

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

CIVIL APPEAL NO. ABU0061 OF 1997  
(High Court Civil Action No. HBC0285 OF 1995)

BETWEEN:

GIUSEPPE RUGGIERO AND TAEKO RUGGIERO

*First Appellants*

AND:

MEDITERRANEAN ISLAND RESORT LIMITED

*Second Appellant*

AND:

ALLESSANDRO BIANCO

*Respondent*

**Coram:** The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
The Hon. Mr Justice Savage, Justice of Appeal

**Hearing:** 25 August 1998

**Counsel:** Dr. Sahu Khan for Appellants  
Mr. C.B. Young for Respondent

**Date of Judgment:** 7 October 1998

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**JUDGMENT OF THE COURT**

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This is an appeal from the judgment of Lyons J. given in the High Court at Lautoka on 12 September 1997. It arose out of a claim made by the respondent, Mr Bianco, against the appellants, Mr and Mrs Ruggiero and the Mediterranean Island Resort Ltd. ("Mediterranean") for the return to him of the sum of \$100,000 paid by him to Mediterranean, for the issue or allotment to him of 10,000 shares in Mediterranean, and for the sum of \$8,200 advanced by him to Mediterranean by way of loan. Judgment was entered in Mr Bianco's favour in respect of both the sums claimed.

Mr Bianco is an Italian citizen who first arrived in Fiji in August 1993 on a visitor's permit. He made contact with Mr. Ruggiero whom he knew was the Italian Consul in Fiji. The Ruggieros were also the shareholders in a company, Mediterranean, which ran a resort at Vuda; Mr Ruggiero was the managing director and Mrs Ruggiero a director. Mr Bianco stayed at the resort. There were discussions between Mr. Bianco and the Ruggieros on the possibility of Mr. Bianco investing in Mediterranean. Mr Bianco left Fiji but returned in February 1994, again on a visitor's permit, which was for a period of one month and which later was extended until June.

On 25 February 1994 Mr Bianco met the Ruggieros in the offices of the accountants to the Ruggieros and Mediterranean in Lautoka, Messrs. Kapadia Singh & Co. Present at the meeting were Mr Bianco, Mr and Mrs Ruggiero, and Mr Singh the accountant. Minutes of the meeting were kept and are as follows:

***"MEDITARRANEAN ISLAND RESORT LTD***

*Minutes of the meeting held at the office of Kapadia Singh & Co., Chartered Accountants of Lautoka on Friday, 25 February 1994 at 2 pm.*

*Present: Mr Giuseppe Ruggiero (Director, Shareholder)  
Mrs. Taeko Ruggiero (Director, Shareholder)  
Mr. Ravindra Singh (Chartered Accountant)*

*It was unanimously resolved that :*

- (a) *A further 10,000 ordinary shares be issued to Mr Alessandro Bianco at a price of F\$100,000 (One Hundred Thousand Dollars), the receipt of which is hereby acknowledged by the company.*

- (b) *Upon completion of the above transaction Mr Alessandro Bianco will be entitled to a share certificate for 10,000 ordinary shares in the company representing 10% of the total registered share capital of the company.*
- (c) *The Directors hereby appoint Mr Alessandro Bianco as 'ISLAND MANAGER' from the date issued 'Working Permit' by the Fiji Government for the period of 3 (three) years. His 'Working Permit' for the years will be applied by the company to the Ministry of Immigration in Fiji. The conditions of his employment will be discussed and determined in the next Director and Shareholders meeting.*

*Kapadia Singh & Co., Chartered Accountants of Lautoka are hereby instructed to prepare the necessary share allotment documents, share certificates etc. to give legal effect to the above transactions. They are further instructed to attend to stamping and filing of the necessary documents with the Commissioner of Stamp Duties and Registrar of Companies.*

*Agreed and Signed below on this date of 28 Feb 1994*

*(Signed)*  
**GIUSEPPE RUGGIERO**  
*Managing Director/Shareholder*  
*Mediterranean Island Resort Ltd.*

*(Signed)*  
**TAEKO RUGGIERO**  
*Director/Shareholder*  
*Mediterranean Island*  
*Resort*

*(Signed) R. Singh*

*(Signed) R. Singh."*

The pleadings in effect accepted that the minutes set out the agreement entered into between Mr Bianco and Mediterranean.

