RESERVE BANK OF FIJI v TREVOR ROBERT GALLAGHER and Anor (ABU0030 of 2005S)

ALAN CHARLES NEWHAM v TREVOR ROBERT GALLAGHER and Anor (ABU0031 of 2005S)

ALAN CHARLES NEWHAM v NADI CONTRACTORS LTD (ABU0032 of 2005S)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, BARKER and HENRY JJA

5, 14 July 2006

Contract — interpretation — failure of consideration — whether deed was valid — Exchange Control Act (Cap 211) ss 11, 20(2), 20(6), 31 — High Court Rules, O 2 r 2, O 5 rr 3, 4(1) 4(2), 4(2)(b), O 7 r 3(1), O 18 rr 18(1)(a), 18(1)(b), 18(1)(c), 18(1)(d), O 28 rr 8(2), 9, O 33 r 3.

On 14 May 1999, Alan Charles Newham (Mr Newham), applied to the High Court at Lautoka by way of originating summons seeking a variety of orders against Trevor Robert Gallagher (Mr Gallagher) and Nadi Contractors Ltd (NCL). The principal claims were for declaratory orders that the declaration of trust (the deed) was valid and Mr Newham and Gallagher were equal shareholders in NCL.

In response, Mr Gallagher claimed that there was a failure of consideration for the deed and that Mr Newham failed to recognise his interest as a 50% shareholder in Nufield (a company owned by Mr Newham). No proceedings were ever taken in Australia concerning the validity of the deed. Evidence presented were all in affidavit form and neither was there a cross-examination of either deponent. The High Court proceeded to the hearing and held that there had been failure of consideration and that the deed of trust cannot be impugned on that ground.

Mr Gallagher and NCL then appealed from the judgment of the court which was upheld and declared that the deed was valid and legal.

Subsequently, Mr Gallagher and NDC sought leave to appeal to the Supreme Court and introduced for the first time into the argument s 31 of the Exchange Control Act relating to the validity of settlements which the court granted despite the fact that the s 31 point had not been argued before. Instead, the court certified for the Supreme Court the issue of whether the Court of Appeal was correct in holding that the deed was valid and legal as it did not require the minister's consent under the Exchange Control Act. The court also imposed a stay pending the appeal to the Supreme Court.

The Supreme Court upheld the appeal and ruled that the deed constituted a settlement within s 31 of the Act but was capable of validation under s 20(6).

Meanwhile, Mr Newham sought by way of originating summons a mandatory injunction compelling NCL to register the 10,000 shares in its capital into his name.

Shortly after the Supreme Court judgment, Mr Gallagher filed fresh proceedings (the 2004 action) in the Lautoka High Court by way of writ of summons submitting in his declarations that the deed was invalid and of no effect because it was incompletely constituted; not a settlement under s 31 of the Exchange Control Act; not being a settlement, cannot be validated under s 20(2) of the Exchange Control Act; the Reserve Bank cannot validate an incompletely constituted trust; and that any purported validation by Reserve Bank was of no effect.

On the other hand, the Reserve Bank moved to strike out the statement of claim against it on the ground that there was no reasonable cause of action, the claim being frivolous and vexatious and an abuse of the process of the court. On 13 August 2004, Mr Newham made a similar application to that of the Reserve Bank.

On 24 August 2004, Mr Gallagher filed a summons in the High Court in his 2004 action for orders restraining: (a) Mr Newham from acting on the Reserve Bank's certificate of validation and (b) the Reserve Bank from upholding or confirming this certificate.

On 7 October 2004, Mr Newham, in his 2003 originating summons proceeding against NCL only, filed an inter partes motion for a mandatory injunction compelling NCL to register the transfer of shares in NCL to him; delivery up by NCL to him of various company records and; an interlocutory injunction restraining NCL from selling plant and equipment and from charging any asset or borrowing money.

On 12 April 2005, the various complaints filed by the parties were set for hearing by Connors J in the High Court and made the following judgments: (1) dismissed the Reserve Bank's application to strike out the claim against it made in Civ Action No 163 of 2004 (Appeal 30 of 2005); (2) dismissed Mr Newham's application to strike out Mr Gallagher's claim against him made in Civil Action 163 of 2004 (Appeal 31 of 2005); (3) Mr Gallagher's application to restrain Mr Newham from acting on the Reserve Bank certificate of validation in Civil Action 163 of 2004 (Appeal 31 of 2005); (4) refused to grant mandatory injunction and noted the well-known principles about the reluctance of the court to grant mandatory injunctions. He considered that damages would be an adequate remedy. He considered Mr Newham's undertaking inadequate and criticised his failure to detail his financial position; (5) issued an injunction against Mr Gallagher from acting on the Reserve Bank's certificate of validation; and (6) issued an injunction against the Reserve Bank from confirming or upholding the said certificate.

Held — (1) It was the court's view that the Reserve Bank's appeal must be allowed on the ground that there was no cause of action against it nor could there be one even if an amendment were allowed. The case concerned essentially a dispute between two individuals. If the validity of the Bank's certificate was to be challenged, that challenge would have to be based on administrative law grounds.

(2) Similarly, the effect of the deed of trust being an incompletely constituted trust on any validation by Reserve Bank was not a matter which has previously being considered by the court in any action between these parties. The Supreme Court referred to well-known principles that new points which should have been raised at the outset, could not be entertained on an appeal and that these principles must be given even greater emphasis in the originating summons procedure. The deficiencies of the originating summons procedure combined with the way the appeals were argued both in the court and in the Supreme Court have meant that no court has ever ruled upon various incidental factual matters which were raised in the High Court in the affidavits and which all courts have indicated should be dealt with in other proceedings.

