IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0007 of 2022
Court of Appeal No. ABU 0036 of 2008 and ABU 0038 of 2018

BETWEEN **AUSSIE HOUSES INTERNATIONAL LIMITED**

Petitioner

HADLEIGH JAMES RUSSEL PETHERICK

SPENCER WADE PETHERICK

Respondents

Coram **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court

Counsel **Mr. R. Vanalagi for the Petitioner**
Mr. J. Sharma for the Respondent

Date of Hearing **13 October 2023**

Date of Judgment **27 October 2023**

JUDGMENT

Temo, AP

1. I agree entirely with judgment and proposed orders of His Lordship, Mr Justice William Young.

Keith, J

2. I entirely agree with the judgment of Young J. There is nothing I can usefully add.

Young, J

The dispute

3. By written agreement of 19 June 2006, Aussie Houses International Ltd (Aussie Houses) agreed to sell a property at Denarau to Steven Petherick. As part of the transaction, Aussie Houses was to complete the construction of a house and ancillary structures on the property. Mr Petherick was to pay:

   a) NZ$1.5 million into the trust account of solicitors acting for both parties (R Patel & Co). This was to be released to Aussie Houses upon receipt of the Minister of Lands' consent to the transaction required under s 7 of the Land Sales Act 1974. And

   b) NZ$1.6 million by way of progress payments in relation to construction, with the last payment to be made on the issue of a completion certificate.

   Settlement (and thus transfer of title) was not to occur issue until the last progress payment was made.

4. Aussie Houses and Mr Petherick were both non-residents for the purposes of the Land Sales Act. Accordingly, s 7 of that Act was engaged. It relevantly provides:

> (1) No non-resident … shall without the prior consent in writing of the Minister responsible for land matters make any contract for the disposition of any land in favour of another non-resident.
> (2) The Minister responsible for land matters … may refuse his consent without assigning any reason, or may specify terms upon which such consent is conditional.

   The initial words "no non-resident" refer to a vendor, just as the concluding words "another non-resident" refer to a purchaser. So construed, the prohibition is addressed to the conduct of those selling land. This accords with the dynamics of the transaction between Aussie Houses and Mr Petherick. Aussie Houses was acting commercially as a developer of the property and no doubt with a view to making money whereas Mr Petherick (although commercially experienced and astute) was just buying a holiday house. As between the two of them, the primary responsibility for obtaining the consent might be thought to rest with Aussie Houses.

5. Clause 25 the agreement for sale and purchase (headed "CONDITION PRECEDENT') provided:

> a) This Agreement is subject to the consent of the Minister of Lands under the Land Sales Act ... and both parties agree that the Agreement shall not constitute or become a contract for the sale and purchase of the said property until such consent is received.
> b) Each party undertakes to use his best endeavours to provide all necessary information and to complete all necessary forms to enable this condition to be satisfied
> c) Each party agrees to cooperate and proceed with due diligence and to execute all documents required for early completion of the sale transaction.

6. Mr Petherick and/or his company, Petherick Properties Ltd, paid NZ$1.5 million to R Patel & Co on 30 June 2006.

7. R Patel & Co sought consent of the Minister under s 7 of the Act and this was granted on 27 July 2006, but subject to conditions, one of which was:

> ... the transfer of the said property be completed within three (3) months from the date the consent is given ... .

As the time then estimated to complete construction was 12 months and settlement was not to occur until that had occurred, this condition would not be complied with unless the agreement was varied to provide for earlier settlement. This did not happen.

8. Disputes over construction arose as between (a) Aussie Houses and its builder and (b) between Mr Petherick and Aussie Houses. By mid-2007 the builder had stopped work. Up until then, Mr Petherick would appear to have met all progress payment requirements and had paid Aussie Houses a total of NZ$2,297,682 (which, for ease of discussion I will round to NZ$2.3 million). In January 2009, Aussie Houses purported to rescind the contract alleging non-payment of progress payments (but without particulars), interference by Mr Petherick with Aussie Houses' relationship with the builder and non-compliance with the conditions attached to the Minister's consent.