A share certificate was completed which certified Mr Bianco was the holder of 10,000 shares in respect of which ten dollars per share had been paid. It was dated 28 February 1994, the same day that the above minutes had been signed, although, as noted earlier in this judgment, the meeting was held on 25 February. Subsequently, on 20 May 1994 another document was executed which recorded that Mr Bianco, as Island Manager and ten percent

shareholder in Mediterranean, "offered a loan of \$8,200 (eight thousand two hundred dollars only) with the conditions of No Interest and No Term and No security" for water sport facilities, which were itemised. The document went on to state that the total amount "was to be repaid whenever the company is available for the refund to Mr Bianco." (sic)

It appears that Mr Bianco commenced his duties as Island Manager and also that on 25 June 1994 he was issued with a permit pursuant to s.8(1) of the Immigration Act (Cap.88) which permitted Mr Bianco to reside in Fiji for work purposes or otherwise until 6 April 1997. This permit was presumably the "working permit" to be applied for by the company in terms of the minutes of 25 February 1994. Mr Bianco, however, did not remain Island Manager for long and, for reasons relating to his personal affairs, he resigned. He returned to Europe. It is not clear just when this was but his letter of resignation is dated 1 August 1994. A year later on 10 August 1995 Mr Bianco's solicitors wrote to Mr and Mrs Ruggiero and Mediterranean stating that on instructions from their client they rescinded the agreement between him and them. The solicitors stated that the agreement was that Mr Bianco had paid them \$100,000 in consideration of their agreeing to issue to him 10,000 ordinary shares in Mediterranean; that by a share certificate dated 28 February 1994 they purported to represent to him that he was the holder of 10,000 shares; that the share certificate was invalid because the purported issuance of shares did not comply with the Exchange Control Act (Cap.211). The ground of the rescission was stated to be that there had been a total failure of the consideration. The solicitors then made a demand for the sum of \$100,000 together with interest on it. The solicitors further demanded repayment to Mr Bianco of the sum of \$8,200 referred to in the "loan" document referred to earlier in this judgment.

At this point it is convenient to dispose of two matters about which the parties do not appear to be in conflict. First, the learned trial judge held that Mr and Mrs Ruggiero acted throughout as office bearers of Mediterranean and on its behalf. Accordingly no liability fell on them and Mr Bianco's action against them was dismissed. The notice of appeal stated the appeal was against the whole of the judgment of Lyons J. but obviously the appellants were content with that part of the judgment. Mr Young for Mr. Bianco did not raise the matter so that part of the judgment stands. Secondly, Lyons J. gave judgment in favour of Mr Bianco in respect of the \$8,200 against Mediterranean and though the notice of appeal would cover that part of the judgment Dr. Sahu Khan did not refer to it in either his written or oral submissions. We think the learned trial judge was correct in treating this as a loan repayable on demand with reasonable notice and so the judgment in respect of it stands.

Returning now to the narrative. The learned trial judge recorded that it appeared as if the solicitors' letter of 10 August 1995 which rescinded the agreement and raised the issue of non-compliance with the Exchange Control Act galvanised Mediterranean into action. It promptly set about endeavouring to remedy the alleged breach of the Exchange Control Act. We shall refer to these steps and their effect later in this judgment.

The basis of Mr Bianco's claim was that the issue of the 10,000 shares to him was in breach of s.10(1) of the Exchange Control Act in that as he was resident outside Fiji the shares could not be issued to him without the prior permission of the Minister; that the prior permission of the Minister had not been obtained when the shares were issued on 28 February 1994;

accordingly the share issue was illegal; and, further, the illegality could not be remedied by subsequent approval or, alternatively, it was not subsequently remedied.

Dr. Sahu Khan in his oral submissions commenced by submitting that there were two principal issues that arose in the appeal. They were -

- . first, was the issue of shares illegal? Mediterranean contended it was not;
- . second, if it was illegal then the parties were in pari delicto and Mr Bianco is not entitled to recover.

We commence with the first issues. Section 10(1) of the Exchange Control Act is as follows:

*“Except with the permission of the Minister, no person shall in Fiji issue any security or, whether in Fiji or elsewhere, issue any security which is registered or to be registered in Fiji, unless the following requirements are fulfilled, that is to say:-*

- (a) *neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and*
- (b) *the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.”*

The learned trial Judge held that Mr Bianco was not resident in Fiji when the shares were issued, that Mediterranean knew this at the time and had not obtained the Minister's permission. The question of Mr Bianco's residence and Mediterranean's knowledge of it seems to have been

argued in the High Court. No issue was raised concerning it before us and we think His Lordship was correct. Plainly too the Minister's permission had not been obtained. Likewise there appears to have been some argument over the question of whether the shares were "issued" or "transferred" but the judge concluded they were issued. In passing he pointed out that it mattered little as the effect of s.11(1) which applied to transfers of shares was substantially the same as s.10(1) which applied to the issue of shares; in both cases the permission of the Minister was required.