(3) It follows that, if Mr Gallagher were to be permitted to continue his proceedings against Mr Newham and NCL, Connors J was quite right to refuse a mandatory injunction requiring NCL to register the shares into Mr Newham's name. Connors J was quite right to point out the court's reluctance to grant such an injunction which normally would have the effect of deciding the whole case.

(4) In its decision, the court directed Mr Gallagher to file in the High Court within 28 days from delivery of the court's judgment a statement of claim which would articulate clearly his precise causes of action against Mr Newham.

Appeal allowed.

Cases referred to

Cromwell v County of Sac (1876) 94 US 351; *Henderson v Henderson* [1843–60] All ER Rep 378; (1843) 3 Hare 100; 67 ER 313; *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631; *Yat Tung Investment Co Ltd v Dao Meng Bank Ltd* [1975] AC 581, cited.

Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 1 All ER 481; [2000] UKHL 65; *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332; 91 ALR 180; 1 ACSR 510, considered.

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; 36 ALR 3, doubted.

M. J. Scott for the Reserve Bank of Fiji

A. Silvester and *V. Mishra* for Newham

B. C. Patel and *C. B. Young* for Gallagher and Nadi Contractors Ltd

Ward P, Barker and Henry JJA.

Introduction

[1] These three appeals (which have been heard together) stem from two judgments of Connors J, given in the High Court at Lautoka on 13 May 2005. The judge on 12 April 2005 heard several applications by various parties. Particulars of those applications will be detailed later.

[2] Connors J's decisions represented yet another phase in a litigious saga which has occupied the superior courts of Fiji over the last 6 years. What is about be narrated shows an unsatisfactory procedural situation which may well have been partly caused by the unwise choice for the first approach to the High Court in 1999 of the originating summons procedure instead of the writ of summons procedure.

[3] It becomes necessary, therefore, to provide a fairly detailed account of previous steps in the litigation involving these parties before one can attempt to summarise, let alone assess, the judgments under appeal.

History of litigation

[4] On 14 May 1999, an Australian citizen, Alan Charles Newham (Mr Newham), applied to the High Court at Lautoka by way of originating summons seeking a variety of orders against a New Zealander with Fiji residency, Trevor Robert Gallagher (Mr Gallagher) and a Fijian company, Nadi Contractors Ltd (NCL). The principal claims were for declaratory orders that: (a) a document dated 2 June 1990 called a "declaration of trust" (the deed) was valid and (b) Messrs Newham and Gallagher were equal shareholders in NCL. Several consequential items of relief were sought. A brief accompanying affidavit from Mr Newham exhibited the deed, an undated share transfer to Newham of 10,000 shares in NCL signed by Mr Gallagher (pursuant to trust) a facsimile in 1999 from Mr Gallagher to Mr Newham's solicitor, appearing to confirm the trust arrangement, and some accounting information about NCL from Mr Gallagher, dated 10 June 1991. There was also a letter dated 7 May 1999 from Mr Newham's Fiji solicitors to Mr Gallagher's Fiji solicitors reporting on a meeting between the parties at which it was allegedly agreed (*inter alia*) that Mr Gallagher would transfer the shares in NCL to Mr Newham. Because an originating summons had been filed, there was no statement of claim articulating the essential facts and the causes of action which would justify the relief sought. There were not even supplied particulars of the causes of action required by O 7 r 3 of the High Court Rules.

[5] Mr Gallagher filed an affidavit in reply, sworn on 22 June 1999. In summary, he claimed that he and Mr Newham had been working in Sydney for an Australian company which had interests in an earth-moving business at Vatukoula. He and his wife owned a company called Romark Pty Ltd (Romark) which was to be used as the vehicle by which Messrs Newham and Gallagher would acquire their employer's interest in its plant and machinery located at Vatukoula. NCL was thus incorporated in 1979 and Romark was allocated all but one of the 20,000 shares. Mr Newham was said to have preferred not to feature

on the shareholder register, so Romark held 50% of the shares on his behalf. According to the affidavit, they then agreed to form another company, Export Supplies Pty Ltd (Export) which was to supply parts and machinery to NCL. Mr Newham and his wife were to be equal shareholders in Export, but with Mrs Newham holding a half-share in trust for Mr Gallagher. In June 1990, Romark transferred 14999 shares in NCL to Mr Gallagher and 5000 to Mrs Gallagher. Tax returns in 1989 recorded Mr Gallagher holding 50% of the shares in Romark in trust for Mr Newham and Mrs Newham holding 50% of the shares in Export in trust for Mr Gallagher.

[6] According to Mr Gallagher, Romark and Export were then liquidated in Australia. NCL owed Export $A210,138. Mr Newham suggested that this debt be assigned to Nufield Engineering Pty Ltd (Nufield) a company which Mr Newham and/or his interests owned. Mr Gallagher was to be a 50% shareholder in Nufield but his shares were to be held by Mr Newham in trust for him. Nufield effectively took over from Export. NDC paid Mr Newham a "dividend" of $A128,158 in January 1990 and Mr Newham paid Mr Gallagher $A67,424 in March 1993 as partial payment of his share of the profits of Nufield.

[7] Mr Gallagher deposed that he signed the deed in June 1990 at the request of Nufield's accountant. He claimed he signed without legal advice and without appreciating the consequence. He thought that Mr Newham would reciprocate in respect of Nufield. He produced a reconciliation of various payments from the various companies and claimed that Mr Newham, as at March 1999, had been paid $A148,218 more then he. To this sum he added interest at 6%, although there appeared to be no agreement to pay interest. In September 1998, he sought to formalise the shareholding arrangements. Solicitors' letters were exchanged, with Mr Newham claiming that no shares in Nufield were held in trust for Mr Gallagher.

