IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

(5)

CIVIL APPEAL NO. CBV 0001/93
(Fiji Court Appeal Case No.67/90)

BETWEEN THE GOVERNOR OF RESERVE BANK OF FIJI

Appellant

AND REDDY'S ENTERPRISES LIMITED

Respondent

Coram: The Rt. Hon. Lord Cooke of Thorndon
The Hon. Sir Anthony Mason
The Rt. Hon. Sir Maurice Casey

Hearing: 20 November 1995

Counsel: M. J. Scott for the Appellant
B. Patel for the Respondent

Judgment: 10 October 1996

JUDGMENT OF THE COURT

The respondent, Reddy's Enterprises Limited, owned the Tanoa Hotel near Lautoka. On 17 December 1988 it was destroyed by fire. It had been insured in London and settlement of the claim was agreed at $F5.1 million of which 10% was paid in Fiji and the balance of 1,865,853 pounds sterling (the then equivalent of F$4.59m) was paid in June and July 1989 to a London broker (Sedgwick London) for the respondent and placed on term deposit with Westpac Bank in London in August. Pending a decision about appropriate plans for the re-instatement of the hotel, the respondent wished to invest this money abroad for up to 2 years at higher interest rates than those currently available in Fiji. Its request for consent to this course under the Exchange Control Act 1952 (Cap 211) was declined by the Governor of the Reserve Bank on 20 June 1989 and further representations to the Minister of Finance were also unsuccessful. The respondent applied the High Court for judicial review seeking to quash the Governor's decision and this was refused by Byrne J in a judgment delivered on 29 November 1990. The Court of Appeal allowed the respondent's appeal and set aside the High Court

order on 14 December 1992 and the Governor of the Reserve Bank now appeals against that decision. The hearing in this Court which began on 20 November 1995 was adjourned to enable counsel to make further written submissions which have now been received and considered.

The central issue in the appeal is the effect of the Exchange Control Act on this transaction. It is a comprehensive statute aimed at the protection of Fiji's reserves of gold and foreign currency and is modelled on the United Kingdom Exchange Control Act of 1947 which was repealed in 1987. It prohibits a wide range of transactions involving dealings by Fijian residents in gold, foreign currency and securities without the permission of the Minister. Under s. 9 approval was necessary for payment of the insurance premiums to the London underwriters, and this was duly granted without conditions about the payment of any proceeds.

Section 3(1) of the Act headed "Dealings in Gold and Foreign Currency" states that, except with the permission of the Minister, no person resident in Fiji other than an authorised dealer shall, outside Fiji, buy or borrow any gold or foreign currency, or sell or lend any gold or foreign currency to any person other than an authorised dealer. Counsel informed us that Westpac Bank was an authorised dealer. It was agreed that the funds could remain there pending the outcome of the Judicial Review proceedings.

Under the heading "Surrender of Gold and Foreign Currency" s.4 relevantly provides:-

> (1) Every person in or resident in Fiji who is entitled to sell , or to procure the sale of any gold or any foreign currency to which this section applies, and is not an authorised dealer, shall offer it or cause it to be offered, for sale to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister.
>
> (1) The foreign currency to which this section applies is such foreign currency (hereinafter in this Act referred to as "specified currency") as may, from time to time, be specified by order of the Minister." [Sterling was a specified currency]

In the event of non-compliance subsection 6 enables the vesting of the gold or currency in the Minister free of encumbrances and he may deal with it subject to

paying to the person entitled the sum he would have received if he had sold it to an authorised dealer. This section is clearly aimed at achieving the transfer of gold and foreign currency held by a Fijian resident to Fiji through the commercial banking system by means of a compulsory offer of sale. It was not suggested that the placing of the sterling funds on deposit with Westpac amounted to such an offer.

In this Court the argument focussed on the application of s.26(1) of the Act which reads:-

> "Duty to collect certain debts
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> 26 (1) Except with the permission of the Minister, no person resident in Fiji who has a right (whether present or future and whether vested or contingent) to receive any specified currency, or to receive from a person resident outside Fiji a payment in Fiji currency, shall do, or refrain from doing, any act with intent to secure or shall do any act which involves, is in association with or is preparatory to any transactions securing-
>
> (a) that the receipt by him of the whole or part of that currency or, as the case may be , of that payment in Fiji currency, is delayed; or
>
> (a) that the currency or payment ceases, in whole or in part, to be receivable by him ."
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> (Contravention entitles the Minister under s.26(2) to give directions to the resident to obtain or expedite the receipt or payment, and to assign to him the right to receive it or to enforce any security for its receipt.)

