JENNYNE GONZALEZ v MOHAMMED AKHTAR and 2 Ors (CBV00011 of 2002S)

SUPREME COURT — APPELLATE JURISDICTION

FATIAKI P, GAULT and WEINBERG JJ

14, 21 May 2004

Practice and procedure — appeal — contract of sale of land — whether contract of sale enforceable — whether contract of sale valid — Bankruptcy Act (Cap 48) — Income Tax (Amendment) (No 2) Bill 1972 — Insurance Act — Land Sales Bill No 23 of 1972 — Land Sales Act (Cap 137) s 6(1) — Land Transfer Act (Cap 131) — Supreme Court Act 1998 s 7.

On 25 September 1985, Mr Gonzalez, a US citizen entered into an agreement (the 1985 Agreement) with Mr Mohammed to purchase a 12-acre block of land for the sum of $90,000 payable in instalments over a period of 5 years and subject to several conditions. These conditions were for Mr Mohammed to subdivide the land at his own expense, construct a well and provide road access. The land in question was part of 101 acres of land which was mortgaged to the Fiji Development Bank (the bank).

Later, when Mr Mohammed faced financial difficulties and was unable to comply with building the access road, Mr Gonzalez made payments out of his own pocket. Later, the relations between Mr Gonzalez and Mr Mohammed had broken down, their agreement was struck in which it was agreed that Mr Gonzales will no longer make further payments to Mr Mohammed until the completion of the access road and if Mr Gonzalez would make payment, the same to be deposited to the trust account of Khan & Associates.

On 5 April 1990, the agreement was again refined (the 1990 Agreement) where it was agreed that Mr Mohammed would arrange the building of the access road, and to comply with all the approval necessary for the subdivision of the land. The agreement likewise obliged Mr Gonzalez to pay $15,000 into the trust account of Khan & Associates which will be used to pay for the building of the access road the balance to be set off against the purchase price. Upon completion of the road, and the relevant approvals from the authorities, the total purchase price with interest would be paid into the trust account and the whole amount would be paid to Mr Mohammed once title to the subject land had been transferred to Mr Gonzalez.

On 13 August 1990, the subdivision was approved, subject to compliance with conditions imposed by the local authority. The parties learned that under s 6(1) of the Land Sales Act Mr Gonzalez not being a resident of Fiji, he could not enter into a contract to purchase more than one acre of land without the prior written consent of the Minister of Lands. To solve the problem, they wrote to the minister and requested for consent.

On 16 October 1990, the minister gave its consent but was subject to a condition that Mr Mohammed should obtain clearance from the Commissioner of Inland Revenue. However, the condition imposed by the minister did not materialise. The commissioner and the Governor of the Reserve Bank did not provide the relevant clearance.

On 13 December 1990, Mr Gonzalez and Mr Mohammed entered into a third agreement and provided that Mr Gonzalez would, within 14 days, deposit in the trust account of Khan & Associates an amount sufficient to satisfy the debt owing to the bank which was complied with after some difficulties.

The parties entered into a fourth agreement which provided that Mr Mohammed would arrange for the clearance to be obtained from the Commissioner of Inland Revenue within 2 weeks. However, Mr Mohammed did not obtain the relevant clearance. As a result, the condition remained unfulfilled, and the minister's consent was never actually given.

On 27 August 1991, Mr Gonzalez lodged a caveat over the subject land with the Registrar of Titles. It claimed an estate or interest as equitable owner only with respect to the 12 acres that were the subject of the 1985 agreement. However, Mr Gonzalez died on

23 May 1992 so his daughter Ms Gonzalez (the Appellant) obtained a grant of letters of administration of his estate in the following year.

As the resolution of the dispute could not be achieved, Mr Gonzalez filed before the High Court and claimed for specific performance ordamages for breach of contract.

On 15 November 1994, Murray Merchant became the registered owner of the 101-acre land. Thereafter, the caveat lodged by Mr Gonzalez was cancelled. By 15 November 1994, the estate of Mr Gonzalez lost any rights that he may have had under the caveat.

The court of first instance held that s 6(1) of the Land Sales Act (Cap 137) prohibited a non-resident from making a contract for the purchase of land without the prior written consent of the minister but did not rule on whether the contract was enforceable but later concluded that the contract entered into without the prior written consent of the minister was enforceable.

On appeal, the Court of Appeal held that the appeal by the Defendants should be allowed. The orders made by the primary judge were set aside and the proceeding brought by the Appellant was dismissed.The Appellant contended that the 1985 agreement was neither expressly nor impliedly prohibited by s 6(1).

The issue in this case was whether the contract for the sale of land executed without the consent of the minister as required under s 6(1) of the Land Sales Act was enforceable.

Held — (1) It was clear under s 6(1) of the Land Sales Act that no non-resident is permitted to make a contract to purchase land without the minister's assent. Thus, when the making of a contract is expressly prohibited by law, the contract is illegal unless the statute itself indicates that theprohibited contract is enforceable. While s 17 prescribes penalties on willful breaches, so are non-willful breaches under s 6(1) making it neither directory, nor regulatory. Not only is consent required but also prior written consent. There were no distinctions between an innocent failure to obtain the requisite consent and willful failure to do so under s 6(1). Nor was there any distinction between speculators and genuine developers. The Act allows contracts in breach of s 6(1) unenforceable while deliberate breaches of the subsections are criminally sanctioned. Thus, the 1985 agreement was illegal and enforceable. The Appellant was not able to establish a cause of action based on the agreement and hence, could not rely uponthe caveat which was based on that agreement.

Cases referred to

Thomas D Hunter v Francis Joseph Apgar [1989] 35 FLR 180; *Love's Realty & Financial Services Ltd v Coronet Trust* [1989] 3 WWR 623; 57 DLR (4th) 606, approved.

Adelaide Development Co Pty Ltd v Pohlner (1933) 49 CLR 25; *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454; 84 ALR 199; *Bradshaw v Gilbert's (Australasian) Agency (Vic) Pty Ltd* (1952) 86 CLR 209; [1952] ALR 969; *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432; [1969] ALR 321; *Butts v O'Dwyer* (1952) 87 CLR 267; [1953] ALR 117; *Denning v Edwardes* [1961] AC 245; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215; 143 ALR 569; *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91; [1930] ALR 72; *Mahoe Developments Pty Ltd v Lionbond Pty Ltd* [1992] ANZ ConvR 199; *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133; *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers* [1919] AC 1; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1987] 2 All ER 152; *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206; [1939] 2 All ER 113, cited.

O'Neill v O'Connell (1946) 72 CLR 101; [1946] ALR 173; *Re Mahmoud and Ispahani* [1921] 2 KB 716; *Re Still v Minister of National Revenue* (1997) 154 DLR (4th) 229; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; 21 ALR 585, considered.

McWilliam v McWilliams Wines Pty Ltd (1964) 114 CLR 656, distinguished.

B.C. Patel and *C.B. Young* for the Appellant

M. Maurice and *S. Sahukhan* for the second Respondent

[1] Fatiaki P, Gault and Weinberg JJ. This appeal concerns the meaning to be given to s 6(1) of the Land Sales Act (Cap 137) which provides as follows:

> 6.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:
>
> Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

The primary question raised on the appeal is whether a contract for the sale of land can be enforced if it was entered into without the prior consent, in writing, of the minister.

[2] The Appellant, Jennyne Gonzalez, is the administratrix of the estate of her late father, Ignazio Gonzalez (Mr Gonzalez). He died in 1992, shortly after having commenced this proceeding. The first Respondent, Mohammed Akhtar, is the sole executor and trustee of the estate of his late father, Yar Mohammed (Mr Mohammed). He died in 1996. Neither the second Respondent, Haroon Khan, nor the third respondent, Murray Merchant Pacific Finance and Investments Ltd (Murray Merchant), featured in the contractual dispute between Mr Gonzalez and Mr Mohammed until long after the contract that is the subject of this appeal was entered into. The roles that they played will be discussed later in these reasons for judgment.