[8] Mr Newham filed a second affidavit, sworn on 19 July 1999, and Mr Gallagher a second affidavit, sworn on 9 August 1999. Without going into detail, it is clear that there were numerous factual disputes between the two of them. In particular, Mr Gallagher claimed a failure of consideration for the deed and that Mr Newham had failed to recognise his interest as a 50% shareholder in Nufield. No proceedings were ever taken in Australia concerning the validity of the deed.

[9] This was the evidence, all in affidavit form, provided at the time of the hearing of the originating summons by Madraiwiwi J in the High Court on 12 August 1999. There was no cross-examination of either deponent. Neither counsel had sought it. However counsel for Mr Gallagher had submitted to the judge that the originating summons procedure was inappropriate for this case. There was no counterclaim filed by Mr Gallagher although one could have been possible under O 28 r 8 of the High Court Rules. Nor did Mr Gallagher file a separate writ of summons as a means of articulating his claims.

[10] Despite the compelling nature of this submission, the judge proceeded to a hearing. In his judgment, which was delivered 21 months later on 5 May 2000, made the following comments on various matters relevant to the present appeal:

> (a) The court accepts that the plaintiff would have been better advised to have commenced these proceedings by writ of summons. Order 5 rule 4(2)(b) is not suited to present circumstances. There are substantial disputes of fact over whether the deed of trust contains the complete terms of the trust, the monies allegedly owed by the plaintiff and the first defendant to each other and the

question of interest being payable on the first defendant's loans. Be that as it may the provision is not in mandatory terms. An unduly technical approach would merely postpone resolution of the dispute. In such circumstances the court will invoke the provisions of Order 2 rule 2 to waive any purported irregularity and determine the issues before it.

(b) The plaintiff seeks to enforce the deed of trust dated 2 June 1990 (Annexure ACN1 of Allen Charles Newham's first affidavit). It provided that the defendant was to hold ten thousand ordinary shares of $1.00 fully paid in the second defendant on trust for the plaintiff. They were purchased from monies provided by him. This issue is not disputed by the parties. The first defendant for his part alleges that the deed of trust was drawn up with the understanding that there would be a like recognition of his interest in Nuffield (sic) Engineering Proprietary Limited. This is an existing company in which the plaintiff and/or his family trust are shareholders. This contention is denied by the latter who says that the first defendant is only entitled to half the net profits of that company. The court is not persuaded about the understanding the defendant claims the parties had. No evidence is provided to support this assertion to enable the court to go beyond the four corners of the deed of trust. The deed of trust appears on its face to be self explanatory and complete. There is a clear intention on the part of the first defendant to honour the terms of the deed of trust. The presumption against importing extraneous material in the interpretation of such documents is well-established. There are no exceptions in present circumstances as would allow the court to go beyond it. It finds there has been no failure for consideration and that the deed of trust cannot be impugned on that ground.

[11] The High Court judgment however was more concerned with the question whether any transfer of shares, purportedly achieved by the deed, contravened s 11 of the Exchange Control Act (Cap 211) (the Act). The judge held that it did. He ended his judgment thus:

(c) The transfer of shares cannot in the court's respectful opinion be preserved. However, it offends its sensibilities that the first defendant has in essence raised a technical and legal argument whereby he benefits from a state of affairs to which he voluntarily contributed. This has enabled him to evade his responsibilities to the plaintiff. It reflects little credit on him given the parties hitherto dealt with each other on the understanding that the transfer of shares pursuant to the deed of trust was valid. Only when they fell out did he invoke the Act as a shield to avoid his obligations to the plaintiff.

(d) Howsoever, the court is satisfied that the deed of trust dated 2 June 1990 is a valid and legal document and a declaration is accordingly made to that effect. An injunction in the terms sought will also issue until the direction to be presently given the plaintiff is complied with and a decision on the same received from the relevant authorities. The plaintiff is directed to seek authorization of the original transfer of shares pursuant to section 20(2) of the Exchange Control Act Cap 211. The effluxion of time is, in the court's respectful opinion, no hindrance in the light of the first defendant's dilatory conduct in that regard. All other relief is refused, the plaintiff not being as yet a shareholder of the second defendant. Costs are summarily assessed against the defendants for $500.00.

[12] Mr Gallagher and NCL then appealed to this court from the above judgment. This court delivered judgment on 15 November 2002.

[13] The submissions of counsel in this court were primarily directed to the Exchange Control illegality point. However, there was reference to other aspects of the judgment under appeal in the written submissions of Mr Gallagher's counsel as follows:

> The Appellants, Mr Trevor Gallagher and Nadi Contractors Limited, appeal against the judgment which:
>
> (i) held that it was appropriate (despite the Appellants' submissions to the contrary) for the Court to complete adjudication on the differences between the parties by way of Originating Summons in the face of substantial disputes of fact even though the Learned Judge had agreed that "There are substantial disputes of facts over whether the deed of trust contains the complete terms of the trust … "
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> (ii) made a finding of credibility against Mr Gallagher, one of the Appellants, on affidavit evidence alone when His Lordship commented at page 10 "… Suffice it to say that for a person with an accounting background a more creative explanation may have inclined him slightly more sympathy if not any credit … "And later on a page 12 His Lordship said "It reflects little credit on him give the parties hereto … "
>
> (iii) found that there was no failure of consideration in the deed of trust stating "It finds that there has been no failure for consideration and that the deed of trust cannot be impugned on that ground" and
>
> (iv) concluding "that the deed of trust dated 2 June 1990 is a valid document … "

[14] The submission went on to say that Mr Newham alleged that Mr Gallagher had no shareholding in Nufield while Mr Gallagher says that he did. Mr Newham disputed that he owes Mr Gallagher and/or NCL any money and interest. Madraiwiwi J's judgment recognised this dispute in the following terms:

> … the monies allegedly owed by the plaintiff and the first defendant to each other and the question of interest payable on the first defendant's loans...