No question was raised in this Court about Byrne J's conclusion (accepted by the Court of Appeal) that the Governor of the Reserve Bank was authorised to exercise the Minister's powers under the Act. He held there had been a proper exercise of those powers and that s26 (1) (a) was to be construed as requiring receipt in Fiji, and the Company had infringed the section by receiving payment in London. The Court of Appeal rejected this interpretation, holding that s 26(1) (a) was not intended to deal with the matter of payment in Fiji at all. As it was accepted there had been no delay in receiving payment, it held that permission under s26 (1) was unnecessary and the Company's appeal was allowed. That court was under the mistaken impression, however, that the payment in London had been made in Fijian currency. Counsel are agreed that it had been paid in sterling.

Counsel made extensive submissions about the proper law governing the insurance contract, notwithstanding that for all practical purposes there is no

difference between the law of Fiji and the law of England in this respect. There was no provision in the policy about the appropriate law applicable, but we agree with the High Court and the Court of Appeal that it was English. The insurance was placed on the London market because it was impossible to obtain appropriate cover in Fiji at the time. It was effected there by the Company's Fijian broker, Sedgwick (Fiji) Ltd., with a consortium of insurers - according to counsel, ten of them were United Kingdom companies and one Italian. The policy was issued in a standard "PSAC" form and the premiums were payable in London. In the absence of any stated address for the insurers in Fiji, it can be assumed that notice of any claim had to be given in London as well. Whether or not the locality of the insured property is a factor to be taken into account (according to Ivamy "General Principles of Insurance Law" 5th Edn. p591 it is not) we are satisfied that English law was the system of law with which this transaction had its "closest and most real connexion"- per Lord Simonds in *Bonython v Commonwealth of Australia* [1951] AC 201,209.

In this Court the appellant eventually advanced two main propositions:

(1) That on its proper interpretation, s.26 (1) required that receipt be in Fiji, so the Company was in breach by receiving payment in London.

(2) That the Company's right was to receive payment only in Fiji dollars, and that by agreeing to take sterling it had delayed receipt of that currency, thereby infringing s. 26(1)(a).

In agreement with the Court of Appeal we would reject the appellant's submission that s.26(1) must be read as requiring payment in Fiji. In the High Court Byrne J reached that conclusion after an extensive survey of authorities dealing with statutory interpretation. He felt it necessary to imply such a term to give effect to the intention of the Act. However, among other more specific provisions the protection of Fiji's foreign exchange reserves is secured by the requirement in s.4 to offer specified foreign currency to an authorised dealer; and by the default provisions in s.26 (2) giving the Minister the power of obtaining or expediting receipt or payment. The place of s.26 among the general body of miscellaneous provisions at the end of the Act, followed by a similar requirement in s.27 not to delay the sale or importation of goods, tends to confirm what its language so clearly indicates - namely, that s.26 is directed

only at conduct by Fiji residents seeking to delay or evade the receipt of payments due to them in the particular currency stipulated. To impose the added obligation of ensuring that payment be received here, notwithstanding contractual terms or business practicality, is to go beyond what the legislature considered necessary for the protection of Fiji foreign currency reserves by the provisions already made in the Act. As noted above, specified foreign currency paid abroad will be brought into its banking system by the requirements of s.4. With Fiji currency the commercial reality is that it will be paid in Fiji, having been purchased in its currency market with foreign funds which become part of its overseas reserves. It is significant that in the United Kingdom it was not thought necessary in 40 years to amend its virtually identical provision so as to require territorial receipt. On the information supplied to us by counsel the position is the same in India, which adopted similar controls in 1947 (Foreign Exchange Regulation Act 1947).

