

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC Action No. 239 of 2019

IN THE MATTER of an Order
of the Circuit Court for the
County of Fairfax, Virginia,
USA made on 08th August
2008

AND IN THE MATTER of the
registration of that Order in
the High Court of Fiji

BETWEEN : **SSII LIQUIDATION LLC**

APPLICANT

AND : **SOUTH SEAS INVESTMENT INC.**

RESPONDENT

Before : **M. Javed Mansoor, J**

Counsel : **Mr P. Knight for the Applicant**

Written submissions : **29 July 2019**

Date of Judgment : **26 September 2019**

ENFORCEMENT OF FOREIGN COURT ORDER: Registration of foreign court order in the High Court – Reciprocal Enforcement of Judgments Act and the Foreign Judgments (Reciprocal Enforcement) Act – High Court Rules, Order 71 – Land Transfer Act, Sections 2, 127 – notice of appointment of liquidator – inherent power of court – interpretation – purposive construction – intention of legislature

Cases referred to:

- a. R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897
- b. Davey v Bentinck [1893] 1 Q.B 185
- c. Re SK (an adult) (forced marriage: appropriate relief) [2005] 3 All ER 421
- d. Shannon Realities Ltd v Ville de St Michel [1924] AC 185
- e. Coltman v Bibby Tankers [1988] 1 AC 277
- f. King v Ettridge [1909] 2 K.B 24
- g. Davidsson v Hill [1901] 2 K.B 606

JUDGMENT

1. The Applicant filed ex-parte summons dated 15 July 2019 seeking a hearing on the Applicant’s application for registration of an order dated 8 August 2008 from the Circuit Court of the County of Fairfax, Virginia, USA, appointing the Applicant as the Trustee in Liquidation of the Respondent. The Application was supported by Carroll Sela, a solicitor.

2. It was averred on behalf of the Applicant that the Respondent, South Seas Investment Inc., which was a company registered in Virginia, USA, is the registered proprietor of freehold land situated on the island of Qamea, Cakaudrove; the ownership and registration of the land are borne out by Certificate of Title Vol. 47, Folio 4648; South Seas Investment Inc. was struck off the register in Virginia, USA, in 1989, for failure to file annual returns; that on 8 August, 2008, the Applicant obtained an Order from the Circuit Court of Fairfax, Virginia, USA, appointing it as the Trustee in Liquidation for South Seas Investment Inc. and authorising it, *inter alia*, to execute all documents required for the sale of the subject land; that an offer for the land has been received from a prospective buyer; and that the Registrar of Titles has advised that in order for the land to be sold, it will be necessary to first register the Order made by the Circuit Court of Fairfax County, Virginia, USA, in the High Court of Fiji. The

advice of the Registrar of Titles, if given in writing, is not before Court. Nor is the Registrar a party to these proceedings.

3. Copy of the Certificate of Title Vol.47 Folio 4648 annexed to the affidavit of Carroll Sela confirms that a transfer of the land to South Seas Investment Inc. was registered by the Registrar of Titles on 4 October 1985.
4. Counsel for the Applicant submitted *inter alia*: that Section 127 of the Land Transfer Act provides that upon the winding up of any company which is registered as the proprietor of any land, the liquidator is required to serve notice of his appointment in such form as may be approved by the Registrar of Titles and a copy of the order appointing such liquidator, if appointed by the court; that, therefore, the Registrar of Titles could accept an order of a foreign court appointing a liquidator and register this appointment; legislation that deals with the registration in Fiji of foreign judgments, namely the Reciprocal Enforcement of Judgment Act and the Foreign Judgment (Reciprocal Enforcement) Act are restricted to the registration of judgments for the payment of money and to various countries in the British Commonwealth, and do not apply to judgments or orders made in the USA; that in the absence of any specific legislation, *the High Court has inherent jurisdiction* to register judgments or orders made in the USA or such other countries if it is fair and equitable to do so, and that unless the Court has the jurisdiction to register in Fiji such a judgment or order, a party in whose favour that judgment or order has been made, would not be able to enforce or apply such an order; that the High Court of Fiji has the jurisdiction to make an order identical or similar to the order made by the court in the USA, if the original proceedings were instituted in Fiji; and that unless this order is registered in Fiji by an order of the High Court, the Applicant Liquidator would find it impossible to deal with the land in perpetuity, a situation which fairness and equity will not permit.
5. The Reciprocal Enforcement of Judgments Act (Chapter 39) is an "*Act to facilitate the reciprocal enforcement of judgments and awards in the United Kingdom and Fiji*". The power to extend the provisions of this Act is confined to a country or

