

THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0030 OF 2000S
 (High Court Civil Action No. HBC164 of 199L)

BETWEEN:

TREVOR ROBERT GALLAGHER

First Appellant

NADI CONTRACTORS LIMITED

Second Appellant

AND:

ALLAN CHARLES NEWHAM

Respondent

Coram:

Tompkins JA, Presiding Judge
 Davies, JA
 Ellis, JA

Hearing:

Friday 8th and Monday 11th November 2002, Suva

C.B.Young for the appellants
A.H.Silvester and Babu Singh for the respondent

Date of Judgment: Friday, 15th November 2002

JUDGMENT OF THE COURT

The respondent applied by originating summons for a declaration that a declaration of trust dated 2 June 1990 is valid and legal and for further declarations relating to the shareholding in Nadi Contractors Ltd ("Nadi"). Madraiwiwi J, in a reserved judgment delivered in April 2000 (the day is not stated) made the declaration sought, issued an injunction, the terms of which are set out below, and declined to make the further declarations sought. From that decision the appellants have appealed to this Court.

The factual background

Nadi was incorporated in Fiji on 26 September 1979. Its shares were held as to 19,999 by Romark Pty Ltd of Sydney ("Romark") and as to one by the first appellant ("Gallagher"). The respondent ("Newham") was the beneficial owner of 50% of the shares in Romark, the other 50% being held by Gallagher. At the relevant time, Gallagher was a resident of Fiji, Newham was a resident and citizen of Australia. Nuffield Engineering Pty Ltd ("Nuffield") was a company in which the shares were held by Newham and his family trust.

In 1990 Romark transferred all its 19,999 shares in Nadi as to 14,999 to Gallagher and as to 5,000 to his wife Shirley Gladys Gallagher.

The declaration of trust, the subject of the proceedings, is dated 2 June 1990. It was prepared by solicitors in Australia. It is executed by Gallagher as a deed. The preamble and the first clause provides:

"To Allan Charles Newham

With reference to the share referred to in the schedule hereto in NADI CONTRACTORS LIMITED, (herein called "the said share"), which at your request I hold in my name I CONFIRM that the purchase money for the said share is to be provided by you out of your own moneys AND I ALSO CONFIRM AND DECLARE THAT:

1. I hold the said share and all dividends to accrue upon or in respect of it upon trust for you and I agree to transfer pay and deal with the said share and such dividends in such manner as you shall from time to time in writing direct."

The schedule to the deed refers to 10,000 ordinary shares of \$1.00 fully paid in Nadi. The remaining 3 clauses of the deed are not relevant to the issues before the Court.

The Exchange Control Act (Cap 211) ("the Act")

It was submitted on behalf of Gallagher that the deed was illegal and therefore void as being in contravention of subsection 11 (1) of the Act. That subsection provides:

"11. (1) Except with the permission of the Minister, a security registered in Fiji shall not be transferred, and a security not so registered shall not be transferred in Fiji, unless, in either case, the following requirements are fulfilled, that is to say:-

- (a) neither the transferor nor the person, if any, for whom he is a nominee is resident outside Fiji; and
- (b) the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and that of the person, if any, for whom he is a nominee; and
- (c) neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Fiji; and
- (d) except where the security is registered in Fiji otherwise than in subsidiary register, the Minister is satisfied that the requirements of paragraph (c) are fulfilled;

Provided that –

- (i) neither the transferee nor his agent shall be deemed to have committed an offence by reason only that the requirements of paragraph (a) were not fulfilled unless the transferee or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled; and
- (ii) neither the transferor nor his agent shall be deemed to have committed an offence by reason only that any of the requirements of paragraphs (c) and (d) have not been fulfilled unless, in the case of non-fulfillment of the requirements of paragraph (c), the transferor or, as the case may be, his agent, knew or had reason to believe that those requirements were not fulfilled."

Securities is defined in the Act as including shares.

As we understand the contention on behalf of Gallagher, it is that the effect of the deed was to transfer a beneficial interest in the 10,000 shares in Nadi to Newham, and that, as Newham was not a resident of Fiji and the permission of the Minister had not been obtained, the transaction breached the subsection with the result that it was illegal and unenforceable. The judge rejected this contention. In our view, he was correct to do so for these reasons.

First, we do not accept the submission that the section prevents the acquisition of an equitable interest in a security. Put simply, that is not what it says. It says that a security, that is a share, "shall not be transferred" without the permission of the Minister. In the absence of a clear indication to the contrary, we consider that that is intended to refer to a transfer of the legal interest in the security, not the equitable interest. If that were not so, the section would prevent parties entering into an agreement subject to the consent of the Minister being obtained, an agreement that would effect a transfer of an equitable but not a legal interest in the security.