The appellant's other proposition, that the respondent's right was to receive payment only in Fiji currency, involves a consideration of "money of account" and "money of payment", the former being the currency in which the debtor's obligation is expressed. In this case it was Fiji dollars, every monetary reference in the policy being so denominated. "Money of payment" is the currency with which the obligation is to be discharged, and one might expect that to be Fijian also, for it is clearly the one that best expresses the insured's loss (see *The Despina R* [1979] AC 685) and the insurers had undertaken to pay in Fiji dollars. However, the position is not so straightforward where English law is the proper law of the contract, and the relevant principles are spelt out in Dicey and Morris on "The Conflict of Laws" (12th Edn.) at p.1579 in these terms:-

"The question what money tokens the debtor must pay or tender to the creditor is one concerning the manner of performance and regard must be had to the *lex loci solutionis*, whether or not it is the law applicable to the substance of the obligation. 'There is no necessary correlation between the proper law that governs an obligation and the ... currency in which the obligation is to be discharged' (*Re United Railways of Havana and Regal Warehouses Ltd* [1961]AC 1007,1060)..... If a debt or other liability expressed in a foreign currency is payable in England, the debtor may tender pounds in discharge . This is 'primarily a rule of

construction" (*Heisler v Anglo-Dal Ltd* [1954] 1WLR 1273). Despite a number of dicta to the contrary the debtor may also discharge his liability by tendering the foreign currency *in specie*, but the creditor cannot compel him to do so"

The authors rely on *Marrache v Ashton* [1943] AC 311 on principle to support the view expressed in the last sentence, in preference to obiter dicta in other cases to the effect that the creditor is entitled to receive the currency of the place of payment. In the 5th Edition of Mann "The Legal Aspect of Money" at p 321 it is also recognised that where a sum of money expressed in a foreign currency is to be paid in England, the debtor has the option of paying it in the foreign currency, or the equivalent in sterling, citing comments to this effect by Mocatta J in *Barclays International Ltd v Levin Bros* (1977) QB 270,277.

The respondent Company argued that the place of payment was London, and in support its counsel referred to the brief statement of Byrne J. to that effect in his recital of the facts at page 3 of his judgment. That finding however (if it be one) cannot bind this Court. As pointed out later in this judgment, it must depend on the inferences to be drawn from the surrounding circumstances about the presumed intention of the parties, and this Court is in as good a position as Byrne J. was to reach a conclusion on that. On the assumption that the place of payment was to be London the respondent submitted that the insurer was entitled to pay the claim there in sterling, in accordance with the English law applicable under the authorities mentioned above, that being the proper law of the contract. It would follow that sterling was the only currency the Company had a right to receive once the insurer had exercised that option; accordingly respondent's counsel submitted there had been no breach of s 26 (1).

The position will be otherwise if Fiji were the place of payment. The policy is silent on this point. The appellant referred us to the statement in footnote 11 on p.590 of Ivamy, to the effect that in the absence of a provision for a place of payment in the policy, it will be the insurers' or the assured's place of business, according as the payment is of premiums or losses. *Robey v Snaefell Mining Co* (1887) 20 QBD 152 was cited in support. That was a case dealing with a claim for the price of goods sold by an

English plaintiff to the defendant in the Isle of Man, and the Court referred to Coke's principle that the obligation is on a debtor to seek out his creditor and pay him.

Counsel for the respondent relied on this rule to submit that the place of "finding" was the place of payment and further, that the parties intended from the commencement of the contract that the respondent, through its English broker, would be "found" in England. But the broker employed to place the insurance in the London market was a Fijian company and the suggestion that it or its London associate was intended by the parties from the outset to receive payment of any claims is untenable in the absence of any supporting authority or evidence. We were not referred to any.

The record shows that before payment of the adjusted claim of F$5.1m, the respondent wrote to the Governor on 22 May 1989 seeking permission to invest the money abroad and demonstrating an awareness that the money had to come into the Fiji banking system by virtue of the Act. The inference is inevitable that the London broker came into the picture only at that point, when the insurers were authorised by the respondent to pay in sterling to it, in anticipation of consent being granted to its retention in London. The insurers obtained a valid discharge and the respondent, by agreeing to take sterling, waived its right to receive Fiji currency. It clearly was not a case of a debtor simply "finding" his creditor in London and exercising his right to pay in sterling, as contended for by appellant's counsel.

