

IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0002 OF 1996S
(High Court Civil Action No.343 of 1992)

BETWEEN:

NOBUYOSHI KASHIWA

APPELLANT

-AND-

GIUSEPPE RUGGIERO

RESPONDENT

Mr A. Khan for the appellant
Mr A. Patel for the respondent

Date and Place of Hearing:
Date of Delivery of Judgment:

7 May, 1997, Suva
16 May, 1997

JUDGMENT OF THE COURT

This appeal is against the dismissal by Lyons J. of the appellant's claim for a declaration that a written agreement entered into between him and the respondent on 15 December 1991 was void or voidable, for refund of 10,000,000 Yen paid by the appellant to the respondent and for damages.

The appellant is a Japanese businessman resident in Japan. The respondent is an Italian businessman resident in Fiji. The agreement which was the subject of the claim referred to the sale and purchase of the leases of two pieces of land in Fiji. Both were State land the subject of protected leases. The lessee of one piece, referred to at the hearing in the High Court as Area A, had been an Indian man, Raj Naicker; he had died in 1988 and his widow, Unnamaleamma, as administratrix of his estate, was registered as the lessee. The lease was for agricultural use and was for a term of 22 years and 9 months from 1 April 1973. On 26

September 1991 the respondent had obtained approval of his leasing the other land, referred as Area B, for recreation purposes for a term of 99 years. Under the terms of the approval he was not permitted to occupy the land until the full amount of survey fees and rent, payable half yearly in advance, had been paid. The approval was to lapse at the end of six months if the survey fees and rent had not been paid by then.

On 14 August 1991 Unnamaleamma had granted the respondent an option to purchase the lease of Area A. He gave valuable consideration for the option. It was renewed, again for valuable consideration, on 11 December 1991. There was no evidence whether the respondent ever exercised the option.

The appellant became interested in the land as the result of an approach made to him in Japan by another Japanese man, Mr Yagi, who provided him with a brochure concerning Area A. It included a copy of the current lease of that land; it showed the term of the lease but not the permitted use of the land. It included also a copy of a letter from the respondent to Mr Yagi's company in which the "specifications of the property" included "Period; 99 years as Commercial Lease". Mr Yagi was a real estate broker in Japan; the respondent had appointed Mr Yagi's company as sole agent in Japan to find a buyer for the land. Mr Yagi was the agent of the respondent either directly or indirectly as agent for the firm.

In November 1991 the appellant came to Fiji to view the land. He met the respondent and held discussions with him; Mr Yagi was present; he inspected the land. The appellant apparently had little, if any, knowledge of the English language and the respondent little knowledge of the Japanese language. Mr Yagi acted as interpreter; the respondent also had

the assistance of his wife who, it appears, is Japanese. The appellant expressed interest in buying not only Area A but also Area B, which was situated on the opposite bank of the Vuda river, opposite Area A. He wanted to develop the land for a school and for recreational purposes.

Following the inspection and those discussions the parties agreed to the sale and purchase of both pieces of land. An agreement in writing in the Japanese language was made on 23 November 1991. Subsequently on 15 December 1991 another agreement, recorded in writing in English, was signed by the parties. The cause of action as pleaded was based on that agreement.

In the agreement the respondent was stated to be the "seller (broker on behalf of owner)". A broker is an agent who is employed to buy or sell on behalf of another. The agreement related to both pieces of land. The names of the owners were not stated. The agreement contained reference to "a general guide book of the object" including, *inter alia*, "the qualification of the seller and the transcript of the registration" and "a document certifying that the seller is the proxy of the land". The "present ownership" was stated to be "99 year lease property by Crown Lease (Educational & Recreational Use)". The selling price was shown as "63,000,000 Yen (F\$630,000 - Six Hundred Thirty Thousand Fijian dollars only)". An initial payment was to be made by 10 December 1991 (five days before the date of the agreement!) "at the time of application for the provisional registration"; the amount was to be "10,000,000 Yen (F\$100,000 - One Hundred Thousand Fijian Dollars only)". The balance of purchase price was to be paid before 31 December 1992 "at the time of application for the plenary registration." The "ownership" of the land was then to be transferred "from the seller to the buyer on the register book of the Fiji Land Administration Office".

