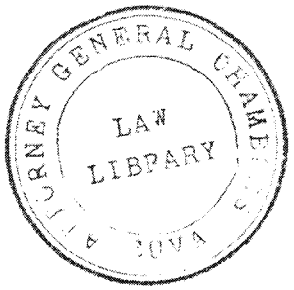
IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

CIVIL APPEAL NO.CBV 0003 OF 1996S
(Fiji Court of Appeal Civil Appeal No.ABU0004/95S)

BETWEEN: FANUZA LIMITED
ZARIN KHAN
NUR ALI
Appellants

AND: MELVYN BLOOM
YVONNE BLOOM
LINLUCK NOMINEES LIMITED
Respondents

Coram: The Hon. Sir Timoci Tuivaga, President
The Rt. Hon. Lord Cooke of Thorndon
The Hon. Sir Anthony Mason



Hearing: 16 March, 1998

Counsel: Dr. M.S. Sahu Khan for the Appellants
Mr. R.A. Smith for the Respondents

Judgment: 26 March, 1998

JUDGMENT OF THE COURT

On 5 January 1995, in an action in the High Court between Melvyn and Yvonne Bloom and Linluck Nominees Limited (Linluck) as plaintiffs and Fanuza Limited (Fanuza) and Zarin Khan and Nur Ali as defendants, Scott J. gave a judgment in favour of the plaintiffs whereby he ordered -

(i) that $100,000 be paid into court pending Reserve Bank permission to pay it out to Linluck, and

(ii) that Fanuza transfer 5700 ordinary shares in Linluck to Mr and Mrs Bloom to be held in escrow as provided by clause 2(a)(i) of a deed dated 4 October 1991, pending receipt of the relevant Reserve Bank permission.

On 15 November 1996 the Court of Appeal (Sir Moti Tikaram P., Thompson and Dillon JJ.A.) dismissed an appeal by the defendants. They now appeal to this Court.

The Blooms and the Khans had been involved together in the ownership and management of two Nadi hotels, the New Westgate Hotel and the Nadi Bay Motel. Various shares in the two companies already mentioned were owned by the individuals or by Nuvonne Hotel Limited, in which again both families had shares.

The deed followed unhappy differences between the two sides as a result of which it was agreed that they would go their separate ways, the Blooms owning the Nadi Bay Motel and the Khans owning the New Westgate Hotel. In the action, commenced on 9 August 1993 and based on the deed, the Blooms sought specific performance of Fanuza's agreement to transfer 5700 ordinary shares in Linluck to them; and Linluck sought judgment against the defendants for $100,000. As already indicated, Scott J. went as far only as ordering delivery of transfers of the shares in escrow and payment of the sum into court. The deed did provide inter alia that Fanuza would transfer to the Blooms the 5700 shares in Linluck and pay Linluck $100,000, and it included guarantees of the latter payment by the Khans.

The limitations on the relief granted by the trial Judge reflect the sole issue on which the case has come to be fought, namely whether the defendants can defeat the claims on the ground that performance of the obligations sued on would be illegal under the Exchange Control Act (Cap.211, Rev.1985).

It appears to be common ground that at all material times the Blooms, who are apparently Australian citizens, have been resident outside Fiji. So, by section 7 of the Act, no payment can be made to them except with the permission of the Minister (for whom the Reserve Bank is a delegate); and, by section 11, transfers of securities registered in Fiji cannot be made by or to them, or a company controlled by them, except with the permission of the Minister. The deed identified the $100,000 as additional consideration for the transfer of shares in Nuvonne by Linluck. This payment was an inseverable element in a scheme of share transfers requiring permission. In our view it required permission under section 11 or section 7 or both.

The deed provided that all shares, share transfers and scripts should be held in escrow pending all necessary governmental and statutory Reserve Bank approvals and consents. The Exchange Control Act contains nothing to prevent such a contract, which may well be common. Section 22(2), to which Mr Smith properly drew attention, does provide that for the purposes of Part IV a person shall be deemed to transfer a security if he executes any instrument of transfer thereof, whether effective or not, and shall be deemed to transfer it at the place where he executes the instrument. But we read this as directed to the place of a transaction; it should not be understood to prevent delivery in escrow.