[15] At one point, the written submission for Mr Gallagher asserted that the judge had refused to consider Mr Newham's right to rectification — a topic which would have required extensive evidence. The written submissions to this court, on topics other than the act are quite comprehensive. There had been no pleading of rectification which would have been an totally inappropriate subject for the originating summons procedure.

[16] In this court (Tompkins, Davies and Ellis JJA), the focus was on the Exchange Control argument. Essentially, the High Court judgment was upheld and the declaration that the deed was valid and legal was affirmed. However the injunction was revoked.

[17] The court had this to say on issues other than the Exchange Control point:

> It was submitted on Gallagher's behalf that there was a failure of consideration that Newham had failed to pay Gallagher his entitlement to half the net profits of Nuffield or in not executing a deed of trust in Gallagher's favour in respect of half the shares in Nuffield.
>
> Gallagher in his affidavit had claimed that the deed of trust relating to the 10,000 shares in Nadi was only part of the larger agreement between the parties that included an understanding that Gallagher was to become the owner of half the shares in Nuffield. This was denied by Newham, who did, however, accept that Gallagher was to have half the profits from Nuffield, an obligation that he said had been met.
>
> The declaration was a deed, so that no consideration was required for it to have legal effect. In fact, it is apparent on the face of the declaration that there was consideration

> as evidenced in the clause referring to the purchase money to be provided by Newham out of his own moneys. If, as Gallagher claims, it was only intended to be part of a larger transaction, that does not go to whether the declaration itself remains binding and effective. It will be for Gallagher to prove the other terms in proceedings that have not yet been commenced. *That the High Court, and this Court on appeal, have determined that the declaration is a binding deed of trust will not prevent Gallagher from seeking to establish that there were other terms in the overall agreement between the parties that have been breached* [Emphasis added.]
>
> *What is apparent is there are a number of outstanding issues between the parties that cannot be resolved in these proceedings*. It was for this reason that, after the hearing had commenced on 8 November 2002, the Court raised with the parties the possibility of their reaching agreement on how these outstanding issues can most effectively be resolved. The hearing was adjourned to enable counsel to see whether such an agreement could reached. It could not, so the hearing resumed on 11 November 2002. [Emphasis added.]
>
> It was submitted on behalf of Gallagher that as there were disputed matters of fact, these proceedings should not have been commenced by an originating summons. We do not accept that submission. It is correct that, if the allegations by Gallagher that there are additional terms to the arrangement are pursued, they will undoubtedly give rise to disputed factual issues. But, as we have endeavoured to make clear, those are not issues that arise on this application. The only substantial issue before the Court at this stage is the defence based on the Act, and that can appropriately be decided on an originating summons as it does not give rise to disputed factual issues.

[18] Mr Gallagher and NDC then sought the leave of this court to appeal to the Supreme Court, claiming that this court had erred in its interpretation of the Act. They introduced for the first time into the argument, s 31 of the Act relating to the validity of settlements. This court (Eichelbaum, Smellie and Ellis, JJA), on 16 May 2003, granted leave to appeal to the Supreme Court despite the fact that the s 31 point had not been argued before. This court certified for the Supreme Court the following issue: *"Was the Court of Appeal correct in holding that the deed of Trust dated 2 June 1990, was valid and legal as it did not require the Minister's consent under the Exchange Control Act?"* This court also imposed a stay pending the appeal to the Supreme Court.

[19] The Supreme Court heard Mr Gallagher's and NCL's appeal on 18 May 2004 and gave its decision on 21 May 2004. The Supreme Court noted that Mr Gallagher's defence to Mr Newham's claim had been based in the High Court on two grounds; first, that the deed had been made without Reserve Bank consent and, second, that the deed was part of a wider transaction imposing obligations upon Mr Newham which had not been discharged by him. As to the second of these grounds, the Supreme Court commented that they *"introduced issues of fact for which the Originating Summons procedure (that adopted by Newham) is not appropriate"*. The wider dispute was *"left open for separate proceedings"*.

[20] The following passages from the Supreme Court's judgment are helpful to record:

> (a) In the argument in this Court the appellants wished to contend further, that the settlement is incapable of validation under section 20 because that section cannot apply to allow validation of a trust that was incompletely constituted. This trust, it was said, was incompletely constituted because there was no trust property on the date it was executed. Two points were made. The first, was that at that date the shares were not owned by Mr Gallagher. The appellants wanted to contend that Mr Gallagher did not acquire his shares in the Company until after the date of the deed. The second point was that the

shares were an unallocated portion of a larger parcel of shares and so could not be identified as having been appropriated to the trust- a fact assumed but not addressed in the evidence.

(b) We are not prepared to enter upon an enquiry into whether the trust was properly constituted. That would raise questions not certified as of significant pubic importance. It would also involve factual issues not appropriate to be dealt with in originating summons proceedings and which are dependent upon evidence not before the Court. In particular it would call for investigation of the circumstances in which shares in the Company came to be acquired by Mr Gallagher (and Mrs Gallagher) from Romark Pty Limited (Romark) a company in which, on Mr Gallagher's evidence, he and his wife held substantially all the shares though 50% were held for Mr Newham. It would be necessary also to consider the written confirmation, after the date of the deed of 2 June 1990 by Mr Gallagher that he would hold 50% of the shares in the company for Mr Newham.