The appellant gave evidence that he paid Mr Yagi 10,000,000 Yen on 5 December 1991. The respondent admitted that on 10 December 1991 he received SF100,000 from Mr Yagi in respect of the payment. There was evidence, not disputed, that at the then prevailing rate of exchange the equivalent of 10,000,000 Yen in Fiji dollars was SF112,447.99.

On 9 January 1992 the respondent wrote to the Director of Lands applying to have the term of the lease of Area A increased to 99 years and permission given for its use as a "youth recreational and educational area" and seeking his consent to purchase the land himself for that purpose; he stated in the letter that the lessee had already agreed to sell the land to him and that "the development will be carried out in association with T.A.C. Fiji Ltd (Japanese Company registered in Fiji)". TAC Fiji Ltd had been incorporated in Fiji by the appellant to run an educational and recreational centre on the land. On 29 January 1991 the Director replied that he had no objection to the proposal to develop the site for a youth recreational and education area for Japanese students but set conditions, including approval by the Director, Town and Country Planning, and observed that involvement of TAC Fiji Ltd could be considered "only after approval to purchase had been granted by the Minister for Lands (in consultation with Cabinet) under the Land Sales Act." He stated further that he was not prepared to transfer the existing agricultural lease to the respondent as the respondent was not a bona fide farmer.

On 12 February 1992 a firm of planning consultants applied to the Director of Town and Country Planning on the respondent's behalf for permission to develop the land for youth recreation, hostel and education purposes for Japanese students. It was stated in the firm's covering letter that the respondent was acquiring the land and intended to develop it for youth,

recreational, hostels and educational purposes for Japanese students. The application was still under consideration in September 1992 when the appellant's solicitors wrote to the firm and the Director stating that TAC Fiji Ltd did not wish to proceed further with it.

Meanwhile early in March 1992 the appellant had come to Fiji and, after speaking to the respondent, had renounced the agreement on 7 March. He gave evidence that he did that because he had discovered that the land belonged to someone else, that it had to be rezoned, that the lease was for agricultural purposes and for a term of only 22 years and that there had been no provisional registration. He asked for the 10,000,000 Yen which he had paid to be repaid to him; the respondent refused and said that the agreement was still in force.

By his amended statement of claim the appellant raised the following issues -

- (1) that the agreement was void for uncertainty;
- (2) that the respondent had failed to discharge obligations imposed on him by the agreement;
- (3) that the respondent had been fraudulent and deceitful and had obtained the 10,000,000 Yen by misrepresentation; and
- (4) that the respondent had failed to account for the full amount of 10,000,000 Yen paid to his agent, Mr Yagi.

In his defence the respondent raised the issue of illegality of the agreement on the ground that no prior consent had been given by the Director of Lands for the sale of either of the two pieces of land as required by section 13 of the State Lands Act (Cap.132). He said that the appellant had wrongfully repudiated the contract.

Lyons J. in a lengthy judgment held that the agreement was not void for uncertainty, that it was a valid lawful contract when executed and that the respondent had not acted fraudulently or deceitfully or obtained the 10,000,000 Yen by misrepresentation. He decided that the agreement required the respondent to lodge a caveat at the time of payment of the 10,000,000 Yen but that the appellant had waived his right to have the respondent lodge the caveat. Finally, he held that the agreement breached section 13 of the State Lands Act (he referred to it as the Crown Lands Act, as it was previously entitled) and that, in consequence, as the appellant was relying on it as the basis of his claim to recover the 10,000,000 Yen which he paid and for damages, his claim could not be upheld. He dismissed it and ordered the appellant to pay the respondent's costs.