Throughout the case Mr Smith has argued that on 5 February 1993 the Reserve Bank granted formal approval of the transfer of the 5700 shares to the Blooms. Reading together two letters written by the Bank on that day, we think that there is much to be said for this contention. The last paragraph of the first of those two letters and the whole of a letter from the Reserve Bank to Westpac Banking Corporation dated 25 October 1993 appear to treat borrowing by Linluck from Westpac as a separate matter, and to attach the condition of introducing the equivalent of F$200,000 into Fiji to the borrowing approval only. Like the Courts below, however, we express no final opinion on that point, as we consider in any event that Reserve Bank approval of the transfer of the shares in Linluck was inseverably linked with the question of Reserve Bank approval of the payment of the $100,000 to Linluck - a question to which we are about to turn. Moreover there has been no cross-appeal from the order that the transfer of the Linluck shares be held in escrow.

As to the F$100,000, there was no dispute in the argument in this Court that permission is required for payment to Linluck. There is no clear evidence in the record that such permission has ever been given. The Reserve Bank letters of 5 February do not explicitly refer to it. Dr Sahu Khan contends that the unqualified agreement in the deed to pay the money by instalments on or before specified dates ($32,500 on or before 24 December 1991, $32,500 on or before 24 March 1992, and $35,000 on or before 23 December 1992) was illegal and void from the start; and he contends also that the Judge had no jurisdiction to order payment into court.

Section 35(1) of the Exchange Control Act provides as amended -

> *"35.(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Minister is at the time of the contract required for the performance of any term thereof, that term shall not be performed, except in so far as the permission or consent is given or is not required:*
>
> *Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason."*

It is the specification of dates by the agreement which Dr Sahu Khan puts forward as showing that the implied condition is inconsistent with the intention of the parties. We are unable to accept this suggestion. As Mr Smith says, commonly contracts require payments to be made at or within certain times. The dates may be specified in the contract or there may be simply an implication of a reasonable time. We do not think that the mere fact that a time is expressly or impliedly fixed by the contract is enough to show an inconsistent intention bringing the proviso into play. If it were, the usefulness of section 35(1) would be largely destroyed. Even though a date for payment is specified in the contract, it is an implied condition under section 35(1) that payments shall not be made until the Minister has given permission.

The ordinary implication that permission must be obtained within a reasonable time must also apply. In the present case a very long time has elapsed. But it has been largely consumed by litigation in which the defendants have been contending that permission after the dates specified could not save the contract. In the light of the history, if permission to pay the $100,000 has not yet been given, we hold that it can still be sought. In considering the matter

the Reserve Bank would be entitled to take into account that there has been a long delay, and no doubt changes in the circumstances of the parties, for which the Blooms appear not to have been primarily responsible.

With regard to payment into court, it has been argued for the defendants that, by reason of the absence of the statutory permission, there was no debt in respect of which the Judge could make an order. The scheme of the legislation disposes of this argument. The former Supreme Court (now the High Court) is the court prescribed for the purposes of paragraph 4 of the Fourth Schedule of the Act: Exchange Control (Prescribed Courts) Order, Legal Notice No.26 of 1980. By clause 1 of that paragraph, in any proceedings in a prescribed court, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Minister and of the permission having been given or having been revoked. The earlier paragraphs of the Fourth Schedule contemplate orders for payment into court in such cases. The decision of the House of Lords in Contract and Trading Co. (Southern) Ltd v Barbey [1960] A.C. 244, on which Mr Smith relies, is precisely in point. That case concerned United Kingdom legislation from which the relevant provisions of the Fiji Exchange Control Act have largely been copied. It was held that there was a debt and the creditor was entitled to judgment apart from the Act but that the debtor must bring the money into court. The position is the same here. Dr Sahu Khan sought to distinguish Barbey on the ground that in the present case the contractual liability was not complete apart from the Act; but it is plain that only the need to comply with the Act stood in the way of completeness. The order for payment into court was therefore properly made.

It follows that the appeal must be dismissed with costs. The transfers remain in escrow and the $100,000 must be paid into court. The question of payment out and the future of the transfers is for the High Court. We reserve leave to any party to apply to the High Court for directions in the light of the existing evidence and such evidence of the Reserve Bank's current attitude as the High Court in its discretion may allow to be given.

Sir Timoci Tuivaga

Lord Cooke of Thorndon

Sir Anthony Mason

Solicitors:

Sahu Khan and Sahu Khan, Ba for the Appellants
Munro, Leys & Co, Suva for the Respondents