It should at this stage be observed that the agreement made between the parties on 25 February 1994 and recorded in the minutes of Mediterranean dated 28 February 1994 was perfectly lawful. It was not prohibited by s.10(1) because it was open to the parties to seek and obtain the Minister's permission before the issue of the shares. An analogous position is to be found in Guiseppe Reggiero v. Nabuyoshi Kashiwa (Supreme Court of Fiji Civil Appeal No.CBV0005 of 1997s, 20 March 1998) which dealt with s.13(1) of the State Lands Act (Cap.132). That section provided that it would not be lawful for a lessee of a protected lease to alienate or deal with the land comprised in the lease without the consent of the Director of Lands first had and obtained. The Supreme Court said, at p.6 of its judgment:

*"Provisions such as section 13(1) are not construed so as to prevent the making of a contract by the lessee to alienate subject to the written consent of the Director of Lands first had and obtained. When a contract is so made there are binding contractual obligations on the parties, or such of the parties as is appropriate, to take all reasonable steps to obtain the Director's consent. In the absence of an express time limit, such steps must be taken within a reasonable time. If such steps are not taken within a reasonable time, the party not in default may rescind the contract and recover any payment he has made under the contract. If the Director's consent (or the consent of the Minister on appeal under section 13(3) of the State Lands Act) is not obtained within a reasonable time, the contract will be at an end and monies paid under it may likewise be recovered. The foregoing is a brief statement of fairly elementary law;"*

Here the learned trial judge had held that Mr Bianco was not resident in Fiji at the time the shares were issued, that the Minister's permission had not been obtained and that, accordingly, the issue of shares to Mr Bianco by Mediterranean was in breach of s.10(1). He then considered the consequences of that finding the relying substantially on the judgment of Slade J. in Re Transatlantic Life Assurance Co. Ltd. (1979) 3 AER 352 held that the issue of the shares was wholly invalid and void. Dr. Sahu Khan submitted the learned trial judge was wrong in holding that issue of shares was in breach of s.10(1) for a number of reasons. First he contended that since the section did not include words such as "first had and obtained" it did not make the issue invalid. We do not accept that submission. There are differing styles in statutory law drafting as in other drafting and it is necessary to consider the particular words used in the particular piece of legislation. In our view the language of s.10(1) is quite clear and means that no person may issue a security unless he has the permission of the Minister at the time of issue.

Dr. Sahu Khan's second reason was based on s.20 of the Act which relates to retrospective validation by subsequent permission. Section 20(2) is as follows:

*20(2) "Without prejudice to the provisions of subsection (1), the Minister may issue a certificate declaring, in relation to a security, that any acts done before the issue of the certificate purporting to effect the issue or transfer of the security, being acts which were prohibited by this Act, are to be, and are always to have been, as valid as if they had been done with the permission of the competent authority, and the said acts shall have effect accordingly."*

This subsection empowers the Minister to issue a certificate to validate what had previously been invalid. In our view this provision does not help Mediterranean in this situation. The subsequent

validation by certificate made pursuant to this section relied upon by Dr. Sahu Khan, assuming for the moment that there was such a validation, was made on 20 September 1995. It is contained in a letter from the Reserve Bank of Fiji to which had been delegated the Minister's powers under the Act. This letter is well over a month after Mr Bianco had rescinded the agreement for a total failure of consideration. It follows that Mr Bianco was entitled to recover the \$100,000 he had paid from Mediterranean before any question of validation under s.20(2) arose. It may be that the issue of shares is declared valid, on the assumption that the letter of 20 September was a s.20(2) validation, but that does not have any effect upon Mr Bianco's by then established right to recover the money paid which had come into existence upon the rescission of the contract. The issue of the shares, originally in pursuance of Mediterranean's obligations under the contract, was illegal; retrospective validation of the issue in September, even if made, could not make that issue comply with the obligation in the contract because by then the contract no longer existed. To affect Mr Bianco's rights it would have had to have been made while the contract was still in effect and before it was rescinded.

It follows that Dr Sahu Khan's first point fails. However, since much of his argument was based on s.20(2) we add that we do not consider that it was established that the section was applicable. We think there is much weight in the learned trial judge's view that there was no way of knowing on the evidence before him whether the letter relied upon by Mediterranean, that is the letter of 20 September 1995 from the Reserve Bank of Fiji, was intended as an approval to issue securities to a non-resident under s.10(1) or a retrospective validation of the issue made in February 1994 under s.20(2). His Lordship went on to say he was not prepared to accept it, together with the other incomplete correspondence that was produced,

as being a retrospective validation. We are clear in our view that notwithstanding Dr. Sahu Khan's submissions the correspondence produced does not satisfy the terms of s.20(2).