[3] In order to understand the central issue in this appeal, it is necessary to set out the background facts in some detail. The proceeding arose out of an agreement entered into between Mr Gonzalez and Mr Mohammed on 25 September 1985 (the 1985 agreement). Under that agreement, Mr Mohammed agreed to sell, and Mr Gonzalez agreed to purchase, a 12-acre block of land located in the district of Nadroga for the sum of $90,000. The land in question was part of a larger block consisting of just over 101 acres. The entire block was mortgaged by way of charge to the Fiji Development Bank (the bank). The charge was registered on 16 April 1982, which was also the date of the relevant Certificate of Title 20817.

[4] The 12-acre block fronted the ocean on a white sandy beach. It was described by Lyons J, the primary judge, as a "*long thin block going from the high water mark towards the interior*". The Court of Appeal observed that the 12-acre block was plainly a desirable area in which to develop a tourist resort.

[5] Mr Gonzalez was, at all material times, a United States citizen, and a resident of that country. However, he had had some contact with Fiji over the years.

[6] The 1985 agreement provided that the purchase price was to be paid in instalments every 6 months, over a period of 5 years. The full amount, together with interest calculated at 13.5% per annum, was to be paid on or before 16 September 1990. The contract was subject to several conditions. Mr Mohammed was to subdivide the land at his own expense, construct a well upon it, and also arrange for road access to be provided. Mr Gonzalez was to obtain the various

statutory approvals for subdivision, and he was to allow Mr Mohammed to harvest any cane then standing on the land. Mr Gonzalez was to take possession upon execution of the contract.

[7] Mr DS Naidu, a solicitor based in Nadi, drew up the contract. He acted on the instructions of both parties. The primary judge found that neither party consulted closely with Mr Naidu, preferring to go about completing the contract on their own, and only calling upon professional help when required.

[8] Mr Gonzalez and Mr Mohammed then set about attending to the various conditions of the contract. Not surprisingly, in a case of this type, certain difficulties were encountered. One problem was Mr Mohammed's inability to raise the funds necessary to perform his part of the bargain in arranging for the access road to be built. To overcome this difficulty, Mr Gonzalez made several payments out of his own pocket.

[9] Sometime in 1988, Mr Mohammed decided to seek the services of his own solicitor. He retained Mr Amjal Khan, of Khan & Associates, a firm also based in Nadi. Like Mr Naidu, Mr Khan noted that the parties went about matters on their own, only consulting their solicitors when they thought it necessary.

[10] On 11 March 1988, Mr Mohammed was made subject to a receiving order under the provisions of the Bankruptcy Act (Cap 48). That order featured prominently in the judgment of the primary judge, but was not an issue before the Court of Appeal. It is also of no relevance to the appeal to this court. Accordingly, apart from noting that the receiving order was discharged on 26 May 1995, nothing more will be said about it.

[11] By early 1990, relations between Mr Gonzalez and Mr Mohammed appear to have broken down. Progress on completing the contract had stalled. Both men consulted Mr Amjal Khan who, after discussing the matter with them, and with Mr Naidu, "*struck*" a further agreement. That agreement provided that Mr Gonzalez would make no further payments to Mr Mohammed until the access road had been completed. Mr Gonzalez, in turn, would pay into the trust account of Khan & Associates any monies to be used for paying the road builders. Such monies were ultimately to be deducted from the purchase price. The agreement provided that payment of the purchase monies would commence once the road was complete, and Mr Gonzalez had taken possession of the land.

[12] On or about 5 April 1990, this further agreement was refined, and reduced to writing by Mr Amjal Khan. Both parties signed it. It was expressed to be "*further to the agreement of 25 September 1985*". Both the primary judge and the Court of Appeal regarded it as a variation of the 1985 agreement, and part thereof.

[13] The 5 April 1990 agreement provided that Mr Mohammed would arrange for the access road to be built as soon as possible. It also obliged Mr Mohammed to comply with all of the approval conditions necessary for the subdivision, and required Mr Gonzalez immediately to pay a sum of $15,000 into the trust account of Khan & Associates. That sum was to be retained for payment to the builder of the access road, with any balance remaining being set off against the purchase price. Once the road had been completed, and the relevant approvals obtained from the authorities, the total purchase price owing, together with interest as provided for in the 1985 agreement, would be paid into that trust account. The entire amount would be paid to Mr Mohammed once title to the subject land had been transferred to Mr Gonzalez.

[14] It should be noted that, at this point, the contract between the parties consisted of the 1985 agreement, as varied by the 5 April 1990 agreement.

[15] On 13 August 1990, the subdivision was approved, subject to compliance with conditions imposed by the local authority.

[16] At about this time, the parties first learned of the existence of s 6(1) of the Land Sales Act. Because Mr Gonzalez was not a resident of Fiji, he could not enter into a contract to purchase more than 1 acre of land without the prior consent, in writing, of the Minister of Lands. The 1985 agreement had been made without any such consent, apparently because Mr Naidu had been unaware of the requirements of the subsection. On 16 July 1990, the parties sought to rectify that problem by writing to the minister and requesting his consent.

[17] The application to the minister was, in one sense, successful. On 16 October 1990, he granted consent. However, in accordance with s 6(2), which provides that the minister may impose conditions upon the grant of any consent, the minister said that he approved the transaction subject to the following condition:

> The vendor to obtain clearance from the Commissioner of Inland Revenue, who will ensure that necessary clearance is also received from the Governor of the Reserve Bank.

[18] Regrettably, further difficulties were encountered. The problem that ultimately gave rise to this proceeding was that the condition imposed by the minister was never met. The Commissioner of Inland Revenue did not provide the relevant clearance. Nor did the Governor of the Reserve Bank.

[19] On 13 December 1990, Mr Gonzalez and Mr Mohammed entered into a third agreement. That agreement was in writing and provided that Mr Gonzalez would, within 14 days, deposit in the trust account of Khan & Associates an amount sufficient to satisfy the debt owing to the bank. Mr Mohammed would have the surveyor register the final survey plan, and obtain the relevant clearance from the Commissioner of Inland Revenue, as stipulated by the minister when he granted his consent. After some further difficulties the sum of $120,174.32 was paid into the trust account of Khan & Associates on 13 February 1991.

[20] Finally, the parties entered into a fourth agreement on 16 March 1991. Importantly, that agreement provided that Mr Mohammed would arrange for the clearance to be obtained from the Commissioner of Inland Revenue within 2 weeks. An amount of $500 was set aside for that purpose. As indicated earlier, however, Mr Mohammed did not obtain the relevant clearance. As a result, the condition remained unfulfilled, and the minister's consent was never actually given.

[21] On 24 June 1991, Mr Amjal Khan, acting with Mr Mohammed's authority, transferred his file to another firm, Koya & Co. He also transferred the monies that had been paid into his firm's trust account by Mr Gonzalez, less authorised costs and disbursements. The amount in question came to $114,811.54.

[22] On 27 August 1991, Mr Gonzalez lodged a caveat numbered 306645 over the subject land with the Registrar of Titles. It claimed an estate or interest as equitable owner by virtue of "*a sale and purchase agreement between the Caveator and the Caveatee … dated the 25 September 1985*". At that stage, the title was still held in one certificate. The caveat, of course, claimed an estate or interest only in relation to the 12 acres that were the subject of the 1985 agreement.

[23] Mr Gonzalez died on 23 May 1992. His daughter, Ms Gonzalez, also a citizen and resident of the United States, obtained a grant of letters of administration of his estate in the following year. These letters were resealed in the High Court of Fiji on 15 September 1994.

[24] In the meantime, the original certificate of title was replaced by two new certificates, each dated 13 January 1993. The 12-acre block the subject of the 1985 agreement had become Lot 2 in the subdivision that had been effected. It comprised the land in Certificate of Title 27072. The balance of 101-acre block was now comprised within a separate Certificate of Title 27071.

[25] On 26 September 1991, Koya & Co wrote to Mr Naidu, on behalf of Mr Mohammed, calling on Mr Gonzalez to settle within 21 days. The letter purported to make "*time of the essence*".

[26] On 17 December 1991, well outside the 21-day period, Mr Naidu replied to Mr Koya's letter, suggesting that any fault for the delay in completing the contract lay with Mr Mohammed, and not with Mr Gonzalez.