territory of the Commonwealth¹. The Foreign Judgments (Reciprocal Enforcement) Act (Chapter 40) is *“an Act to make provision for the enforcement in Fiji of Judgments given in foreign countries which accord reciprocal treatment to judgments given in Fiji for facilitating the enforcement in foreign countries of judgments given in Fiji and for other purposes in connection with the matter aforesaid”*². This Act defines “judgment” to mean a judgment or order given or made by a court in any civil proceedings or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. The terms “judgment creditor” and “judgment debtor” are defined. The judgment referred to is required to be a judgment of a superior court of a foreign country, be final and conclusive and a sum of money should be payable thereunder. The Rules made under the Reciprocal Enforcement of Judgments Act (Chapter 39) will apply with necessary modifications under the Foreign Judgments (Reciprocal Enforcement) Act (Chapter 40).

6. The order dated 8 August 2008 is not for the payment of money. It was not submitted by counsel that the Circuit Court is a superior court. Nor can the order of the liquidator’s appointment be termed final and conclusive. No proclamation has been made extending the provisions of the Act to any part of the USA. The summons dated 15 July 2019 and the affidavit dated 11 July 2019 do not rely on either the Reciprocal Enforcement of Judgments Act (Chapter 39) or the Foreign Judgments (Reciprocal Enforcement) Act (Chapter 40). A brief examination of the provisions of these enactments confirms that the Applicant’s counsel was correct in submitting that these enactments are not applicable to the Application before Court. The Reciprocal Enforcement of Judgments Act (Chapter 39) and the Foreign Judgments (Reciprocal Enforcement) Act (Chapter 40) are restricted to the registration of judgments for the payment of money and do not apply to judgments or orders made in the USA. Order 71 of the High Court Rules refer to the Reciprocal Enforcement of Judgments Act, but provides no other statutory route through which registration of the subject order can be done. Hence, there is no statutory provision that allows for the registration of the order made by the

¹ Section 7, Reciprocal Enforcement of Judgments Act

² Section 2(1), Foreign Judgments (Reciprocal Enforcement) Act

Circuit Court of the County of Fairfax, Virginia with a court in Fiji. In those circumstances, it is unnecessary to consider these two enactments any further for the purpose of this Application.

7. The Applicant, however, has sought the intervention of this Court to register the order made by the Circuit Court on the basis of this Court's *inherent power*. Counsel submitted that unless it is registered in Fiji by an order of the High Court, the Applicant would find it impossible to deal with the land in perpetuity, and that this was contrary to the principles of fairness and equity. Counsel, though, did not draw the attention of Court to any helpful authority where the inherent power of court was exercised in an analogous situation. In the circumstances of this case, and especially in view of the relevant provision in the Land Transfer Act, it is the view of this Court that the position advanced by the Applicant's counsel cannot be accepted. The inherent powers of court can be used to supplement the powers of court to aid the interests of justice in appropriate situations. Such powers have been exercised to control the court's own procedure³ or where there is a lacuna in the procedural laws, to attain the objects of an enactment, to prevent an abuse of the process of court⁴ or to protect vulnerable persons such as a person forced into marriage⁵. A court, however, has no inherent power that vests it with jurisdiction in matters that were clearly not intended by the legislature.
8. For these reasons, the Applicant's Application to register with the High Court of Fiji the order dated 8 August 2008 from the Circuit Court of the County of Fairfax, Virginia, USA, appointing the Applicant as the Trustee in Liquidation for the Respondent, is refused.
9. For the purpose of completeness, though, Section 127 of the Land Transfer Act needs to be examined:

Section 127 of the Land Transfer Act states:

³ R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897

⁴ Davey v Bentinck [1893] 1 Q.B 185

⁵ Re SK (an adult) (forced marriage: appropriate relief) [2005] 3 All ER 421

*“Upon the winding up of any company which is registered as the proprietor of any land, or any estate or interest therein, **the liquidator shall serve notice of his or her appointment in such form as may be approved by the Registrar and shall produce a copy of the appointment of such liquidator if appointed under a voluntary winding up, or an office copy of the order appointing such liquidator if appointed by the court, and the Registrar shall enter a memorial of such appointment in the register, provided that in the case of a voluntary winding up the notice shall be supported by such evidence of the appointment having been legally made as the Registrar may require**” (emphasis added).*

10. The requirement contemplated by Section 127 of the Land Transfer Act is the serving of *notice* by the Liquidator. In the event the Liquidator is appointed by court, the section calls for an *office copy* of the order appointing such liquidator. The Registrar of Titles is required to enter a *memorial* of such appointment in the register. A memorial is defined as the entry relating to any instrument duly entered by the Registrar of Titles on the instrument of title⁶. There is no other statutory formality to be observed in giving the required notice to the Registrar of Titles where the appointment is by court. There is *no* requirement to register in any court such appointment of a liquidator.
11. The purpose of the section is for the liquidator to give notice to the Registrar of Titles for entry in the register; the marginal note to the section refers to the “Appointment of liquidator of company to be entered in the register”. Once this is done the statutory duty of the Registrar of Titles is to enter a memorial. This would accord with the objects of the legislation. The Registrar of Titles has not been conferred the jurisdiction to exercise discretion and initiate an inquiry with respect to making the memorial if the liquidator complies with the requirements of the section. The right conferred on the liquidator by Section 127 of the Land Transfer Act is to have the necessary particulars entered in the memorial, upon giving notice to the Registrar of Titles in the prescribed manner.
12. The Companies Act 2015 and the Companies (Winding Up) Rules 2015 make provision for the appointment and functions of a liquidator. The court referred to

⁶ Section 2, Land Transfer Act

in the Companies Act is the High Court of Fiji⁷. A Company is defined to mean a company formed and registered under Act No.3 of 2015⁸. An existing company means a company or foreign company formed and registered under any of the repealed Acts.

13. A liquidator appointed in Fiji has to merely follow the simple procedure outlined in the enactment to cause a memorial to be entered by the Registrar of Titles. Once the memorial is entered and registration of title in the liquidator is effected, the liquidator can deal with the property owned by the company subject to the winding up order and distribute the net proceeds to those entitled in law. That right, which is necessary to perform the statutory function, is available to a liquidator appointed in Fiji.
14. The difficulty is caused, in particular, by the definition of “court” in Section 2 of the Land Transfer Act. Court is interpreted to mean the High Court. This would appear to exclude a foreign court. (Even in the absence of the definition of court, the ordinary grammatical meaning of Section 127 may support an exclusion of the foreign court. The section 127 makes no reference to an appointment of the liquidator in Fiji, but this can be implied as such, as laws are usually aimed at the subjects of a country or to those within its territorial jurisdiction).
15. If the appointment is by the “the court”, the liquidator is required to produce an office copy of the order appointing the liquidator. The grammatical language of the enactment is such the same route to registration appears to not exist if the liquidator is appointed outside Fiji. As submitted by the Applicant’s counsel, the liquidator of a company incorporated overseas will be unable to make use of the provisions of Section 127 of the Land Transfer Act, even though such company was not prohibited from owning land in Fiji. Not being able to do so, the liquidator of such company will be unable to sell the land it owns, rendering it a useless asset, and, in the process, such a result could deceive all those who had relied upon the company’s net assets as reflected in the balance sheet and deny the rights of potential claimants and shareholders.