The section provides, as applicable to this case, that the Minister may issue a certificate which declares that any acts done before the issue of the certificate in respect of the issue of the shares to Mr Bianco, which was prohibited by the Act, were to be and always to have been done with permission. But this correspondence, and in particular the letter of 20 September, does not declare any acts to be valid and to have always been valid as if they had been done with permission. No doubt, as Dr. Sahu Khan submitted, it is not necessary for a certificate under s.20(2) to be in any particular form but in our view it must on its face comply with the section. It should be clear that it is an exercise of the power given under s.20(2). This letter does not do that; indeed on its face it appears to say something quite different. The learned trial judge expressed the view that it more probably was an approval to issue securities to a non-resident under s.10(1) than the exercise of the power given in s.20(2). We go further and say we are satisfied that whatever else it may do it clearly does not satisfy the terms of s.20(2).

We turn now to consider Dr Sahu Khan's second point which was that if the transaction was illegal then the parties were in *pari delicto* and Mr Bianco was not entitled to recover. He submitted that there was some responsibility on Mr Bianco under s.10(1) to ensure compliance with the section and therefore he was in *pari delicto*. We do not think it is correct that the section requires the person who becomes the owner or receives the benefit of the security to ensure compliance with it. The language is plain and in our view the duty of ensuring compliance with the section is cast upon the person issuing the security.

Dr; Sahu Khan, however, placed more emphasis upon an alternative submission that if the transaciton was illegal, and so null and void, Mr Bianco could not claim the \$100,000 back because it was the consideration for an illegal transaction irrespective of whose responsibility it was to seek the Minister's permission. He relied on a number of cases which supported his proposition as to the law. It is not necessary for us to consider them for in our view Dr Sahu Khan's submission is based upon a misapprehension of what the illegal transaction was. As has already been pointed out earlier in this judgment the contract created by the agreement made by the parties on 25 February 1994, and evidenced by the minutes dated 28 February 1994, was not illegal. The \$100,000 was paid in terms of it for the minutes record that the receipt of that sum was acknowledged. It follows that it was not the consideration for an illegal transaction. The transaction that was illegal was the subsequent issue by Mediterranean of the shares and Mr Bianco does not bear any responsibility for that.

Dr Sahu Khan went on to urge a further, and alternative, basis for his submission which he said he had not raised in the court below. It was this: that in paying the \$100,000 Mr Bianco was in breach of s.7(b) of the Act and thus he cannot recover it. Section 7 is as follows:

*"7. Except with the permission of the Minister, no person shall do any of the following things in Fiji, that is to say:-*

- (a) make any payment to or for the credit of a person resident outside Fiji; or*
- (b) make any payment to or for the credit of a person resident in Fiji by order or on behalf of a person resident outside Fiji; or*
- (c) place any sum to the credit of any person resident outside Fiji:*

*Provided that, where a person resident outside Fiji has paid a sum in or towards the satisfaction of a debt due from him, paragraph (c) of this section shall not prohibit the acknowledgment or recording of the payment."*

We do not accept this submission. We are satisfied s.7(b) has no application in these circumstances. When reduced to its essentials the section says that, except with the permission of the Minister, no person shall in Fiji make any payment to a person resident in Fiji either by order of a person resident outside Fiji or on behalf of a person resident outside Fiji. The purpose of s.7 appears to be that of controlling the outflow of money from Fiji without the consent of the appropriate authorities in Fiji - a necessary part, no doubt, of the machinery to maintain economic stability in Fiji. The control is extended in s.7(b) to money paid "by order or on behalf" of a non-resident to a Fiji resident, but these words are not apt to cover a payment made in Fiji directly by a non-resident. Section 7 is not directed at what was done here, which was a transaction within Fiji involving money already in Fiji and which was not going to leave Fiji or create obligations outside Fiji.

The appeal is dismissed. The respondent, Mr Bianco, is allowed \$1,000 costs and disbursements.

*Moti Tikaram*

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Sir Moti Tikaram  
President

*M Maurice Casey*

.....  
Sir Maurice Casey  
Judge of Appeal

*Mr Justice Savage*

.....  
Mr. Justice Savage  
Judge of Appeal

**Solicitors:**

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant  
Messrs. Young and Associates, Lautoka for the Respondent