[27] On 9 January 1992, Mr Koya, on behalf of Mr Mohammed, wrote to Mr Naidu, purporting to rescind the contract. On 22 January 1992, Mr Naidu responded by saying that it was Mr Mohammed who could not complete the contract, as he had not obtained the clearance from the Commissioner of Inland Revenue that was required in order to satisfy the minister's consent.

[28] No resolution of the dispute could be achieved. It was at that stage that Mr Gonzalez commenced this proceeding in the High Court claiming, as against Mr Mohammed, specific performance or, in lieu thereof, damages for breach of contract. He also claimed as against all three respondents damages for fraud.

[29] In the meantime, on 23 January 1992, the Registrar of Titles wrote to Mr Gonzalez informing him that unless he obtained an order from the court to the contrary within 21 days, the caveat would be removed. On 11 March 1992, Mr Gonzalez applied for an order that would allow the caveat to remain. On 27 March 1992, the court ordered, by consent, that the caveat be extended until further order.

[30] Inevitably, as seems to have been the pattern in this case, Mr Koya died in 1993. In December of that year, Mr Mohammed engaged another firm of solicitors, Sahu Khan & Sahu Khan, to act for him.

[31] Early in 1994, Mr E Ray Holden, later the principal shareholder in Murray Merchant, came to Fiji. He, like Mr Gonzalez, was a citizen and resident of the United States. He was alerted to the possibility that the subject land might be available for purchase. However, unlike Mr Gonzalez, he was interested in the whole 101-acre block, and not just the 12 acres that were the subject of the 1985 agreement. Mr Holden was introduced to Mr Mohammed, and together they sought legal advice from Sir Vijay Singh.

[32] Sir Vijay wrote to the bank on 17 February 1994. He was, of course, aware at the time that there was ongoing litigation between Ms Gonzalez, as the personal representative of her father's estate, and Mr Mohammed. His letter made it clear that Mr Mohammed knew that he could not sell the land for so long as the caveat remained on the title.

[33] The bank replied to Sir Vijay saying that it was aware that the land could not be sold directly to Mr Holden. However, it foreshadowed the possibility that Mr Holden might tender for the land in the event that the bank carried out a mortgagee sale.

[34] Several months later, in June 1994, the bank advertised the sale of the land, calling for tenders. Mr Holden, through two corporate entities, Five Star Holdings Inc, and Capital Investments Ltd, submitted tenders for $250,100 and $271,000 respectively. He arranged for a 5% deposit to be paid on behalf of each company, as prescribed, and nominated Sir Vijay as his attorney and "*local point of contact*". It may be noted that the tenders offered were somewhat lower than the figure Mr Holden and Mr Mohammed had agreed upon when they consulted Sir Vijay. At that time, a price of $300,000 was discussed.

[35] Mr Holden then approached Dr MS Sahu Khan, who was Mr Mohammed's solicitor in the pending litigation. Mr Holden and Dr Sahu Khan spoke on 24 July 1994, and letters were exchanged. On 26 July 1994, Dr Sahu Khan wrote to Mr Holden confirming that the land was subject to a mortgage in favour of the bank on which approximately $155,000 was owing. Moreover, there was still the caveat over the land, which had been registered on 27 August 1991. Dr Sahu Khan then suggested that once the bank had been paid, it would transfer (and not discharge) the mortgage to whoever "we" nominate. That person was designated "the Nominee". Dr Sahu Khan said that it was important to note that the bank had received several tenders for the sale of the land, and that it had indicated that it would not accept any tender until the following day. He added:

> By that date we have to confirm to them that their debts will be paid by us (that is you) on their transferring the mortgage to our nominee as aforesaid. That is the only way available to stop them accepting the tenders and to facilitate the process to have the said land sold to you. That is to have the mortgage transferred to the nominee.

[36] Dr Sahu Khan suggested that the Nominee would then be in a position to transfer the land legally to Mr Holden at the agreed price, and that the land would then be registered in his name free from all encumbrances. He added that this would only be done once the consent of the relevant minister under s 6(1) had been obtained. He said that he did not anticipate any difficulty in obtaining that consent. He insisted that the sum of $155,000 be deposited by Mr Holden in his firm's trust account that week and undertook that the funds would only be used to pay the bank on its transferring the mortgage to "*our Nominee*".

[37] On 27 July 1994, Dr Sahu Khan wrote to the bank's solicitors confirming Mr Holden's willingness to purchase the mortgage. He requested that the bank not accept any tender pending that purchase of the mortgage. At that stage, the bank called a halt to the tender process. Thereafter, a good deal of correspondence passed between the parties, though it is unnecessary to set it out here.

[38] It is a curious feature of this case that, as the evidence showed, Mr Holden's tender was, in fact, the highest of all the tenders submitted. As the primary judge observed, had Mr Holden proceeded on that basis, as advised by Sir Vijay Singh, and rejected the advice of Dr Sahu Khan, he may well have avoided some of the difficulties that subsequently arose. In any event, the plan that Mr Holden, Dr Sahu Khan and the bank arrived at by about 27 July 1994 was ultimately implemented.

[39] In substance, that plan was as follows. All parties were aware of the caveat and realised that it posed a stumbling block to Mr Mohammed selling the entire block (formerly Certificate of Title 20817 but by 1994 divided into Certificates of Title 27072 and 27071) to Mr Holden for $300,000, as discussed. In order that Mr Holden could take the land free of any encumbrance or caveat, he would

provide the funds necessary to pay out the bank. That would enable the mortgage to be transferred to his nominee, a person to be selected by Dr Sahu Khan. Once the mortgage was transferred to that nominee, he or she would transfer the land to Mr Holden. That would ensure that Mr Holden could take the land minus the caveat. The caveat lodged by Mr Gonzalez would thus be defeated.

[40] On 6 September 1994, Mr Holden paid more than $300,000 into the trust account of Sahu Khan & Sahu Khan. That firm then wrote to the bank's solicitors advising that the mortgage was to be transferred to a Mr Haroon Khan, son of Amjal Khan, of Ba, clerk. Mr Haroon Khan was, of course, the second defendant in this proceeding. He was, as at 6 September 1994, a warehouse manager residing in Sacramento, California in the United States. The evidence before the primary judge was that he had not set foot in Fiji since 9 April 1992.

[41] On 1 November 1994, Mr Holden arranged for the sum of $160,708.89 to be deposited in the bank's solicitors' trust account in consideration for the transfer of the mortgage. That amount consisted of $157,084.24 as pay out of the mortgage debt, and the balance as professional costs for the bank's solicitors. Although these monies came from the trust account of Sahu Khan & Sahu Khan, and were ostensibly paid on behalf of Mr Haroon Khan, it was entirely clear that they in fact came from Mr Holden.

[42] On 1 November 1994, Sahu Khan & Sahu Khan served a demand, under the mortgage that had by then been transferred to Mr Haroon Khan, upon Mr Mohammed. The balance said to be owing under the mortgage was $285,000. The primary judge noted that no evidence had been led to explain how the amount owing had suddenly increased from $157,084.24 to $285,000 in less than one day. Later that same day, Mr Mohammed signed an agreement to sell the entire 101-acre block to Murray Merchant for $300,000. Murray Merchant had been incorporated in 1992. By November 1994, its shareholders were Dr Sahu Khan, Mr Holden, Mr Haroon Khan, and a Mr Graeme Ferrier-Watson.

[43] Several days later, on 7 November 1994, Mr Haroon Khan swore two separate statutory declarations in which he identified himself as the mortgagee named and described on the Certificates of Title. He deposed that Mr Mohammed had mortgaged the land in question, and that the monies secured amounted to $285,000. He referred to the registration of the mortgage and to the demand which he had made on Mr Mohammed. He declared that, in exercise of a power of sale under the Land Transfer Act (Cap 131), he had executed the transfer of the two titles to Murray Merchant. He added that the mortgagor, Mr Mohammed, had not made any payment in response to the notice of demand. He said that the sale had not been advertised because the mortgagor had consented to the mortgagee sale.

