had been received from Messrs. G.P. Lala the rate was cut from 50% to 25% and the fine was accordingly halved. It is the imposition of this fine of \$22,727.50 which the Plaintiff invites the Court to declare to be contrary to law.

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Both Counsel filed written submissions for which I am grateful. Mr. Lala argued that the original contract was invalid until the Minister's first consent was obtained on 14 October 1997. The consent having then been given the contract became valid until the consent expired on 14 January 1998. It then

A became valid again on 9 February 1998 when the second consent was given. In these circumstances there was no valid transfer available for stamping until 9 February and therefore stamping took place within the two month non-fine period specified in Section 37 (1) (a) of the Act.

B In answer, Mr. Kumar citing *IRC v DG Angus & Co* [1889] 23 QBD 579, 589 suggested that it was not the transaction which was being stamped but the instrument; whether therefore the transfer document fell foul of the Land Sales Act when it was signed on 1 August 1997 was not relevant to the question of whether it was liable for stamp duty under the Stamp Duties Act.

In my opinion Mr. Kumar's submission is sound and I know of no authority that a contract which is prohibited by statute can retrospectively be validated.

C As I see it the starting point for the answer to this issue is the Stamp Duties Act itself. The primary liability to pay stamp duty is set out in Section 5 (2) of the Act. It is a duty imposed in this case on the transferee (Pacific Harbour Resort Co) to pay the duty chargeable on the transfer *immediately upon the execution thereof*.

D "Execution" is defined in Section 2 of the Act to mean: "signed by any one or more of the parties thereto". There is no exception to this liability either in Part II or Part III or any other section of the Act based on the voidability, unenforceability or illegality of the instrument executed and in particular based on failure to comply with Section 7(1) of the Land Sales Act. Were there such exceptions the Stamp Duties Act would obviously be almost impossible to administer.

E In the present case an instrument of transfer was signed and therefore executed on 1 August 1977. Had the parties not failed to comply with Section 1 of Lands Sales Act they would have been able to present this transfer for stamping within the required period. That they could not and did not was entirely their own fault. In my opinion the Commissioner correctly interpreted the Stamp Duties Act. Nothing has been placed before me to show that he exercised his discretion incorrectly when he reduced the penalty by 50%. Courts do not readily come to the aid of parties who through their own breach of the requirements of one Act have failed to comply with the requirements of another and I see no justification for doing so on this occasion. The Action fails and is dismissed.

G (*Action dismissed.*)

[Editor's note: *Hunter v. Apgar* (1989) 35 FLR 180 was approved by the Fiji Court of Appeal in *Mohammed Akhtar v. Gonzalez* ABU 0054/98S, judgment dated 30 August 2002]