(c) In any event it is not apparent that these arguments could assist the appellants because, if the trust is incompletely constituted (as they claim), then there has been no settlement to be invalidated by section 31. *Yet there may very well remain a continuing obligation to allocate shares in accordance with an underlying agreement by which Mr Gallagher acquired the shares*. The allocation could be made after obtaining the necessary consent, as in the *Ruggiero v Bianco case*. [Emphasis added.]

[21] The Supreme Court also noted that:

(a) Mr Gallagher and NDC did not continue with the argument of failure of consideration for the deed and

(b) It had been made clear to his counsel that he could not argue that the trust was incompletely constituted and

(c) The settlement effected by the deed was capable of validation under s 20(2) of the Act.

[22] The court noted also:

> Mr Silvester for Mr Gallagher informed the Court that the respondent received a certificate of validation just the day before the hearing. Counsel for the appellant had had no time to consider its effect and we heard no submissions on it. However, consistent with this judgment, a proper certificate under section 20(2) would overcome the invalidity we have found.

[23] The Supreme Court upheld the appeal and ruled that the deed constituted a settlement within s 31 of the Act but was capable of validation under s 20(6).

[24] Notwithstanding the inapt use of the originating summons procedure in the 1999 proceedings, Mr Newham on 17 April 2003, had filed another such document in the High Court citing NCL as sole defendant. He sought — by way of originating summons — a "mandatory injunction", compelling NCL to register the 10,000 shares in its capital into his name. Clearly there could be disputed evidence before such an injunction would be granted. This was the proceeding affected by the stay order made by this court when granting leave to appeal to the Supreme Court.

[25] Accompanying the originating summons, were affidavits from Mr Newham and a law clerk, exhibiting documents, most of which had come before the various courts in the earlier proceedings. Later, there were filed affidavits from both Messrs Newham and Gallagher of an contentious nature which indicated that the dispute over the alleged reciprocal shareholding in the various companies was still smouldering. Some of the material in the affidavits

seemed of marginal relevance, such as copies of judgments in litigation involving Mr Newham and other persons in Australia. The same criticisms of the originating summons procedure for the 1999 proceeding apply equally to this proceeding.

[26] Shortly after the Supreme Court judgment, on 11 June 2004, Mr Gallagher filed fresh proceedings in the Lautoka High Court by way of writ of summons. In these proceedings, he cited Mr Newham and the Reserve Bank as defendants.

[27] Mr Gallagher claimed declarations that:

(a) The deed is invalid and of no effect because it is incompletely constituted;
(b) The deed is not a "settlement" under Section 31 of the Exchange Control Act;
(c) The deed, not being a settlement, cannot be validated under Section 20(2) of the Exchange Control Act;
(d) The Reserve Bank cannot validate an incompletely constituted trust;
(e) Any purported validation by the Reserve Bank is of no effect.

[28] Mr Gallagher's statement of claim in his 2004 proceeding pleaded the deed and its invalidity under s 31 of the Act unless validated under s 20(2). It also averred:

> The deed was also invalid and of no effect, independent of s 31 because:
> It was an incompletely constituted trust, in that:
> (a) the plaintiff did not own 10,000 shares on 2 June 1990 and the Deed did not cover after — acquired shares;
> (b) in any event, the 10,000 shares were an undifferentiated portion of a parcel of shares and lacked sufficient identification or allocation.
>
> The Deed was part of a larger transaction and does not contain all the terms agreed by the Plaintiff and the 1st Defendant, and the agreed consideration has also not been paid or satisfied.
>
> Consequently, the Deed cannot be validated by the 2nd Defendant under s 20(2) of he Exchange Control Act.

[29] No particulars of the allegations above were provided. For example there was no definition of what was included in "a larger transaction" or what were the terms omitted from the deed. Particulars clearly should have been given. The statement of claim revealed no cause of action against the Reserve Bank.

[30] Mr Newham's statement of defence recited the history of the litigation. It asserted the validity of the deed and that the minister's certificate under s 20(2) of the Act had validated the deed.

[31] On 2 July 2004, the Reserve Bank moved to strike out the statement of claim as against it, on the grounds that there was no reasonable cause of action, the claim was frivolous and vexatious and an abuse of the process of the court. Order 18 r 18(1)(a)–(d) and the inherent jurisdiction of the court were invoked.

[32] On 13 August 2004, Mr Newham made a similar application to that of the Reserve Bank.

[33] On 24 August 2004, Mr Gallagher filed a summons in the High Court (in his 2004 action) for orders restraining: a) Mr Newham from acting on the Reserve Bank's certificate of validation dated 18 May 2004 and b) the Reserve Bank from upholding or confirming this certificate. The already turbid factual matrix was muddied even further by the reference in this supporting affidavit to a document from the Reserve Bank dated 12 June 1999 which the Supreme Court had refused to allow to be introduced during the hearing before it. More recent correspondence with the Reserve Bank was also exhibited in which Mr Gallagher

sought to be heard on any fresh application for Reserve Bank approval to the deed. Mr Gallagher's solicitors had alleged that the bank's purported validation of 18 May 2004 was invalid in that it had been issued without submissions from Mr Gallagher and on the basis of the Court of Appeal's decision which was later reversed by the Supreme Court.

[34] The solicitors had also claimed in the correspondence that the deed had been improperly constituted and was therefore ineffective and incapable of validation. Moreover the deed was not a trust for acquired shares. In a letter in reply, the bank pointed to Mr Gallagher counsel's acceptance during the course of the Supreme Court hearing, as recorded by the Supreme Court, that it could not be argued that the trust had been improperly constituted.

[35] An affidavit in support on behalf of Mr Newham was sworn, not by him, but by his solicitor. It exhibited, yet again, the numerous documents and judgments which had already been produced in the various proceeding and/or which were matters of public record. Such needless duplication of effort and resources seems to have been symptomatic of this litigation.