[44] Dr Sahu Khan witnessed both statutory declarations. He attested that the signature "*H Khan*" had been made in his presence. Mr Haroon Khan was described in each statutory declaration as being "*of Ba, Fiji, Clerk*".

[45] The following day, on 8 November 1994, Mr Haroon Khan purportedly executed the transfer to Murray Merchant. The certificate signed by Dr Sahu Khan, which accompanied the transfer, again recorded that the signature "*H Khan*" had been made in his presence. Dr Sahu Khan stated that he believed that this signature was in the proper handwriting of the person described as Haroon Khan. Indeed, he certified that he had read over and explained to that person, in the Hindustani language, the contents of the transfer.

[46] As indicated earlier, the primary judge found, as a fact, that Mr Haroon Khan had not been in Fiji at any time between 1 and 8 November 1994. His Lordship concluded that he had probably been in the United States throughout that period, working as a warehouse manager. Certainly, he was not in Ba working as a clerk. Each respondent to this appeal challenged that finding before the Court of Appeal.

[47] On 15 November 1994, Murray Merchant became registered as the owner of the 101-acre block now comprised in the two Certificates of Title. The caveat that Mr Gonzalez had lodged over the 12-acre block was cancelled. This was notwithstanding the previous order made by the High Court on 27 March 1992 that extended the caveat until the matter came on for hearing. In the result, and as planned, Murray Merchant received a clear, unencumbered title to the entire 101-acre block.

[48] The primary judge observed that it was curious that although the transfer of the mortgage from the bank to Mr Haroon Khan was clearly a registrable document under the provisions of the Land Transfer Act, there was no notation of that document on the title deed. Another curious feature of what took place was that the Registrar of Titles did not give Ms Gonzalez, the administratrix of her father's estate, notice of any of the dealings involving the bank, Mr Haroon Khan, or Murray Merchant. She was not informed of the transfer of the mortgage or of the subsequent transfer of the land.

[49] Thus, by 15 November 1994, the estate of Mr Gonzalez had lost any rights that he may have had under the caveat or the subsequent court order that had extended its operation. To make matters worse, by that time it became apparent that the monies transferred from Mr Amjal Khan's trust account to that of Mr Koya had "*disappeared*". The primary judge concluded that these monies had either been illegally removed from Mr Koya's trust account, or improperly used by someone without the authority of Mr Mohammed.

[50] In 1996, Dr Sahu Khan and Mr Ferrier-Watson transferred their shares in Murray Merchant to Mr Holden and his son. By now, Murray Merchant wished to construct a tourist development on the land. However, Ms Gonzalez lodged a further caveat over the title, which prevented that development from proceeding. There the matter stood when the primary judge heard this case.

The findings at first instance

[51] The primary judge commenced his analysis of the position, as it stood in 1992, by noting that Mr Gonzalez had performed all of his obligations under the contract, as agreed, both in 1985 and by later variations. All that remained to be done was for Mr Mohammed to obtain the clearance from the Commissioner of Inland Revenue, and hence the minister's consent. Then Mr Gonzalez would have been able to get a clear title to the 12-acre block. The one complication was s 6(1) of the Land Sales Act.

[52] His Lordship formulated the question to be determined in the proceeding as being whether s 6(1) was to be interpreted so as to render unenforceable any contract entered into without the minister's consent being first obtained. He accepted that the subsection plainly prohibited a non-resident from making a contract for the purchase of land without the prior written consent of the minister. However, he concluded that this did not resolve the question whether a contract entered into without such consent should be regarded as unenforceable, or as he put it, "*void*".

[53] The primary judge referred to certain extrinsic material, including the minister's speech in the House at the time that the Bill for the Land Sales Act was introduced. The minister had spoken of a desire not to penalise "*genuine developers*", as distinct from "*speculators*". The minister had also said that the subsection would give him a "*right to refuse a land transaction … if it is not in the interest of Fiji*". According to the primary judge, these comments suggested that the minister had in mind that land transactions by genuine developers were not contrary to the interest of Fiji, but those by speculators were. In the end, his Lordship concluded that the minister's speech was of no assistance in construing the relevant provision, and he declined to give it any weight.

[54] His Lordship then referred to a number of cases of high authority in Australia and elsewhere. In particular, he focused upon the decision of the High Court of Australia in the leading case of *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; 21 ALR 585 (*Yango Pastoral*). That case concerned s 8 of the Banking Act 1959 (Cth) which prohibited a body corporate from carrying on any banking business in Australia unless it was in possession of an authority to do so. The section imposed a penalty for each day during which the contravention continued. It was held that the section did not render void or unenforceable a mortgage or guarantee given to a body corporate carrying on an unauthorised banking business to secure a loan made by it in the course of that business. His Lordship cited several passages from the judgment of Mason J, as his Honour then was, which he regarded as correctly stating the relevant legal principles governing statutory illegality.

[55] His Lordship then said that in interpreting a provision such as s 6(1), the court would consider first whether the section was intended to be prohibitory, or merely directory or regulatory in nature. If it were merely directory or regulatory, the fact that the contract contravened the section would not lead to its being vitiated.

[56] Even if the section were prohibitory, the court would look to the extent and effect of the prohibition. It would then consider whether the Act was passed entirely for reasons of public policy.

[57] The most striking feature of s 6(1), in his Lordship's view, was that it did not expressly state that non compliance rendered the contract void, and hence unenforceable. A distinction had to be drawn between an intention to protect the public, and an intention simply to secure the revenue. When the intention of the statute was to protect the public, any contract entered into in breach of the relevant provision would be regarded as prohibited. If the intention was only to protect the revenue, a contract entered into in breach of the relevant provision might still be enforceable.

[58] After analysing a number of authorities, the primary judge concluded that s 6(1) should not be regarded as prohibitory. Clearly the legislature did not intend to prevent non-residents from purchasing land in Fiji. All that the Act did was to regulate that process so that non-resident landowners could be identified, thereby making it easier to tax any profits that they might make. It followed, in his Lordship's view, that s 6(1) was merely declaratory or regulatory, and that any contract that contravened the requirements of the subsection could still be enforced.

[59] His Lordship went on to consider the question on the basis that his initial finding was wrong, and the section was prohibitory. Even then, he concluded that a contract entered into without the prior written consent of the minister would be

enforceable. The policy underlying the Act was simply to prevent speculative profiteering by non-residents. It was essentially a revenue statute, and not an Act directed towards any wider public policy. In addition, s 17, which contained penalties for wilful breach of any of the earlier provisions, supported the conclusion that non compliance with s 6(1) should not lead to the non-enforceability of contractual rights. Accordingly, in his Lordship's view, the plaintiff's claim for breach of contract was made out.

[60] His Lordship added, for completeness, that there was no doubt that the breach of s 6(1) that had occurred in this case was initially an oversight. There was no wilful act which could evoke a penalty under s 17. As soon as the oversight was discovered, steps were taken to obtain the relevant consent.

[61] Having arrived at these findings, his Lordship dealt with the removal of the caveat, and the various claims for fraud. He characterised the conduct of the defendants as "*a web of deceit and dishonesty*" and concluded that the plaintiff was entitled to judgment against all of them based upon that fraud and dishonesty. He did not, however, grant the primary relief sought against the first defendant, namely specific performance, but awarded damages instead.

[62] In a separate judgment, he assessed total damages, inclusive of interest, at $461,637.85. He ordered the defendants to pay costs on an indemnity basis, which he fixed at $106,832.80.

The judgment of the Court of Appeal

[63] The Court of Appeal unanimously held that the appeals brought by all defendants should be allowed. The orders made by the primary judge were set aside and, in lieu thereof, it was ordered that the proceeding brought by Ms Gonzalez should be dismissed. The court also ordered that her appeal against the refusal by the primary judge to grant specific performance should be dismissed.

[64] In a joint judgment, Sheppard and Gallen JJA observed that despite the lengthy written submissions filed by the parties, there were in the end only two principal questions to consider. The first was whether the 1985 agreement, as later varied, was illegal and unenforceable. If that contention were upheld, that would be the end of the matter. If that contention did not succeed, the other question raised was whether the finding of fraud against each of the defendants could be sustained.