9. In July 2009, Mr Petherick issued proceedings against Aussie Houses seeking specific performance. Presumably in anticipation of doing so and in light of the reference to non-

compliance with the conditions of Ministerial consent referred to in the January 2009 notice of rescission, Mr Petherick's solicitors had sought an extension of the consent. This was granted, with the Ministry of Lands and Mineral Resources writing on 3 June 2009 to the solicitors in these terms:

> This is to advise that the consent for the above dealing is extended for 3 years from 24.10.06. The consent will now expire on 24.10.09.

I interpret this as requiring settlement (and thus a transfer of the land) by 24 October 2009.

10. I have some difficulty discerning from the original statement of defence of Aussie Houses just what the defence was. It seems to have been based on:

    a) The contention that Petherick Properties, rather than Mr Petherick, had made all payments required under the agreement. The relevance of this was not explained. And

    b) A not-particularised assertion that Aussie Houses had not been able to make contact with Mr Petherick "making it problematic or impossible to continue with the works." This was followed by the contention that Aussie Houses "was also unable legally to continue with the works" by reason of Court orders obtained by the builder.

11. In March 2014, Aussie Houses applied for leave to amend its defence to plead illegality and for the trial of a preliminary issue directed to this defence. Orders to this effect were made. The new defence was pleaded in this way:

> [Mr Petherick] and [Aussie Houses] are and were at all material times non-residents as defined in the Land Sales Act.
> The [Sale] and Purchase agreement made 19th June 2006 was entered into and/or the performance thereof was commenced without the approval/consent required under [section 6] of the Land Sales Act.
> In the premises the dealing between [Mr Petherick] and [Aussie Houses] under the [Sale] and Purchase agreement dated 19th June 2006 is illegal null and void and unenforceable due to non compliance with the provisions of the Land Sales Act aforesaid and [Mr Petherick] is not entitled to any relief under the [Sale] and Purchase agreement or otherwise.

I note in passing that other new defences were also pleaded: frustration (by reference to the dispute between Aussie Houses and the builder) and along the lines of the grounds asserted in the January 2009 notice of rescission.

The judgment of the High Court Judge

12. The preliminary issue came before Tuilevuka J in the High Court at Lautoka. In a judgment delivered on 16 April 2018, the Judge:

    a) Held that the sale and purchase agreement was illegal.
    b) Directed restitution of NZ$2.3 million. In doing so he applied the judgment of the Supreme Court of the United Kingdom in *Patel v Mirza*,[1] albeit that he also concluded that Aussie Houses and Mr Petherick had not been *in pari delicto*. This latter finding provided a basis for directing restitution that was independent of *Patel v Mirza*. And
    c) Declined to award interest on the NZ$2.3 million, despite Mr Petherick having been out of his money for around 11 years.

Appeals to the Court of Appeal

13. Aussie Houses and Mr Petherick both appealed to the Court of Appeal: Aussie Houses against the order that it pay NZ$2.3 million to Mr Petherick and Mr Petherick against the finding of illegality.

14. Before the appeals were heard, Mr Petherick died, and he was replaced as a party by his executors.

15. In a judgment delivered on 27 May 2022, the Court of Appeal dismissed the appeal. This was for reasons given by Guneratne JA. He approached the case on the basis that the finding of illegality was not in issue, at least "directly" (a proposition that I have difficulty reconciling with Mr Petherick's notice of appeal and the written submissions on behalf of the estate). He did not see *Patel v Mirza* as relevant, but rather decided the case on free-standing principles of unjust enrichment, the right to recover payments made for a failed consideration as money had and received and *restitutio in integrum*.

Patel v Mirza [2015] AC 467.

The petition seeking leave to appeal to this Court

16. Aussie Houses seeks leave to appeal against the Court of Appeal judgment. The primary basis for the proposed appeal is that the Court of Appeal misapplied the law of Fiji as to illegal contracts, However, it also wishes to challenge some aspects of the Court of Appeal's reasoning, most relevantly:

    a) The summary rejection by the Court of Appeal of the argument that the estate could not recover the NZ2.3 million as it had been paid by Petherick Properties.

    b) What is said to have been a conclusion that if, Aussie Houses did not have to repay the NZ$2.3 million, it would be better off by that amount and unjustly enriched in that particular sense. As to this Aussie Houses wishes to argue that it had not been shown to have been better off in that way.