⁷ Companies Act (Cap 247), Capital Markets Decree 2009, Unit Trusts Act (Cap 228) and the Registration of Business Names Act (Cap 249),

⁸ Section 3

16. In the present matter, the USA incorporated Respondent was registered as the owner by the Registrar of Titles. There was no legal bar in South Seas Investment Inc. acquiring or holding title to the subject property in Fiji. There was no impediment to it in dealing with the property as it chose. Upon the making of a winding up order though the Trustee in Liquidation of South Seas Investment Inc. is unable to deal with the property as was open to the company, if a grammatical reading of the enactment is considered apt. Whether a rational draftsman could have contemplated such a legal effect is a moot point. Could Parliament have intended such a result? What could indeed be the purport and object of the enactment in issue?
17. Statutory provisions must be interpreted in a meaningful and purposeful way. A construction that is not strictly grammatical may be needed in some circumstances so that a reasonable conclusion can be reached as to the intention of the legislature. A strained construction may be justified even where the enactment is not grammatically ambiguous⁹. Such a construction may be necessary to avoid an absurdity. The legislature cannot be intended to have made an absurd mistake. Parliament is taken not to intend its laws to be unworkable. If the policy to cause hardship is patently clear, then the legislature's intent has to be given effect regardless of how absurd the consequences are. The question is whether the Land Transfer Act discloses a legislative policy aimed at denying the property rights of foreign companies during their winding up.
18. Although courts are often inclined to use the plain and ordinary meaning of an enactment, such a preference has not shackled judges from adopting a strained construction where such an approach was considered appropriate. In Shannon Realities Ltd v Ville de St Michel¹⁰, the Court said, "*Where the words of a statute are clear, they must, of course, be followed, but in their Lordships' opinion where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and*

⁹ Bennion on Statutory Interpretation, 7th Ed. 364

¹⁰ 1924 AC 185

that alternative to be rejected which will introduce uncertainty, friction or confusion into the working of the system”.

19. In Coltman v Bibby Tankers¹¹, the question before the Court of Appeal was whether the term “equipment” could be extended to cover a ship for the purpose of the Employer’s Liability (Defective Equipment) Act 1969. Equipment was defined to include any plant and machinery, vehicle, aircraft and clothing. By a majority decision, the Court of Appeal held that equipment included a ship for the purpose of the Act. The House of Lords agreed with the decision of the Court of Appeal.

20. In King v Ettridge¹² the Court of Criminal Appeal was called upon to construct section 4 (3) (3) of the Criminal Appeal Act to determine whether a prisoner had a right of appeal after pleading guilty. The Court held, *“We are of the opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the legislature; and this is to be ascertained from a careful consideration of the entire statute”*¹³. And again, *“In these circumstances we are of the opinion that the rules to be collected from the cases decided on the interpretation of statutes justify us in disregarding those words and in holding that this statute gives us power to quash the sentence appealed from, and to pass in its place another sentence warranted by law”*¹⁴.

21. In Davidsson v Hill¹⁵ the question before the court was whether the representatives of a deceased foreigner could recover damages under the Fatal Accidents Act, which imposed liability on British citizens. The defendants were British and the ship navigated by them was a British ship; however, the act of negligence and the consequent drowning took place in the high seas. It was contended on behalf of the defendants that the Fatal Accidents Act applied only to British subjects and to persons of other nationalities who are within the territorial jurisdiction of the British Crown. The court considered the principle

¹¹ [1988] 1 AC 277

¹² [1909] 2 K.B 24

¹³ At page 28

¹⁴ At page 29

¹⁵ [1901] 2 K.B 606

that Acts of Parliament are to be deemed not to apply to non-resident aliens unless the court is compelled to so apply. The Court held¹⁶, “*Our courts are not only open, but open equally to foreigners as to British subjects; and foreigners who have the benefit of the English common law have also the benefit of English statutes*”. The court gave judgment in favour of the plaintiff.