[65] Their Lordships noted that s 6(1) made it unlawful for a non-resident to enter into a contract for the purchase of land without the "*prior consent*" in writing of the minister. It was common ground that there had been no consent prior to the 1985 agreement. The issue was whether this rendered the contract unenforceable. Counsel for Ms Gonzalez argued that the primary judge had correctly held that the failure to obtain consent did not invalidate the contract.

[66] Before the Court of Appeal, counsel for Ms Gonzalez relied upon an alternative way of putting her case. He noted that on 16 July 1990, shortly after the parties had discovered that the minister's consent had been required, an application was made for that consent. That application did not mention the 1985 agreement. It was submitted that the document signed by the parties on 13 December 1990, 2 months after the minister's consent had been obtained, constituted a new and enforceable contract between Mr Gonzalez and Mr Mohammed. In substance, counsel submitted that the original contract had been overtaken by a novated contract.

[67] Their Lordships gave short shrift to this alternative argument. If there had been a novation, as claimed, the document prepared in December 1990 would have been couched in far more elaborate terms. Moreover, there was no evidence that the parties intended to disregard the earlier agreement, and start again.

[68] Accordingly, the critical question was whether the original agreement, as varied, was illegal and unenforceable as a consequence of the operation of s 6(1). Their Lordships were in no doubt about the answer to that question.

[69] As indicated earlier, the primary judge had relied heavily upon the observations of Mason J in *Yango Pastoral*. Their Lordships focused instead upon what Gibbs ACJ had said at CLR 413–14; ALR 588–9 as well as upon what Mason J had said at other parts of his judgment. They concluded that s 8 of the Banking Act, which was the subject of consideration in *Yango Pastoral* was a very different type of provision from that under consideration in the present case. They observed that s 8 did not render it unlawful to borrow or lend money, or to give and take a mortgage supported by guarantees, in order to secure its repayment. So the contract in question did not require the performance of any act which s 8 forbade. Indeed, the section made no reference to contracts or transactions.

[70] Their Lordships observed that the same could be said of another decision of the High Court of Australia upon which the primary judge had relied, *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215; 143 ALR 569 (*Fitzgerald*), and particularly the judgment of Kirby J at CLR 231–52; ALR 580–97. There it was held that the manner of performance of the contract by a driller under the Water Act 1992 (NT) did not turn the contract into one that was forbidden by the Act. The driller was not required to rely on any illegal act to establish his cause of action. Therefore the contract was enforceable.

[71] Their Lordships concluded that the language of s 6(1) was "*clear and specific*". The words used revealed an intention on the part of the legislature to require non-residents who wished to purchase land in excess of 1 acre to obtain ministerial consent, in writing, prior to entering into the contract. That was what the plain words of the statute said.

[72] Their Lordships then set out what they considered to be the policy of the Act. This was to enable the Government of Fiji to determine which non-residents should be allowed to own substantial areas of land, and which should not. There were no criteria to guide the minister. His discretion was complete, subject only to the requirement that he act in the public interest. Indeed, no appeal lay from his decision.

[73] Their Lordships noted that the minister who gave consent to the 1985 agreement in October 1990 plainly had taken revenue matters into account. However, it did not follow that the Land Sales Act should be regarded as being nothing more than a revenue statute. The policy that actuated the minister at the time may have been revenue-driven, but the form of consent, or the conditions imposed on the grant of consent, could not control the meaning of the statute.

[74] Their Lordships said that the statute:

> … is expressed in clear terms and, in our opinion, its purpose is to protect Fiji from the acquisition of land by persons thought to be undesirable. At least that is one of its purposes. There are no doubt others but we can understand the extensive public policy reasons for the legislation in question.

[75] In their Lordships' view, it remained only to consider the effect, if any, of s 17 upon the construction of s 6(1). They noted that penalties under s 17 would only apply if there were a wilful contravention. If a contract entered into without ministerial consent were none the less enforceable, then at least in cases where there had been no wilful contravention, a breach of s 6(1) would be of no consequence whatever. It seemed unlikely that the legislature would have intended the subsection to have no substantive effect in what might be a significant number of cases.

[76] Their Lordships noted that the legislature could have taken the extra step of expressly providing that any contract in breach of s 6(1) was void and of no effect. It had not done so, but, in their view, it had made clear that a contract entered into in contravention of the subsection was unlawful. In those circumstances, it was difficult to see how there could be any conclusion other than that the contract was void and unenforceable.

[77] Finally, their Lordships noted that in *Thomas D Hunter v Apgar* [1989] 35 FLR 180 (*Hunter*), Palmer J had arrived at the same conclusion regarding the effect of s 6(1). His Lordship had held that the subsection was intended to ensure that the minister's consent was obtained prior to the contract for the sale of land being entered into, and that consent given subsequently to the formation of the contract was void. Their Lordships indicated their respectful agreement with that conclusion.

[78] Their Lordships, having concluded that the 1985 agreement was unenforceable, then held that the action for breach of contract brought by Ms Gonzalez must fail. She could not sue upon that contract because it was unlawful. Moreover, she could not sue upon the caveat because it was based entirely upon the claim that an estate or interest arose out of the 1985 agreement. Because that agreement was "*illegal and void*", Mr Gonzalez had no estate or interest in the land that could be protected. Any application to remove the caveat would inevitably have succeeded.

[79] Their Lordships then turned to the allegations of fraud. They concluded that, at least as against the third defendant, those allegations could not be sustained. There were aspects of the case brought against Mr Mohammed and Mr Haroon Khan that they found disturbing. However, because of their conclusion regarding the illegality of the 1985 agreement, it was unnecessary to deal with the question of fraud.

[80] Smellie JA delivered a concurring judgment. He agreed with Sheppard and Gallen JJA that there had never been an enforceable contract for the sale of the subject land. However, he preferred not to base his conclusion solely upon an acceptance of the approach taken by Palmer J in *Hunter*. Rather he noted that the minister's consent, obtained some 5 years after the 1985 agreement had been entered into, had been conditional. No evidence had been called to demonstrate that the clearances from the Commissioner of Inland Revenue, and the Reserve Bank, had ever been obtained. Accordingly, there had never been a valid and unconditional consent. That meant that the plaintiff was never in a position to enforce the contract, and had never had a registrable interest. It also meant that there was no basis for the grant of specific performance, or the award of damages.

[81] His Lordship's conclusion also rendered it unnecessary to deal with the issue of fraud. Even if there had been a fraudulent conspiracy, as alleged, the object of that conspiracy was to defeat the plaintiff's registrable interest. In the absence of an unconditional consent, there was no interest to defeat.

The basis upon which leave to appeal was granted

[82] On 29 November 2002, the Court of Appeal, then constituted by Reddy P and Smellie and Penlington JJA, granted leave to appeal to this court. In doing so, the Court of Appeal certified the following question as being of significant public importance for determination by the Supreme Court:

> Did the Court of Appeal in its judgments Civil No ABU0054/68 on 1988S place the correct interpretation upon s 6 of the Land Sales Act (Cap 137).

[83] It should be noted that in granting leave, the Court of Appeal rejected a motion filed by counsel for Ms Gonzalez that it should certify no fewer than ten questions as having that character. The Court of Appeal considered that the other matters sought to be raised were of interest to the litigants, but fell well short of the requirement in Art 122(2)(a) of the Constitution of "*significant public importance*".

The Appellant's contentions on the appeal

[84] Mr Patel, who appeared on behalf of the Appellant, together with Mr Young, submitted that, contrary to the conclusion reached by the Court of Appeal, the 1985 agreement was neither expressly nor impliedly prohibited by s 6(1). He submitted that the purpose of the Land Sales Act was to control speculation in order to prevent escalation in land prices. This would be achieved by taxing profits and, in the case of non-residents, by withholding consent to potentially speculative purchases or sales of land. It was not the policy of the Act, per se, to prohibit non-residents from owning land in Fiji.