[36] On 7 October 2004, Mr Newham, in his 2003 originating summons proceeding against NCL only, filed an inter partes motion for

(i) a mandatory injunction compelling NCL to register the transfer of shares in NCL to him;

(ii) delivery up by NCL to him of various company records; and

(iii) an interlocutory injunction restraining NCL from selling plant and equipment valued it more than $F5000 and from charging any asset or borrowing money.

[37] Mr Newham's affidavit in support largely recycled earlier affidavits and offered reasons as to why NCL books should be investigated. If the transfer of shares were accomplished, he proposed having his son move from Australia to Fiji to become joint managing director of NCL, along with Mr Gallagher.

[38] In an affidavit in reply, sworn on 5 April 2005, Mr Gallagher challenged Mr Newham's suitability to participate in NCL for various reasons: he detailed NCL's financial situation. He considered that the presence of Mr Newham would be divisive and could lead to the loss of NCL's biggest customer, Emperor Gold Mining Co Ltd. He gave a brief, but far from comprehensive, overview of his own financial situation. Neither he nor Mr Newham had offered the usual undertaking as to damages in support of the various injunction claims.

[39] At last, the scene was set for the hearing by Connors J in the High Court on 12 April 2005. The judge heard on the same day:

(a) The Reserve Bank's application to strike out the claim against it made in Civil Action 163 of 2004 (Appeal 30 of 2005).

(b) Mr Newham's application to strike out Mr Gallagher's claim against him made in Civil Action 163 of 2004 (Appeal 31 of 2005).

(c) Mr Gallagher's application to restrain Mr Newham from acting on the Reserve Bank certificate of validation of 18 May 2004 in Civil Action 163 of 2004 (Appeal 31 of 2005).

(d) Mr Gallagher's application for a mandatory injunction against NCL compelling it to register shares made in originating summons 136 of 2003 (Appeal 32 of 2005).

[40] On 13 May 2005, Connors J delivered two reserved judgments, one in the 2003 proceeding and one in the 2004 proceeding.

[41] In the 2004 proceeding, Connors J:

(a) dismissed both Mr Newham's and the Reserve Bank's motions to strike out Mr Gallagher's statement of claim;

(b) issued an injunction against Mr Gallagher from acting on the Reserve Bank's certificate of validation; and

(c) issued an injunction against the Reserve Bank from confirming or upholding the said certificate.

[42] In this judgment, after reciting the litigious history, the judge concentrated on the rule in *Henderson v Henderson* [1843–60] All ER Rep 378; (1843) 3 Hare 100 at 115; 67 ER 313 (*Henderson*) and the numerous authorities flowing from that case. Broadly stated, the rule is that a party is normally required to bring his/her whole case in one proceeding and is not permitted to add fresh aspects to the same litigation by subsequent proceedings which should have been brought in that proceeding with reasonable diligence. The judge considered the written and oral submissions made by counsel and concluded on the authorities, that the 2004 proceedings were not such as should incur the serious consequence of being struck out.

[43] Connors J did not in this judgment advert to any of the following:

(a) whether a proper cause of action had been pleaded against the Reserve Bank;

(b) whether an injunction against a public body like the Reserve Bank was appropriate;

(c) The principles for granting interim injunctions, notably:

(i) whether damages would be an adequate remedy

(ii) the balance of convenience

(iii) an undertaking as to damages from Mr Gallagher and

(d) Mr Gallagher's financial position and whether it was sufficient to support such an undertaking.

In his other judgment delivered in tandem, however, the judge noted Mr Gallagher's financial position as disclosed and did mention the need for undertakings and the balance of convenience. So one can assume that he had these matters in mind when he granted the injunctions noted above.

[44] In his judgment, in the 2003 originating summons proceeding, Connors J refused to grant a mandatory injunction against NCL directing it to register the 10,000 shares into Mr Newham's name. The judge also declined to grant the further relief sought relating to the production of financial records and the conduct of NCL's business.

[45] In this judgment, the judge noted the well-known principles about the reluctance of the court to grant mandatory injunctions He considered that damages would be an adequate remedy. He considered Mr Newham's undertaking inadequate and criticised his failure to detail his financial position. He could find little basis for the ancillary orders sought.

Appeal by Reserve Bank

[46] In our view, the Reserve Bank's appeal must be allowed. There is just no cause of action against it, pleaded in Mr Gallagher's statement of claim. Nor could there be one even if an amendment were allowed. This is essentially a dispute between two individuals. If the validity of the bank's certificate is to be

challenged that challenge would have to be based on administrative law grounds. Mr Gallagher's only such remedy would be by way of judicial review proceedings which would need the leave of the High Court for their institution. In any event, we note the bank's willingness, expressed in the correspondence to consider representations from both parties before issuing any new certificate.

[47] It is quite wrong for a public body such as the bank to be joined in litigation between individuals without some proper cause of action being shown. None was shown in this case. The bank's appeal must therefore be allowed with costs to it of $2000 plus disbursements in this court and in the High Court as fixed by the registrar. The award of costs is to cover the bank's costs both in this court and in the High Court.

[48] Being of the view that as the bank's appeal must be allowed because there is no cause of action, it is not necessary to consider its other grounds of appeal.

Mr Newham's appeal

[49] Dealing now with the appeal in the 2004 case by Mr Newham; his counsel criticised the following comments of Connors J:

> It would appear therefore that if the plaintiff in the current proceedings were successful that would not result in a judgment which conflicts with the earlier judgment of the Supreme Court as the validity of the deed by virtue of it being an incompletely constituted trust has not been considered by the court previously. Similarly, the effect of the deed of trust being an incompletely constituted trust on any validation by the 2nd defendant is not a matter which has previously being considered by the court in any action between these parties.