Of the grounds of appeal filed, the following were relied on at the hearing of the appeal:

- 3.2 *The learned Judge held the sales contract void under section 13 of the crown lands as the subdivision and rezoning had taken the contract beyond a mere contract stage but he held the option agreement valid when the rezoning and subdivision was for the purpose of execution of the Defendants option agreement.*
- 5.1 *The learned Judge erred in law and in fact in not taking relevant matters into account in coming to his decision.*

7.1 *The learned Judge erred in law and in fact in holding that the sale contract was illegal and unenforceable as it went beyond a mere contract due to the rezoning and subdivision but failed to consider that the subdivision and rezoning was in respect of the agreement between the Respondent/Defendant and the Estate of Raj Naicker.*

9. *The learned Judge erred in law and in fact in considering that the facts of this case does (sic) not fall within the exceptions to the rule of illegality in view of the evidence in this case.*

We shall deal first with ground 5.1. Mr Khan submitted that Lyons J. erred by refusing to take into account the agreement dated 23 November 1991 written in the Japanese language. A copy of that agreement was received in evidence but, when an English translation was about to be tendered, it was observed that the parties were named as companies, not the appellant and the respondent as natural persons. Mr Patel, who was representing the appellant, objected to the admission of the translation as extrinsic evidence of the agreement of 15 December 1991, the agreement on which the cause of action was based. Lyons J. held that it was irrelevant and declined to admit it into evidence.

As a number of important provisions of the agreement of 15 December 1991 were infelicitously expressed and a decision had to be made as to their proper construction, the agreement of 23 November 1991 (albeit executed by the parties in their corporate personas rather than their natural ones) might well have assisted the Court in the task of construing them and the English translation of it should for that reason have been admitted in evidence. However, Mr Khan was unable to show either that the agreement of 15 December 1991 should have been construed differently or that, if Lyons J. had had details of the earlier agreement, he should have held that the later agreement was void for uncertainty. Consequently, although we find that His

Lordship did err in not taking the terms of the earlier agreement into account, we are not satisfied that that affords a ground on which appeal against his judgment can succeed.

The remaining three grounds are all concerned with Lyons J.'s finding that action taken by the respondent after the execution of the agreement of 15 December 1991 constituted dealing with the two protected leases which by virtue of section 13 of the State Lands Act (Cap. 132) rendered the agreement illegal and void.

Over the past four decades there have been many cases in the courts of Fiji, and one in the Privy Council, in which the issue of illegality of agreements by reason of the provisions of section 13 and the practically identical provisions of section 12 of the Native Land Trust Act (Cap. 134) has had to be determined. It is now well established that an agreement for the sale and transfer of a protected lease is not illegal if it is held inoperative and inchoate while the consent of the Director of Lands or the Native Lands Trust Board, as the case may be, is sought. However, it becomes illegal and void if, and as soon as, it is implemented in any way touching the land without that consent (*Jai Kissun Singh v. Sumintra* (1970) 16 FLR 165, per Gould V-P at 176 and per Tomkins J.A. at 173).

Lyons J. accepted that the agreement of 15 December 1991 was not illegal until the respondent acted to give effect to it. However, as stated above, he held that it became illegal as the result of the respondent's acts. We are unable to agree with him that it did so. It provided for the sale to the respondent of 99-year leases of Area A and Area B, the leases being for educational and recreational use. On 15 December 1991 the existing lease of Area A was for a term of 22 years and 9 months (which would have expired on 31 December 1995) for agricultural

use. The lease belonged to the administratrix of Raj Naicker's estate; the respondent had an option to purchase it from her. In order, therefore, for him to be able to transfer to the respondent a 99-year lease of Area A for educational and recreational use, he had to exercise his option to purchase the existing lease and then have it converted into a 99-year lease for educational and recreational use. He had also to obtain the consent of the Director of Lands to the transfer of the lease to him, so that he could exercise his option and purchase it.