[85] Mr Patel developed that submission by contending that in the case of non-residents, the purpose of the Act was to regulate the procedures whereby they could buy and sell land, and to tax any profits arising from speculative sales. The aim was to ensure that such persons did not acquire any rights in land, whether legal or equitable, without first obtaining the minister's consent. However, s 6(1) was only concerned with speculative sales and the risk that those engaged in such activity might evade tax. That view of the subsection was said to be supported by reference to the "*objects and reasons*" attached to the Land Sales Bill No 23 of 1972, and the various statements made by the minister during the course of the Parliamentary Debates on the Bill.

[86] The "*objects and reasons*" were drafted by the then Attorney-General, Mr JN Falvey. Paragraph 1 expressed the government's concern about transactions in land in Fiji, particularly those of a speculative nature. These transactions were said to have resulted in rapid increases in the price of land, which had been detrimental to the economy. A number of those who engaged in such transactions were non-residents of Fiji. The government proposed to take steps to control them. It had therefore been decided to introduce legislation to ensure that all taxes were paid upon the profits made on speculative dealings. The provisions of the Bill were said to be complementary to those of the Income Tax (Amendment) (No 2) Bill 1972. Importantly, it was noted that the two Bills were designed to regulate speculative dealings in land, but "*also to control the acquisition or disposition of land in Fiji by persons who are not resident here*".

[87] The Parliamentary Debates to which we were taken, were, as the primary judge noted, somewhat confusing. The Land Sales Bill was recognised as being controversial. There was concern about land being used merely for speculation, and for obtaining large profits. At the same time, a distinction was drawn between "*speculation*" and "*genuine land development*". The Bill was said to be directed

against speculators, whether resident or not. In the end, the extrinsic materials provided little assistance in construing the relevant provisions of the Act.

[88] Mr Patel then turned to the specific language used in s 6(1). He submitted that it was important to note that the subsection did not provide, in terms, that it was unlawful for any non-resident to enter into a contract for the sale of land without prior ministerial consent. It simply provided that "*[n]o non-resident … shall … make*" any such contract. He then submitted that had the legislature intended to prohibit non-residents from entering into contracts of this type, it would have used clearer language to do so.

[89] Mr Patel submitted that s 6(1) was couched in similar terms to various provisions that had been construed by courts of high authority as neither expressly nor impliedly prohibiting the making of particular contracts. He cited *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457; 84 ALR 199 at 201; *Mahoe Developments Pty Ltd v Lionbond Pty Ltd* [1992] ANZ ConvR 199 at 200 and *Denning v Edwardes* [1961] AC 245 at 253 in support of that proposition. In each of those cases, it was held that a contract that had been made without a requisite consent having been obtained was not illegal.

[90] Mr Patel next submitted that it was always open to the parties to enter into a contract for the sale of land subject to a condition that the contract would not become effective unless, and until, the minister's consent had been obtained. He referred to *Butts v O'Dwyer* (1952) 87 CLR 267 at 279–80; [1953] ALR 117 for that proposition. That submission was not challenged. It is obviously correct, and nothing more need be said about it.

[91] There was more difficulty for Mr Patel in his next submission. He contended that the 1985 agreement was itself impliedly subject to the minister's consent. He referred to *McWilliam v McWilliams Wines Pty Ltd* (1964) 114 CLR 656 at 659–61 (*McWilliam*). That case involved a vendor who agreed to sell to a company his interest in an irrigation farm lease, which was held on trust for him, in consideration of an allotment of shares in the company. The shares were allotted, and the company went into occupation of the lease. By virtue of s 145A of the Crown Lands Consolidation Act 1913 (NSW), the consent of the Water Conservation and Irrigation Commission was required to any dealing with the lease. However, no consent was sought, and title to the lease remained with the trustee. The company sought a declaration that the trustee held the lease on trust for it. The High Court of Australia held that the agreement to sell the lease was subject to an "implied condition" that the transfer was subject to the consent of the statutory body. Accordingly, it was not a dealing forbidden by s 145A.

[92] Mr Patel submitted that s 6(1), on its proper construction, plainly permitted the making of conditional contracts. He submitted that the 1985 agreement was such a contract, having been entered into subject to an implied condition that any necessary consents, or approvals from third parties be obtained before the agreement came into effect. He relied upon what a number of commentators describe as the principle of "*obviousness*", as discussed by Mackinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206; [1939] 2 All ER 113. According to Mr Patel, the conditional contract became effective once the minister granted consent on 16 October 1990.

[93] There are stark differences between the issue raised for determination in McWilliam, and that raised before this court. *McWilliam* is no authority for the proposition that every contract that requires the consent of a third party is necessarily subject to an implied condition that the contract is of no effect until the consent has been obtained. Were it otherwise, there would be no room for the operation of the ordinary principles that govern statutory illegality. To construe the 1985 agreement as being subject to such an implied condition would give s 6(1) little, if any, work to do. It is unlikely that this was the intention of the legislature.

[94] Somewhat surprisingly, Mr Patel then sought to argue that the 1985 agreement had become complete and effective on the grant of the minister's consent on 16 October 1990. This was because the conditions that the minister had attached to that consent were "*meaningless*". There was no basis for requiring the vendor of a parcel of land to obtain clearance from the Commissioner of Inland Revenue when it was the non-resident purchaser whose tax position was in question.

[95] When asked by the court whether this submission had been advanced before the primary judge or the Court of Appeal, Mr Patel, somewhat reluctantly, acknowledged that it had not. He then sought leave to argue this additional point. Leave was opposed, and ultimately refused. Whether or not the conditions imposed by the minister were "*meaningless*" could have been the subject of evidence had that issue been raised below. In addition, no notice was given to counsel for the second Respondent of any intention to raise this entirely new point. It was clear that there might be prejudice to the opposing party if the point could be raised now, for the first time.

[96] We wish to emphasise that it is highly undesirable that points of this kind should be raised for the first time during the hearing of an appeal to this court. The conditions under which leave to appeal to this court will be granted are closely regulated by the Constitution, and by s 7 of the Supreme Court Act 1998. It will be rare, indeed, that leave will be granted to raise a new matter, during the hearing of an appeal, particularly when no notice has been given of any intention to rely upon that matter.

[97] Mr Patel then introduced another variant upon the Appellant's case. He submitted that a party was not entitled to rely upon that party's own default in fulfilling the conditions necessary to obtain ministerial consent, in order to avoid a contract. To permit that to occur would be to allow a party to take advantage of his or her own wrong. In that regard, he referred to *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers* [1919] AC 1 at 8. In effect, Mr Patel sought to rely upon the doctrine of estoppel in answer to the respondents' claim that the 1985 agreement had been illegal and unenforceable.

[98] There was some debate between the parties as to whether Mr Patel had previously attempted to invoke estoppel before the primary judge or the Court of Appeal. We are content to proceed on the basis that the issue had been raised. We note that in her motion seeking leave to appeal to this court from the Court of Appeal, the Appellant included estoppel as one of the matters that should be the subject of any grant of leave.

[99] Having first argued that the 1985 agreement was neither expressly nor impliedly prohibited by s 6(1), Mr Patel next submitted that even if that contention were rejected, the agreement was none the less enforceable. He submitted that it did not follow from the fact that a statute prohibited the making

of a particular contract, that the contract was necessarily unenforceable or void. Whether the statute had that effect was essentially a matter of construction. The result would ordinarily depend upon the public policy that underscored the prohibition.

[100] Mr Patel submitted that the Court of Appeal had erred by adopting what he described as "*the classical model of illegality*". That model held that a contract that is contrary to statute would be unenforceable regardless of good faith, ignorance of the law or the consequences for an innocent party. Mr Patel argued that this classical model was out of step with the "*modern approach*" to illegality in contract law. He referred to *Yango Pastoral*; *Nelson v Nelson* (1995) 184 CLR 538 at 604–5; 132 ALR 133 at 186–7 per McHugh J, *Fitzgerald*, and *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1987] 2 All ER 152 at 176 per Kerr LJ. He relied, in particular, upon *Re Still v Minister of National Revenue* (1997) 154 DLR (4th) 229 at 246–50 (*Re Still*), a judgment of the Canadian Federal Court of Appeal.