17. In the High Court, counsel for Mr Petherick argued that the agreement for sale and purchase was not illegal and that he should be permitted to go to trial on his claim for specific performance. Mr Petherick's claim for the restitutionary relief was advanced only as alternative, that is, that he wished to pursue specific performance but if the contract was held to be illegal, he should get his money back. I consider that the estate adopted the same position in the Court of Appeal. In contradistinction, before us, counsel for the estate confirmed that the estate is now content with restitutionary relief, a position reflecting the executors' assessment of the economic realities of the situation rather than the legal merits of the claim for specific performance.

Was the contract illegal?

18. The conclusion of Tuilevuka J that the agreement was illegal must have been premised on the view that the agreement of 19 June 2006 was a "contract for the disposition of … land", either from the moment it was signed or at least prior to 27 July 2006, when consent was obtained. Tuilevuka J thought it material that, prior to consent being obtained, construction was underway and NZ$1.5 million had been paid to R Patel & Co. The Court of Appeal, being of the view that the finding of illegality had not been challenged by Mr Petherick's estate, did not engage with the illegality arguments.

19. This approach adopted by Tuilevuka J ignores clause 25 of the agreement. This clause makes it clear that the agreement would not be in force, and that there would therefore not be a contract for the disposition of land, until the consent of the Minister had been obtained. The judgment of this Court in *Gonzales v Akhtar*[2] confirms that an agreement with such a clause does not constitute a contract for the disposition of land prior to the consent of the Minster being obtained and, for this reason, does not involve a breach s 7. This view was adopted by the Court of Appeal in *Port Denerau Marina Ltd v Tokomaru Ltd* [3] and the High Court in *Resort in Park and Garden Ltd v Naidu*.[4]

20. It does not matter that prior to the consent being obtained, construction was underway and NZ$1.5 million was paid to R Patel & Co. That Aussie Houses carried out work pending the obtaining of consent does not show that a contract for the sale of the land was in place. All it means is that if consent had not been obtained, Aussie Houses would have had no right to be paid. And likewise, the payment of the NZ$1.5 million to R Patel & Co to be held in escrow pending an anticipated consent did not mean that a contract for the sale of the land was in place.

21. As I have noted, a condition of the consent was that the land was to be transferred within three months. This was not adverted to by either Tuilevuka J or the Court of Appeal. Before us, counsel for Aussie Houses did not contend that non-satisfaction of this condition rendered the contract illegal retrospectively. I do not think that it did. As to this, I note that a similar issue arose in *Resort in Park Garden Ltd v Naidu*, *supra*, where Calanchini J dealt with a broadly comparable situation. His view that such non-satisfaction does not render a contract illegal, accords with my own.

So, should leave to appeal be granted?

22. The proceedings before us commenced in 2009. The illegality defence was not advanced until 2014. This unhappy litigation has now been underway for some 14 years.

Gonzales v Akhtar [2004] FJSC 2 at [90].
Port Denerau Marina Ltd v Tokomaru Ltd [2006] FJCA 27.
Resort in Park and Garden Ltd v Naidu [2012] FJHC 883.

23. As is apparent, I see no plausible defence in the first statement of defence As for the additional defences pleaded in 2014, I see nothing in the evidence to controvert Mr Petherick's assertions in affidavits that he had met all progress claims and find it difficult to see how Aussie Houses could rely on the difficulties it had with its builder to defeat Mr Petherick's claim. So, if the agreement is not illegal (which is how I see the case), Mr Petherick's (and now his estate's) entitlement to the return of NZ$2.3 million might be thought to be reasonably strong.

24. Assuming illegality, the Court of Appeal may well have been wrong to reject the applicability of *Patel v Mirza*. But since *Patel v Mirza* proceeds on the basis of unjust enrichment, which was also the general approach of the Court of Appeal, such argument might be thought to be largely semantic. More generally, I accept that, in an appropriate case, there may be scope for argument as to the application of *Patel v Mirza* in Fiji. I am, however, well-satisfied that this is not that case. This is for two reasons.