He applied for that consent; the Director refused his consent for transfer of the existing lease for agricultural use but indicated his willingness to allow the respondent to acquire it if it was converted into a 99-year lease for educational and recreational use. However, the conversion of the lease had to await the Director of Town and Country Planning's approval of the rezoning of the land for that use. The respondent then had the firm of consultants apply to the Director of Town and Country Planning on his behalf for the rezoning. In the application the respondent was stated to be interested in the site as the "prospective purchaser." The respondent gave evidence that he employed ten people to clear the land and that he "started to do everything necessary to transfer it to the plaintiff." He did not, however, say that he did any of that before the appellant renounced the agreement in March 1992. As he was seeking to establish the illegality of the contract, the onus was on him to do so.

It is, we consider, quite clear that all the action taken by the respondent, or on his behalf, before the appellant renounced the agreement was taken in order to put himself in a position where he could implement the agreement of 15 December 1991 to transfer to the appellant two 99-year leases for educational and recreational use. It was preparatory to performance of the contract. The clearing of the land was apparently part of "everything

necessary to transfer [the land] to the plaintiff' and so also preparatory to performance of the contract. There was no dealing in the land amounting in any way to *implementation* of it. The agreement, therefore, remained unexecuted; it was still inoperative and inchoate when the appellant renounced it. It was not rendered illegal and void by section 13 of the State Lands Act before the appellant renounced it. At the hearing, in response to our invitation, counsel addressed us on the consequences if we so held.

In his statement of claim the appellant alleged both breach of the agreement by the respondent and fraud. It is necessary, therefore, to consider whether at the time of the appellant's renunciation of the agreement he was entitled to treat it as discharged by breach or to rescind it for fraud. Then, depending on what we decide on that issue, we must consider what remedy, if any, the appellant is entitled to.

The breaches pleaded in the statement of claim were "failure to register as agreed upon payment of the 10,000,000 Yen" and failure to provide the guidebook provided for in the agreement. The appellant gave evidence that the reasons which he gave the respondent for renouncing the agreement included the first of those alleged breaches but not the second. For any partial failure of performance of a contract to entitle the other party to treat the contract as discharged it must go to the root of the contract (Mersey Steel and Iron Co. v Naylor, Benzon & Co. (1884) 9 App. Cas. 434, 444). As stated above, Lyons J. held that the provision in the agreement for provisional registration was to be construed as imposing on the respondent an obligation to lodge caveats in respect of the two blocks of land. The amount of the initial payment, which was to be contemporaneous with the provisional registration, was nearly one-sixth of the purchase price. That registration was clearly intended to provide the appellant with

a safeguard against the risk of the land being sold to someone else, which would have meant his losing the whole benefit of the contract and possibly that very substantial amount of money. Failure to lodge the caveats did, therefore, in our view go to the root of the contract.

However, Lyons J. held that the appellant had waived his right to have the caveats lodged. Mr Patel has referred us to the fact that the payment was made ten days before the agreement, on which the cause of action is based, was signed. Further, we note that, if there was a breach of the agreement, it occurred in December 1991 but the appellant did not renounce the contract until March 1992. There was no evidence that during the intervening period he pressed for caveats to be lodged. We shall consider each of those matters in turn.

His Lordship referred to the appellant's evidence of why he paid the 10,000,000 Yen on 5 December 1991. He stated that the appellant was asked in cross-examination:

"The payment of 10,000,000 Yen was not dependent on the application for provisional registration?"

and that the appellant replied "Correct." According to the transcription of the evidence in the appeal book the question asked was "The payment of 10,000,000 Yen was not a deposit on the approval for provisional registration?" The significant difference between the two versions of the question is that in the question, as recorded in the appeal book, the word "*dependent*" was not included.

The appellant is recorded as having given evidence, under cross-examination, that he paid the money to Mr Yagi because Mr Yagi told him that the respondent needed the money and was reputable. Asked whether he understood that "before paying the 10,000,000 Yen the application for provisional registration had to be made, he replied -

"I paid on 10th December on Mr Yagi's request. Was told by Yagi to proceed as the application was going ahead and there would be no problem..... When I paid the deposit I was assured by Mr Yagi that the application had been made for approvals and all was okay."