[101] Mr Patel submitted that the difference between these two approaches to statutory illegality had been most clearly articulated by Robertson JA in *Re Still*. That case concerned a United States citizen who had been lawfully admitted to Canada. Pending consideration of her application for permanent residence status, and acting in good faith, she obtained employment without securing a work permit as required under the relevant regulations. When she was laid off from work, she applied for unemployment benefits. Although the relevant statute imposed no penalty for an innocent breach of the regulations, and although she had paid her insurance premiums, her application for benefits was denied on the basis that her contract of employment was void for illegality. The Federal Court of Appeal granted her application for judicial review.

[102] Robertson JA observed at DLR 246:

> [37] At this point, it is proper to ask how it is that the classical model of illegality differs from the modern approach. In my view, the latter approach rejects the understanding that simply because a contract is prohibited by statute it is illegal and, therefore, void ab initio. There are alternative ways of expressing this legal conclusion: (1) the contract may be declared illegal but relief is granted under the guise of an exception. Alternatively, (2) the contract is held not to be illegal and therefore enforceable. In either case the legal result is the same. The other distinguishing feature of the modern approach is that enforceability of a contract is dependent upon an assessment of the legislative purpose or objects underlying the statutory prohibition. Under the classical model, the purpose of the statute was only relevant when determining whether the prohibition was for the sole purpose of raising revenue. Today, the purpose and object of a statutory prohibition is relevant when deciding whether the contract is or is not enforceable.

[103] His Lordship continued:

> [41] Under the classical model of the illegality doctrine, the fact that the applicant acted in good faith is an irrelevant consideration. Accordingly, her employment during the period May 9, to September 23, 1993, constituted an illegal contract which was void ab initio. Assuming this to be so, the next issue is whether employment under an illegal contract can constitute insurable employment within the meaning of the Unemployment Insurance Act. If I accept that the applicant's employment contract was void from the outset then surely that question must be answered in the negative. Nonetheless, I am not prepared to accept the classical model for several reasons.
>
> [42] First, I am of the view that the classical model has long since lost its persuasive force and is no longer being applied consistently. The doctrine is honoured more in its

> breach than in its observance through the proliferation of so-called judicial "exceptions" to the rule. I am not the first to recognize that these exceptions are truly a movement away from the doctrine itself (see: supra, at paragraph 24 and *Love's Realty & Financial Services Ltd v Coronet Trust* [1989] 3 WWR 623 at 629; 57 DLR (4th) 606, per Kerans JA). In my view, decisions such as Sidmay and Grobman mark a new era in the illegality doctrine while retaining the quintessential feature underlying its existence. That feature is the jurisdiction of the courts to refuse relief to those in breach of a statutory prohibition, the grounds of refusal being on a principled and not arbitrary basis.

[104] Finally, his Lordship articulated the general principles that ought to govern contractual illegality.

> [48] In conclusion, the extent to which the precepts of the common law doctrine of illegality are ill-suited to resolving the issue at hand provides impetus for this Court to chart a course of analysis which is reflective of both the modern approach and its public law milieu. In my opinion, the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

[105] Mr Patel submitted that this court ought to adopt the reasoning of the Federal Court of Appeal in *Re Still* in preference to the older, and now outdated, approach reflected in many of the leading cases on this subject. He contended that the new approach, based on public policy, would result in the decision of the Court of Appeal being set aside.

[106] Applying that approach, Mr Patel submitted that s 6(1) should be construed in a way that did not lead to the unenforceability of the 1985 agreement. He pointed to a number of considerations that supported that construction. These included the following:

- the Land Sales Act did not prevent non-residents from owning land in Fiji. It only sought to control speculation in land by taxing profits made on speculative sales;
- the Act did not expressly, or in terms, render a contract made in breach of s 6(1) illegal, void or unenforceable;
- the Act penalised only those who wilfully contravened its provisions, and not those who did so innocently;
- the Act provided its own penalties for failure to comply with the requirements of s 6(1). Those penalties ensured that its purposes would be served. Additional sanctions were unnecessary, and inappropriate;
- the fact that s 17 allowed forfeiture of up to 1 quarter of the purchase price to be ordered, showed that a contract made in breach of s 6(1) was not unenforceable;
- the minister's power to refuse consent was plainly intended to be exercised only in rare cases;
- to render the 1985 agreement unenforceable would cause grave injury to the Appellant without achieving any object in furtherance of the Act; and
- the decision of the Court of Appeal simply created a windfall for the respondents.

[107] Finally, Mr Patel submitted that *Hunter* had been wrongly decided, and should now be overruled.

The second Respondent's contentions on the appeal

[108] Mr Maurice, who appeared on behalf of the second Respondent, together with Ms Sahukhan, was largely content to rely upon the reasoning of the Court of Appeal in answer to Mr Patel's submissions.

[109] Mr Maurice emphasised only one or two additional matters. He submitted that s 6(1) expressly prohibited the making of a contract to purchase land without the prior consent of the minister. That, of itself, distinguished the present case from a number of the authorities upon which Mr Patel had relied, most of which involved statutory provisions that prohibited some act related to the making of a contact, but not the making of the contract itself.

[110] Mr Maurice also submitted that there was no basis for treating the 1985 agreement as a conditional contract. The fact that Mr Gonzalez may have been unaware of the need to obtain ministerial consent at the time he entered into that agreement did not make the contract conditional. Rather, it simply meant that it was illegal and therefore unenforceable.

[111] Finally, Mr Maurice submitted that this court should decline Mr Patel's invitation to adopt the approach taken in Canada by the Federal Court of Appeal in *Re Still*. He submitted that it would be contrary to sound principle to treat every case of contractual illegality on its own particular facts, without any guiding precept as to what the consequences of such illegality should be.

Conclusion

[112] We should say at the outset that we are unable to accept Mr Patel's submission that the 1985 agreement was neither expressly nor impliedly prohibited by s 6(1). In our opinion, the words of the subsection are clear and unambiguous. No non-resident shall, without the prior consent in writing by the minister, make any contract to purchase land. Those words mean precisely what they say.

[113] According to orthodox statements of contract law, a contract may be illegal because making or performing it is prohibited by statute, expressly or by implication. A contract may also be illegal because it is contrary to public policy. Some contracts are illegal "as formed" while others are legal at their inception, but become illegal as a result of the way in which they are performed. See generally N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract Eighth Australian Edition*, Australia, LexisNexis Butterworths, 2002, pp 842–6. The position in England is essentially the same as that in Australia. See J Beatson *Anson's Law of Contract*, 28th ed, Oxford, Oxford University Press, 2002, pp 349–50.

[114] If making or performing a particular contract is expressly prohibited by statute, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication, a contract the formation or performance of which is expressly prohibited by statute is illegal.

[115] In *Re Mahmoud & Ispahani* [1921] 2 KB 716, a wartime statutory order prohibited the purchase or sale of linseed oil without a licence from the Food Controller. Mr Mahmoud held a licence to sell to other licensed dealers. Mr Ispahani falsely assured him that he had a licence and Mr Mahmoud therefore agreed to sell him a quantity of linseed oil. Mr Ispahani later refused to accept the oil on the ground that he had no licence, and Mr Mahmoud sued him for breach of contract. The Court of Appeal rejected Mr Mahmoud's claim even

though he was ignorant at the time the contract was made of the facts that brought it within the statutory prohibition. Bankes LJ at KB 724 regarded the statutory order as:

> … a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into.

[116] The relevant principles were set out clearly by the High Court of Australia in *O'Neill v O'Connell* (1946) 72 CLR 101; [1946] ALR 173, a case in which the relevant provisions bore some similarity to s 6(1). Williams J formulated the relevant principle in the following terms at CLR 132; ALR 183:

> The ordinary principle is that, in the absence of a sufficient indication of intention to the contrary, a transaction which is made illegal by statute is void. But the statute may indicate, either expressly or by implication, that it is not intended that the illegality shall avoid the transaction, but only that the wrongdoer shall incur some punishment.