25. First, the basis on which the illegality argument was pursued by Aussie Houses was fundamentally flawed. In this context, challenges to the legal correctness of the approaches of Tuilevuka J and the Court of Appeal would have to be assessed on a very artificial basis. For this reason alone, the case is not a suitable vehicle for determining the issues that Aussie Houses wishes to argue.

26. Secondly, whatever approach this Court were to take the judgment of the Supreme Court of the United Kingdom in *Patel v Mirza*, it is close to inconceivable that it would come up with the outcome contended for by Aussie Houses:

    a) The argument for Aussie Houses comes down to propositions that (i) it retains the land and the partly completed house, but (ii) Mr Petherick and his estate are to remain out of pocket for NZ$2.3 million and receive nothing in return. It is inherently unlikely that any court would arrive at a result that would be so unjust.

    b) Tuilevuka J held that the parties were not in *in pari delicto*. On the basis of the pre-*Patel v Mirza* authorities such as, for instance, *Kiriri Cotton Co Ltd v Dewani*,[5] this conclusion provided a strongly arguable alternative basis for directing restitution. I

[5] *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192.

am inclined to agree with this aspect of Tuilevuka J's judgment; that is, if the agreement were illegal, the parties were not equally to blame. As I have noted, s 7 is addressed directly to the conduct of vendors. On this approach, any fault in relation to the consent (assuming there is one) would be primarily the fault of Aussie Houses, a view that, as I have explained, is consistent with the commercial dynamics of the transaction.

27. It remains for me to address the contentions that:

a) the payments to Aussie Home were funded by Mr Petherick's company, Petherick Properties and that this precludes relief being granted to his estate. And:

b) as events panned out, Aussie Houses was not shown to have been "enriched" by what happened given that the building was never completed and there was no evidence as to the current value of the land and uncompleted building.

I see no merit in these arguments.

28. Any money paid by Petherick Properties to meet liabilities of Mr Petherick would have been to his use and created a corresponding liability on his part to his company. It makes no difference whether Mr Petherick paid Aussie Houses by (a) drawing down on a current account he had with a bank, (b) borrowing from a bank, or (c) using money lent to him by his company. How Mr Petherick's current account position was later sorted out between him and the receivers or liquidators of Petherick Properties is irrelevant (as *res inter alios acta*) as between Mr Petherick's estate and Aussie Houses.

29. In his reasons Gunaratne JA spoke in reasonably general terms of the "enrichment" of Aussie Houses. Examples of this include references to "moneys paid by [Mr Petherick]" being "in the hands of [Aussie Houses] and "gain-based" recovery. I do not see these references as indicating that he considered that the estate could recover no more than the amount by which Aussie Houses, at the date of the hearing, was better off in relation to the land by reason of the transaction with Mr Petherick. This is because Guneratne JA did not seek to carry out the calculations that such an approach would require. This is unsurprising. Whether the current financial position of Aussie Houses in relation to the land is more or less favourable than it was in 2006 depends on factors that have nothing to do with Mr Petherick, such as

changes in land values, currency rate fluctuations, the outcome of its litigation with the builder and what Aussie Houses did with the NZ$2.3 million it received from Mr Petherick. Counsel for Aussie Houses cited no authority indicative of restitutionary relief being constrained in the way contended for. In this context, I see Aussie Houses as having been relevantly enriched when it received NZ$2.3 million without providing anything to Mr Petherick in return.

30. Under s 7(3) of the Supreme Court Act 1998 leave to appeal can only be granted in a civil case if the proposed appeal involves "a far-reaching question of law" or matters "of great general or public importance" or "otherwise of substantial general interest to the administration of civil justice". This case is an instance of litigation gone wrong. The arguments that Aussie Houses wishes to pursue are both unmeritorious and particular to the complexities of its failed litigation strategy. There in nothing here of sufficient general interest to warrant leave to appeal.

Orders

31. I would:

a) Dismiss the petition seeking leave to appeal

b) Order Aussie Houses to pay the estate's costs, summarily assessed, of $15,000.

The Hon. Acting Chief J stice Salesi Temo
Acting President of the upreme Court

SUPREME COURT FIJI

The Hon. Mr. Justice Brian Keith
Ju ge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court