[50] Counsel submitted that the judge failed to appreciate what had occurred in the Supreme Court: in particular, an attempt by Mr Gallagher's counsel there to produce a signed share transfer dated 13 June 1990 from Mr Gallagher to Mr Newham. The court declined to receive the document. We do not find the court's refusal surprising, given that all the Supreme Court was considering was the applicability of the Act to the transaction. Moreover, the Supreme Court, in a passage noted earlier gave an indication that there could be a continuing obligation to allocate shares even after Reserve Bank consent to the deed had been obtained. The Supreme Court also noted that the wider dispute between the parties was "*left for separate proceedings*".

[51] The Supreme Court referred to well-known principles that new points which should have been raised at the outset, could not be entertained on an appeal and that these principles must be given even greater emphasis in the originating summons procedure. See *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645. The Supreme Court refused to consider factual issues, given the narrowness of the illegality point which formed the basis on which leave to appeal to that court had been given.

[52] Counsel submitted that Connors J ignored the principles of *res judicata*, equitable estoppel and finality in litigation. He submitted that the judgment was really giving Mr Gallagher a "second run at the same target".

[53] But the Supreme Court did not decide whether the trust had been properly constituted. It stated that an inquiry on that score would involve factual issues not appropriate for originating summons procedures as well as evidence not before the court. It emphasised that it was only deciding the question of illegality under the act as had been certified by the Court of Appeal.

[54] The Supreme Court recognised the fundamental procedural problem which has dogged this litigation since 1999. Namely, the totally inappropriate use by Mr Newham of the originating summons procedure.

[55] Use of the originating summons procedure meant:

(a) there was no proper statement of claim to justify the range of orders sought and to articulate the causes of action relied upon;

(b) the facts were placed before the court by affidavits from which causes of action and/or defences might or might not be able readily to be discerned;

(c) No cross-examination is usually allowed. The court was badly placed to decide contested facts.

[56] Order 5 r 3 of the High Court Rules mandates the originating summons procedure only when an application is made under any Act. Rule 4(1) gives a plaintiff a choice of originating summons or writ unless the rules expressly require one or the other.

[57] Order 5 r 4(2) reflects the normal use of the originating summons procedure, indicating that the procedure is appropriate for interpretation arguments or cases where there is unlikely to be any substantial dispute of fact. Thus, if all that needed to be decided was the illegality of the deed under the act, an originating summons was appropriate.

[58] Order 7 r 3(1) requires an originating summons to state in addition to the relief sought, sufficient particulars to identify the causes of action on which the plaintiff relies. This rule was ignored in the 1999 originating summons filed by Mr Newham.

[59] Order 28 r 8(2) entitles a defendant to an originating summons to file a counterclaim. He must inform the court of the nature of the counterclaim and the court will direct how it is to be made. No resort to this subrule was ever made by Mr Gallagher.

[60] Order 28 r 9 empowers the court, in effect, to convert an originating summons into writ and for the proceedings thereafter to continue as if they had been commenced by way of writ, subject to any direction of the court. In our view, it would have been better for Madraiwiwi J to have operated under this Rule. We do not share his view that such an approach would have been "too technical".

[61] The deficiencies of the originating summons procedure combined with the way the appeals were argued both in this court and in the Supreme Court have meant that no court has ever ruled upon various incidental factual matters which were raised in the High Court in the affidavits and which all courts have indicated should be dealt with in other proceedings.

[62] The High Court, in our view, was right to isolate the illegality point as a preliminary issue for determination before trial under O 33 r 3. A determination of illegality could have ended the proceedings. However, Madraiwiwi J did not consider when or how the balance of the dispute between the parties — unaffected by the illegality point — might be resolved.

[63] Although this court gave the parties an opportunity to resolve issues other than the illegality point during the course of the hearing of the appeal in this court, they did not do so. This court too adverted to the possibility of other proceedings. There were unresolved factual issues brought before it on appeal, as can be seen from the extracts from Mr Gallagher's submissions quoted earlier.

[64] The Supreme Court was limited by the question of law posed to it. The court specifically rejected any additional argument which depended on factual findings. The court acknowledged that there still could be some areas of fact which could be litigated despite its ruling that s 31 of the Act applied to the deed, which was able to be validated under s 20(2).

[65] The high point of strictness for the *Henderson* rule is found in the privy council in *Yat Tung Investment Co Ltd v Dao Meng Bank Ltd* [1975] AC 581, Lord Kilbrandon, giving the advice of the privy council, noted at 589 that it becomes an abuse of process to raise in subsequent proceedings matters an issue which could and therefore should have been litigated in earlier proceedings.

[66] His Lordship stated at 590:

> The shutting out a "subject of litigation" — a power which no court should exercise but after a scrupulous examination of all the circumstances — is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances"; are reserved in case justice should be found to require the non-application of the rule.

[67] The strictness of the privy council's view of the rule was doubted by the High Court of Australia in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602–3; 36 ALR 3 at 12 (*Anshun*). The joint judgment of Gibbs, CJ, Mason and Aickin JJ expressed the principle thus:

> In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations, given in *Cromwell v County of Sac* (1876) 94 US 351 (24 Law Ed at p 199).
>
> It has generally been accepted that a party will be estoppel from bringing an action which, if it succeeds will result in a judgment which conflicts with an earlier judgment.

[68] In *Johnson v Gore Wood & Co* [2002] 2 AC 1; [2001] 1 All ER 481; [2000] UKHL 65 (*Johnson*), Lord Bingham in the House of Lords comprehensively reviewed the authorities. The following extract from his speech at 498–9 is instructive:

> It may very well be, as has been convincingly argued (Watt "The Danger and Deceit of the Rule in *Henderson v Henderson*: A new approach to successive civil actions arising from the same factual matter (2000) 19 CJQ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been

> raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding, involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice. [Emphasis added.]