[117] Where a statute expressly prohibits the sale of land or goods, or entering into a contract without a licence, such contracts are normally regarded as illegal and unenforceable. See generally *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91 at 103; [1930] ALR 72; *Adelaide Development Co Pty Ltd v Pohlner* (1933) 49 CLR 25 and *Bradshaw v Gilbert's (Australasian) Agency (Vic) Pty Ltd* (1952) 86 CLR 209 at 218; [1952] ALR 969. Legislation that prohibits the formation or performance of particular contracts must be distinguished from legislation that precludes the enforcement of specific contracts, or provides that they are invalid or void. Such contracts are not necessarily illegal, and the rules that apply to illegal contracts do not apply to them.

[118] A contract entered into in breach of s 6(1) is, in our view, a clear example of a contract expressly prohibited by legislation. The authorities upon which the primary judge relied in the present case, in particular *Yango Pastoral* and *Fitzgerald*, are directed to a different issue altogether, namely when it can be said that a contract that is not expressly prohibited may nevertheless be prohibited by implication. That may be possible if the formation or performance of the contract involves or is linked to conduct prohibited by the statute.

[119] Whether a contract is prohibited by implication, and therefore illegal, depends upon the construction to be given to the particular statute. That question is normally decided by reference to the purpose and object of the statute, in conformity with established principles of statutory interpretation.

[120] Perhaps one of the leading cases on this subject is *Yango Pastoral*, upon which the primary judge mainly relied. In that case the relevant section of the Banking Act provided:

> A body corporate shall not carry on any banking business in Australia unless … in possession of an authority … Penalty $10,000 for each day during which the contravention continues.

[121] The section made no reference whatever to contracts. However, *Yango Pastoral* argued that contracts made by a body corporate carrying on a banking business without authority were prohibited by implication. It was that argument that the High Court rejected. It was to that issue that the observations of Mason J were mainly directed.

[122] Gibbs ACJ formulated the relevant test for drawing such an implication at CLR 413–14; ALR 588–9:

> The question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes."The determining factor is the true effect and meaning of the statute" (*St John Shipping Corporation v Joseph Rank Ltd*. "One must have regard to the language used and to the scope and purpose of the statute" *(Archbolds (Freightage) Ltd v S Spanglett Ltd*). One consideration that has been regarded as important in a great many cases, of which *Cope v Rowlands* is a notable example, is whether the object of the statute — or one of its objects — is the protection of the public. An antithesis is commonly suggested between an intention to protect the public and an intention simply to secure the revenue, and it is said that when the former intention appears the contract must be taken to be prohibited, whereas if the intention is only to protect the revenue the statute will not be construed as imposing a prohibition on contracts. The question whether the statute was passed for the protection of the public is one test of whether it was intended to vitiate a contract made in breach of its provisions, but I am with respect in full agreement with the views expressed in *St. John Shipping Corporation v Joseph Rank Ltd* and *Shaw v Groom* that it is not the only test. It would be contrary to reason and principle to allow one circumstance to override all other considerations in the interpretation of a statute. As Devlin J. said in *St John Shipping Corporation v Joseph Rank Ltd*: "The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant considerations and no single consideration, however important, is conclusive." See *Shaw v Groom*. [Footnotes omitted.]

[123] Mason J said at CLR 423; ALR 596:

> The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.

[124] It is important to note that immediately following this passage, his Honour posed the question whether s 8 expressly prohibited the making of a contract of loan. He answered that question in the negative. It is plain, therefore, that *Yango Pastoral* was not concerned with the principles relating to express prohibition, but rather those relating to the circumstances under which prohibition would be implied.

[125] Despite the fact that *Yango Pastoral* did not involve express prohibition, Jacobs J did refer to the principle regarding that doctrine in the following terms. His Honour said at CLR 430; ALR 601:

> When a statute expressly prohibits the making of a particular contract, a contract made in breach of the prohibition will be illegal, void and unenforceable, unless the statute otherwise provides either expressly or by implication from its language.

[126] The High Court concluded that the business of banking involved many different kinds of contractual relations. To hold that all contracts made by First Chicago were illegal, and therefore unenforceable, would have resulted in harm to innocent parties including, for example depositors and employees, while

conferring an unjustified windfall upon Yango and other borrowers. Moreover, the statute provided for a sufficient sanction against breach of s 8 by imposing a substantial penalty. Importantly, the court distinguished those cases in which a more specific activity was prohibited unless licensed, such as broking or conveyancing. See for example the observations of Gibbs ACJ at CLR 416; ALR 590 in relation to those cases in which the unsuccessful plaintiff did the very thing that the statute forbade him from doing unless authorised. The present case falls squarely within those observations.

[127] The same comment may be made about *Fitzgerald*. There the High Court held that the fact that the contract had been performed in an illegal manner did not turn it into a contract forbidden by the Act. The statute in question was intended to penalise conduct, and not to prohibit contracts. The contrast between the legislation in that case, and the language of s 6(1), could hardly be greater.

[128] The cases upon which Mr Patel relied, suggesting that revenue statutes fall into a different category, must be understood in context. Revenue statutes are regarded as different when considering whether particular contracts are, or are not, impliedly prohibited by statute. However, the fact that a statute that expressly prohibits the making of a particular contract happens to be a revenue statute, does not of itself lead to the conclusion that the contract is neither illegal nor unenforceable. As a general rule, all contracts that are expressly prohibited by statute are illegal and unenforceable unless the statute expressly or impliedly provides that, notwithstanding their illegality, they are valid and enforceable.

[129] It may be that the dichotomy adopted by Gibbs ACJ in *Yango Pastoral* between statutes that have as their objects the protection of the public, and statutes that are intended simply to secure the revenue, is too stark. It is not always possible to separate these objects so neatly. The Land Sales Act may be regarded as a useful illustration of the difficulty of doing so. The primary judge regarded it as nothing more than a revenue statute, while the Court of Appeal concluded that one of its objects was to maintain control over those non-residents who sought to purchase substantial blocks of land in this country. Whatever view one comes to regarding this issue, there is no justification for abandoning the longstanding principles that have governed statutory illegality in England and Australia, and replacing those principles with a wide-ranging discretion that simply allows every case to be decided on its own peculiar facts. The argument is not strengthened by describing the new approach as one based on "*principle*" rather than "*rule*", or by invoking the all-purpose umbrella of "*public policy*" as justification for departing from well-established, and soundly based doctrine. If that approach is to be adopted, it should be done by the legislature, as has occurred to some degree in New Zealand where the Illegal Contracts Act 1970 permits validation. We reject the submission that the approach taken by the Federal Court of Appeal in Canada in *Re Still* correctly states the common law in this country.

[130] In arriving at this conclusion, we are of course conscious of the fact that the only penalties for contraventions of the Act contained in s 17 are for "*wilful*" breaches. It does not follow that non-wilful breaches of s 6(1) carry no sanction. The subsection is couched in mandatory terms. It is neither directory, nor regulatory. It requires not just consent, but "*prior*" consent in writing. The legislature must have intended the subsection to perform some function. It was not included in the Act simply as an expression of hope. There is nothing to indicate that any distinction was to be drawn, for the purposes of s 6(1), between

an "innocent" failure to obtain the requisite consent, and a wilful failure to do so. Nor is there any warrant for the distinction between speculators and genuine developers, urged by Mr Patel, said to be implicit in the subsection. A speculator may contravene the subsection innocently, while a genuine developer can do so wilfully. The Act, when read as a whole, allows for contracts in breach of s 6(1) to be treated as unenforceable, while deliberate breaches of the subsection are punished by criminal sanctions.

[131] Mr Patel's attempt to invoke estoppel cannot succeed. It is trite law that the right to rely on illegality is not barred by estoppel. See generally *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432; [1969] ALR 321, and the many other authorities cited in support of that proposition in *Cheshire and Fifoot's Law of Contract Eighth Australian Edition*, pp 841–2.

[132] For these reasons, we consider that the Court of Appeal correctly held that the 1985 agreement was illegal, and unenforceable. In our view, *Hunter* was correctly decided, and remains good law. The Appellant could not establish a cause of action based upon that agreement, and therefore could not rely upon the caveat, the sole basis for which was that agreement. Nor could the Appellant succeed in the claim based on fraud since no loss of any kind was sustained as a result of that fraud. The appeal must be dismissed.

Orders

(1) The appeal be dismissed.
(2) The Appellant pay the second Respondent's costs.

Appeal dismissed.