Secondly, the situation is similar to that in *Guisepppe Ruggiero and Taeko Ruggiero and another v Allesandra Bianco* Civil Appeal No ABY0061 of 1997 (CA). The parties had agreed that shares be issued to Bianco, who was not a Fijian resident. This was done. A share certificate was issued to him. The permission of the Minister, as required by subs 10 (1), was not obtained. That subsection relates to the issue of securities, not the transfer of securities, but is otherwise of the same effect as subs 11(1). The judge in the High Court held, and the Court of Appeal agreed, that as the security had been issued without the necessary permission, the issue was wholly invalid and void.

The Court of Appeal, however, also held that the agreement to issue the securities was lawful. At page 7 of the unreported judgment it said:

"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 26 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."

So in this case it was open to Newham to obtain the permission of the Minister before he called on Gallagher to transfer the shares to him pursuant to clause (1) of the deed. Had the shares been transferred before permission was obtained, that would clearly have been contrary to the subsection. But that is not what occurred. The shares can now lawfully be transferred because, on 18 May 2000, the Reserve Bank, acting on behalf of the Minister, granted permission for the shares in Nadi to be transferred from Gallagher to Newham.

Consideration

It was submitted on Gallagher's behalf that there was a failure of consideration in that Newham had failed to pay Gallagher his entitlement to half the net profits of Nuffield or in not executing a deed of trust in Gallagher's favour in respect of half the shares in Nuffield.

Gallagher in his affidavit had claimed that the deed of trust relating to the 10,000 shares in Nadi was only part of the larger agreement between the parties that included an understanding that Gallagher was to become the owner of half the shares in Nuffield. This was denied by Newham, who did, however, accept that Gallagher was to have half the profits from Nuffield, an obligation that he said had been met.

The declaration was a deed, so that no consideration was required for it to have legal effect. In fact, it is apparent on the face of the declaration that there was consideration as evidenced in the clause referring to the purchase money to be provided by Newham out of his own moneys. If, as Gallagher claims, it was only intended to be part of a larger transaction, that does not go to whether the declaration itself remains binding and effective. It will be for Gallagher to prove the other terms in proceedings that have not yet been commenced. That the High Court, and this Court on appeal, have determined that the declaration is a binding deed of trust will not prevent Gallagher from

seeking to establish that there were other terms in the overall agreement between the parties that have been breached.

What is apparent is there are a number of outstanding issues between the parties that cannot be resolved in these proceedings. It was for this reason that, after the hearing had commenced on 8 November 2002, the Court raised with the parties the possibility of their reaching agreement on how these outstanding issues can most effectively be resolved. The hearing was adjourned to enable counsel to see whether such an agreement could be reached. It could not, so the hearing resumed on 11 November 2002.

The form of the proceedings.

It was submitted on behalf of Gallagher that as there were disputed matters of fact, these proceedings should not have been commenced by an originating summons. We do not accept that submission. It is correct that, if the allegations by Gallagher that there are additional terms to the arrangement are pursued, they will undoubtedly give rise to disputed factual issues. But, as we have endeavoured to make clear, those are not issues that arise on this application. The only substantial issue before the Court at this stage is the defence based on the Act, and that can appropriately be decided on an originating summons, as it does not give rise to disputed factual issues.

The form of relief

The judge held that there should be a declaration that the deed of trust dated 2 June 1990 is valid and legal. He also issued an injunction, that, in the formal judgment, was in these terms.

- (i) Both the defendants and/or their nominees/servants/agents or workmen and/or other third parties be restrained:
 - (a) from disposing/selling/assigning any assets in Nadi Contractors Ltd;

(b) from utilising any fund for any dividend or bonus payments or any overseas expenses from Nadi Contractors Ltd

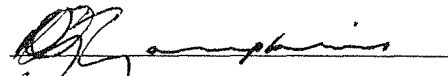
We consider that an injunction in these terms is too wide and also note that it is unlimited as to time. Mr Sylvester was prepared to accept that if a declaration on the validity of the deed of trust is made, an injunction is not required. Accordingly the injunction is revoked.


The result

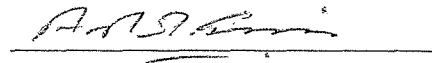
The result of the appeal is:

1. The declaration that the deed of trust dated 2 June 1990 is valid and legal is affirmed.
2. The injunction is revoked. To that extent only the appeal is allowed.
3. As the appeal has largely failed, the respondent is entitled to costs to be agreed or taxed.




Tompkins, JA


Davies, JA


Ellis, JA

Solicitors:

Messrs. Young and Associates, Lautoka for the Appellant
Messrs. Babu Singh and Associates, Nadi for the Respondent