[69] Relying on these and other authorities, Connors J held that while the existence of the 2004 proceedings might be a "severe annoyance" to the defendant they were not such as to warrant striking out or stay. It should also be remembered that Connors J was exercising a discretion and therefore the normal rules about appeals from the exercise of a discretion apply. It seems to us that what the judge was doing was to make a "broad merits based judgment taking into account all the circumstances" — just as the quotation from Lord Bingham envisaged.

[70] Counsel referred us to many manifestations of applications of the *Henderson* rule. We find it unhelpful to review them all since we are attracted by the non-dogmatic approach in *Johnson* and the reasonableness approach in *Anshun*.

[71] We are of the view that it has not been shown that the judge exercised his discretion wrongly when refusing to strike out Mr Gallagher's claim. Justice requires Mr Gallagher to have his day in court to litigate such issues that still remain open to him, as were indicated by this court and the Supreme Court in their respective judgments. These issues, signalled by him in the imperfect medium of the 1999 originating summons, were never properly heard and determined.

[72] The position of a defendant who might have had a counterclaim when proceedings were first instituted against him is mentioned by Brennan and Dawson, JJ in the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 346; 91 ALR 180 at 189; 1 ACSR 510 (*Tanning Research*) thus:

> A plaintiff who has an unadjudicated cause of action which can be enforced only in fresh proceedings (*Duedu v Yiboe* (77) cannot be precluded from taking fresh proceedings merely because he could have and, if you will, should have counterclaimed on that cause of action in a forum chosen by the opposite party in proceedings in which

the opposite party sued him. We do not read the majority judgment in *Port of Melbourne Authority v Anshun Pty Ltd* as holding the contrary, except in a case where the relief claimed in the second proceeding is inconsistent with the judgment in the first: see especially at 599–601.

[73] The issues raised by Mr Gallagher had effectively been "parked" by both the High Court and this court, pending a decision on the illegality argument. Even though the Supreme Court found illegality it too, indicated areas where there could still be a factual dispute.

[74] Mr Gallagher could have counterclaimed in the originating summons or filed his own proceeding, in 1999. But the originating summons procedure and the insistence by the judge to stay with that procedure while the illegality point was being considered, operated as powerful disincentives against such a course. Once the illegality question was sorted by the Supreme Court, he filed his new proceedings promptly, albeit imperfectly, given the deplorable lack of particulars. Besides, the dictum from *Tanning Research* is of help to a party who might have, but did not file a counterclaim in original proceedings.

[75] Accordingly, we are of the view that Connors J was right not to strike out Mr Gallagher's 2004 proceedings and Mr Newham's appeal is dismissed on that aspect of the judgment.

[76] As to an interim injunction to restrain Mr Newham acting on the Reserve Bank's certificate of validation, there should have been a consideration by the judge of the balance of convenience and a requirement for an undertaking as to damages from Mr Gallagher. We consider that there has to be a holding injunction. Damages would not be an adequate remedy. We require Mr Gallagher to file the usual undertaking as to damages within 28 days from the delivery of this judgment. The does so, the interim injunction will stand and the appeal against the interim injunction will be dismissed. The interim injunction will dissolve if he does not file the undertaking.

Mr Newham's appeal against NCL

[77] It follows that, if Mr Gallagher were to be permitted to continue his proceedings against Mr Newham and NCL, Connors J was quite right to refuse a mandatory injunction requiring NCL to register the shares into Mr Newham's name. Connors J was quite right to point out the court's reluctance to grant such an injunction which normally would have the effect of deciding the whole case.

[78] Accordingly Mr Newham's appeal against NCL is dismissed with costs to the Respondent of $1000 and disbursements as fixed by the registrar.

[79] We direct that Mr Gallagher files in the High Court within 28 days from delivery of this judgment a statement of claim which articulates clearly his precise causes of action against Mr Newham, giving full particulars. Care will have to be given to plead only those causes of action now remain, given the pronouncements of the Supreme Court. For example, Mr Gallagher cannot rely on inadequacy of consideration or that the trust was incompletely constituted, because of the Supreme Court's claim rulings on those points.

[80] We direct that the High Court:

(a) Afford urgency to the hearing of the 2004 writ filed by Mr Gallagher.

(b) Consider making an order that the 2003 originating summons filed by Mr Newham be converted into a writ of summons by use of O 28 Rule.

(c) The two proceedings be heard together as soon as possible.

[81] Nothing we have said should be taken as prohibiting Mr Newham from raising any proper defence to Mr Gallagher's amended statement of claim.

[82] The result is:

(a) Appeal by Reserve Bank against Mr Gallagher allowed. The injunction against the Reserve Bank is dissolved.

(b) Mr Gallagher to pay the Reserve Bank a total of $2,000 for costs in this court and in the High Court plus disbursements on both courts as fixed by registrar.

(c) Appeal by Mr Newham against Connors J's refusal to strike out Mr Gallagher's statement of claim is dismissed.

(d) Interim injunction ordered by Connors J against Mr Newham continued on condition that Mr Gallagher files an undertaking as damages within 28 days from the date of delivery of this judgment.

(e) Mr Newham to pay Mr Gallagher $1000 plus disbursements as costs in this court plus disbursements as fixed by registrar.

(f) Appeal by Mr Newham against Nadi Contractors Ltd dismissed.

(g) Mr Newham to pay Nadi Contractors Ltd $1000 costs in this court plus disbursements as fixed by registrar.

Appeal allowed.