As we read that evidence, the appellant was saying that, although the provisional registration had not been effected when he paid the 10,000,000 Yen to Mr Yagi, he made the payment upon Mr Yagi's assurance that it had been applied for and would be approved in due course. That was not evidence of waiver of the requirement of provisional registration. Rather it showed the appellant's concern that the requirement should be met and his acceptance of an assurance that it was in course of being met.

Mr Patel submitted that, as the payment was made before the agreement was signed, there was then no contractual requirement of provisional registration, or lodging of caveats. It was clearly established, however, by the document in the Japanese language made on 23 November 1991, and by the parties' oral evidence, that there was agreement between the parties prior to the agreement of 10 December 1991, albeit recorded in the earlier document as made in their corporate personas rather than their natural personas. The payment of the money

was acknowledged by the respondent by a receipt dated 10 December 1991 as being on account of "the first payment of the contract." It is quite clear that the payment was made in contemplation of the formal contract in the English language being executed and containing provision for an initial payment of 10,000,000 Yen of the purchase price to be made contemporaneously with the provisional registration being effected, provision which, when it was executed, it did contain.

So far as concerns possible delay in taking action to renounce the contract following the breach, the appellant's evidence was that he believed that the provisional registration had been done (presumably because of the assurance given to him by the respondent's agent, Mr Yagi, to which we have referred above). He did not say when he had discovered that it had not been done. He was in Fiji on 15 December 1991, when he signed the English-language agreement. That was shortly after he had been told by Mr Yagi that approval for provisional registration had been sought and everything was proceeding properly. The appellant would have been wise to check, while in Fiji then, that the provisional registration had in fact been approved. However, while that is apparent with hindsight, it was not unreasonable, in our view, that he did not do so. It appears that his next visit to Fiji was in March 1992, which was when he renounced the agreement.

Accordingly, having considered the three matters in respect of the breach which we specified above, we have come to the conclusion that the appellant was entitled to treat the contract as discharged by the failure of the respondent to lodge caveats.

For the sake of completeness we turn now to consider whether the appellant was entitled to rescind the contract in March 1992 because of fraud. The appellant is, of course, confined to the items of allegedly fraudulent conduct set out in his amended statement of claim. Paragraph 11 of that statement of claim reads:-

"11. The Defendant has been fraudulent deceitful and obtained the initial payment by way of misrepresentation.

Particulars

- (a) *Agreeing to payment of Y10,000,000 on provisional registration when such registration does not exist in Fiji.*
- (b) *Receiving more than \$100,000 Fiji Dollars but receipting only Y10,000,000 as (F)\$100,000.*
- (c) *Obtaining money prior to entering agreement.*
- (d) *Representing to the Plaintiff that "the provisional registration was done and everything was in order no problem".*
- (e) *.....*
- (f) *Entering into sale contract without any legal authority from the true owner of the land.*
(Underlining in the original.)

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(Particular (e) was struck out at the hearing; the appellant has not made that striking-out the subject of appeal.)

So far as the first of those particulars is concerned, Lyons J. construed "provisional registration" as meaning lodging of a caveat. The parties conducted the appeal on that basis. The appellant, rightly, did not suggest that the law in Fiji relating to land transfer does not provide for the protection of some interests in land by the lodging of caveats; it clearly does (see Part XVII of the Land Transfer Act (Cap. 130)).

The respondent issued a receipt (annexed to Exhibit 25) for "(One Hundred Thousand Fiji Dollars) Ten Million Japanese Yen Only." That clearly was not a fraudulent document, even though it was internally inconsistent because SF,1000,000 was not the equivalent in Fiji dollars of 10 million Yen.

The respondent obtained the payment of the 10,000,000 Yen as the result of a misrepresentation by his agent, Mr Yagi, that "provisional registration" had been applied for. But that is not what is alleged in the third particular. The evidence established that the payment was made in anticipation of the execution of the agreement of 15 December 1991; but that, *per se*, was not fraudulent or deceitful.