22. These decisions underline the willingness of courts to construe an enactment so as to achieve a workable result.
23. As South Seas Investment Inc. was incorporated in the USA, the winding up order and the appointment of the liquidator could not have taken place in Fiji. The order dated 8 August 2008 by the Judge of the Circuit Court of Fairfax County is not a judgment or order for the payment of money. The order is merely an appointment to facilitate the winding up process. It is an order appointing the Applicant as a Trustee in Liquidation of the Respondent, and vesting full authority to execute documents on behalf of the Respondent, solicit buyers and execute contracts without further order from the County Court, to make payment of necessary expenses in connection with the sale of the subject land and to distribute the net proceeds of the sale of the land to those entitled by law. As Trustee in Liquidation, the Applicant has a duty to the appointing court to discharge its functions in terms of the court order.
24. In this case, winding up was a consequence of non-compliance of regulations by South Seas Investment Inc. The appointment of the liquidator *per se* does not create substantive rights, but ensures that competing claims are rightly met in accordance with the law. For this, the liquidator is required to make the necessary disposal of assets and act in terms of its appointment and the law. This function the liquidator can discharge in Fiji only through giving the required statutory notice prescribed by Section 127 of the Land Transfer Act.
25. When straining the language of an enactment to give effect to the purpose intended by Parliament, such matters as the object and the scheme of the Act are important. Of like importance are other considerations germane to the

¹⁶ At page 618

circumstances of the case. In this case, questions like these would seem relevant. Is the Applicant's function as liquidator objectionable? Is it obnoxious to the law, practice and policy of Fiji? Is the Applicant liquidator's manner of appointment vastly different to the method used in this country? Did Parliament intend to prevent the liquidator functioning in Fiji or from giving notice to the Registrar of Titles in the manner a liquidator appointed in Fiji would? Did Parliament intend to take away the rights and privileges of foreign corporate entities or their successors in title? Were such rights to be denied to the creditors and shareholders of a company that has been wound up? Would such rights be denied to a natural person who is not a citizen of Fiji? South Seas Investment Inc. was a foreign investor. Did Parliament intend that such foreign corporate investments or the ownership rights of foreign companies be curtailed through restrictions in dealing with land?

26. That Parliament intended such a curtailment of rights is not axiomatic upon an examination of the scheme of the Act. Nor can a rationale be readily deduced to support a restriction on the successor in title of an overseas company disposing its land in Fiji for the purpose of finalising the company's winding up proceedings. An interpretation that will cause unnecessary hardship must be avoided unless it is patently clear that Parliament intended to cause such hardship. Court cannot, ordinarily, fill in the gaps left by Parliament. There is not the remotest suggestion by the scheme of the enactment that Parliament was desirous of placing obstacles in the way of foreign registered corporate entities or their successors in title in conveying company assets for the purpose of winding up the affairs of such corporate bodies and distributing the net proceeds of surplus assets to those entitled by law. The Land Transfer Act does not expressly exclude conveyances by foreign proprietors of lands in Fiji, more particularly (the necessary registration and) a conveyance by a liquidator in the discharge of his official functions. In view of the factors considered, such exclusion cannot be even implied without inviting irrational consequences.
27. It is my view, therefore, that for the limited purpose of permitting a conveyance by the liquidator, the Registrar of Titles may, in accordance with Section 127 of the Land Transfer Act accept notice and act on the order of a foreign court that

has appointed a liquidator. For the limited purpose of this enactment, the term “court” could be read to mean a court having competent jurisdiction to appoint a liquidator.

28. As adverted to, the Registrar of Titles is not a party to these proceedings. It may be of importance to mention though that when a foreign court appoints a liquidator – in the absence of express provision to register such order in a court in Fiji – it is for the Registrar of Titles to satisfy himself in regards to the authenticity of the order of the foreign court. The Registrar may for that purpose stipulate such requirements that will satisfy him for the purpose of entering a memorial in the register.

Order

The Applicant’s Application for registration of the order dated 8 August 2008 from the Circuit Court of Fairfax in the High Court of Fiji is refused.

Delivered at Suva this 26th day of **September, 2019**



M. Javed Mansoor
Judge of the High Court