It is necessary to ascertain the true intention of the parties about the place of payment from the terms of the policy, in the light of the nature of the transaction and other relevant circumstances existing at the time the insurance contract was made. One must not ignore the realities of modern commercial practice, with the almost instantaneous ability to transfer funds to most parts of the business world, rendering obsolete financial transactions such as the formal tendering of banknotes or cheques on which earlier decisions may have been based. Nevertheless, in this instance we are satisfied that the parties must be held to have intended that any claims under the policy would be paid in Fiji and not in London. The Company was domiciled here and all its business was local, as was the insured hotel. It would no doubt have been contemplated that the money payable under the policy would be required in Fiji to

repair or re-instate it in the event of a fire.

The place of payment being Fiji, it follows that the currency of payment must be Fijian also. It was the currency stipulated in the policy and is the sole legal tender in this country, and was therefore the only one in which the insurers' obligations could be discharged, and the only one the respondent had a right to receive in terms of the policy. Once the claim was admitted and the amount agreed upon, the Company had a present vested right to payment in Fiji currency, to use the language of s.26(1). The question then arises whether its action in arranging through its London agent to receive payment there in sterling without Ministerial consent constituted a breach of that section.

Respondent's counsel submitted that the Company had the ability to obtain judgment against the insurers in Fijian dollars under proceedings brought in England. but could enforce it there only for the sterling equivalent (*Miliangos v George Frank (Textiles) Ltd* [1976] AC 443). Accordingly this constituted a contingent right to receive sterling in terms of s 26(1) and there was no breach of subsections 1(a) or (b) by obtaining that currency in advance. As counsel had pointed out in an earlier part of his submission, however, there is only one right under s.26(1) to receive payment in either specified currency (i.e.sterling) or Fiji dollars. That right can be either present or future, and either vested or contingent. Just as with the two types of currency, each pair of these characteristics is mutually exclusive. As stated above, we are satisfied that the Company acquired a present vested right to payment in Fijian currency on settlement of the policy claim, and logically under the terms of s 26 (1) it could not have acquired at the same time a contingent right to sterling in the same transaction. The ability to execute an English judgment in that currency was no more than an incident of the vested right to payment in Fiji dollars and does not constitute a separate right of the kind contemplated by the subsection.

Appellant's counsel advanced his submissions on the basis that the Company had infringed s. (26) (1) (a) by "delaying" receipt of the payment in Fijian currency, but it has always been accepted there was no delay. The Company's decision to accept sterling resulted in payment of Fijian currency "ceasing" to be receivable in terms of

subsection (1)(b) and the question of breach must be considered in relation to that subsection only - namely whether, by accepting sterling, the Company did an act involving a transaction securing that "the currency or payment ceases, in whole or in part, to be receivable by it." Read in conjunction with the way these words are used in s. (26)(1)(a), "currency" must mean "specified currency" and "payment" a "payment in Fijian currency." Respondent's counsel submitted that subsection (1)(b) could not have been intended to penalise a Fijian creditor who does nothing to delay or forego payment of his debt due in Fijian dollars. If he elects instead to receive it in a specified currency it must be offered for sale under s.4 to an authorised dealer, thereby achieving the Act's intended protection of the country's foreign currency reserves

In principle there may be merit in this submission, but we find it difficult to escape the distinction which s.26(1) makes between "specified currency" and "payment in Fijian currency", in their context being treated as mutually exclusive terms. If that distinction is to be carried through into subsection 1(b) (as we think it is), there is no room for treating the types of receipt referred to therein as interchangeable. The Company did not have the option under the Act of taking sterling in place of the payment in Fijian dollars to which it was entitled.

For the foregoing reasons we are satisfied there has been a breach of s. 26 (1) by the respondent. We allow the appeal and confirm the High Court order refusing the application for judicial review. No order for costs was made in that Court or in the Court of Appeal, apparently on the basis that it was being treated as a test case. Each party sought costs in this Court if successful. We think the appellant is entitled to them and would make an order accordingly.

Cooke of Thorndon
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Lord Cooke of Thorndon

A T Mason
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Sir Anthony Mason

M E Casey
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