The evidence establishes that the respondent, by his agent Mr Yagi, did represent to the appellant that "approval" of "provisional registration" had been sought and that "all was okay". That was untrue. The respondent knew that he had not lodged caveats but there was no evidence that his agent, Mr Yagi, did so. The appellant, therefore, failed to prove that the misrepresentation was fraudulent.

At the time when the agreement was executed the respondent did not have a 99-year lease for either Area A or Area B. However, the period after which he was to transfer the land to the appellant was more than one year. He had an option to purchase the existing shorter lease of Area A; he had the right to obtain a 99-year lease of Area B on paying for survey and half a year's rent in advance. It is clear from the letters of the Director of Lands and the Acting Director of Town and Country Planning which were tendered as exhibits at the hearing that the

respondent had a reasonable prospect of being able to perform his obligations under the agreement within the time set. The advertising brochure provided to the appellant by the respondent's agent, Mr Yagi, contained a copy of the existing lease which showed the owner to be Unnamaleamma. The appellant gave evidence that he relied on the material in the brochure in deciding to buy the land. The agreement showed the respondent to be selling as "broker on behalf of owner". We are satisfied, therefore, that the evidence did not establish that the respondent fraudulently misrepresented himself to be the owner of the land.

That being so, the appellant was not entitled to rescind the agreement on the ground of fraud. He was, however, as we have found above, entitled on 7 March 1992 to treat it as discharged by breach on the respondent's part, which breach went to its root. The effect of the appellant's renunciation of it was that he was absolved from future obligations under it (Heyman v. Darwins Ltd. [1942] AC 356, 399.) The renunciation put an end to all primary obligations of the parties which remained unperformed. If the agreement had become operative, the renunciation would not have resulted in rescission *ab initio* (Johnson v. Agnew [1980] AC 367,393). Instead of the primary obligations there would have been substituted, by implication of law, a secondary obligation on the respondent to pay money compensation to the appellant for any loss sustained by him in consequence of the non-performance of the primary obligations in the future (Photo Production Ltd. v. Securicor Transport Ltd. [1980] AC 827, 849). However, as the agreement remained inoperative and inchoate pending consent by the Director of Lands, the practical effect of the renunciation was similar to rescission *ab initio*, that is to say the appellant became entitled to *restitutio in integrum* but not to damages (D.B. Waite (Overseas) Ltd. v. Wallath (1972) 18 FLR 141,146). In any event, the appellant did not establish any loss other than the money paid as the initial payment. The respondent did not make a counter-claim.

Although in the agreement of 15 December 1991 the price to be paid for the land was expressed in both Japanese Yen and Fiji dollars, it appears that the primary currency of the transaction was intended by the parties to be the Japanese. The initial payment was made by the appellant in Japanese Yen, but with the intention that the money should be sent to Fiji and converted into Fiji dollars. Accordingly, in our view, the appellant is entitled to be paid in Fiji the amount in Fiji dollars equivalent to 10,000,000 Yen at today's rate of exchange. That rate is to be the middle rate at which Japanese Yen could be bought to-day with Fiji dollars at the National Bank of Fiji. If the parties cannot agree on the amount of Fiji dollars, so calculated, the calculation is to be performed by the Registrar at the rate as ascertained by him. The appellant did not claim interest.

Accordingly the appeal must be allowed, the judgment of the High Court set aside and judgment given in favour of the appellant with the costs of this appeal and his costs in the High Court.

Decision

Appeal allowed.

Judgment of the High Court set aside.

Respondent to pay the appellant the amount in Fiji dollars equivalent to 10,000,000 Yen, calculated at the middle rate of exchange at which Japanese Yen could be bought to-day with Fiji dollars at the National Bank of Fiji. that amount to be calculated by the Registrar if not agreed by the parties.

Respondent to pay the appellant's costs of this appeal and in the High Court.

Moti Tikaram

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Sir Moti Tikaram
President Fiji Court of Appeal

M. Maurice Casey

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Sir Maurice Casey
Justice of Appeal

I.R. Thompson

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Mr. Justice I.R. Thompson
Justice of Appeal