THOMAS D. HUNTER & PEARLEEN HUNTER

v.

FRANCIS JOSEPH APGAR & DOROTHY OLITA APGAR

[HIGH COURT, 1989 (Palmer J) 15 September]

Civil Jurisdiction

Land- purchase of land by non-residents- whether agreement to purchase subsequently approved by the Minister enforceable- Land Sales Act (Cap 137) Section 6.

The Plaintiffs who were non-residents entered into an agreement with the Defendants to purchase land in Fiji. The agreement was conditional upon obtaining the consent of the Minister which in due course was forthcoming. The Defendants then rescinded the agreement. The High Court, giving its ruling on a preliminary issue HELD: that Section 6 of the Land Sales Act was intended to ensure that the Minister's consent was obtained prior to the contract for the sale of the land being entered into and that consent given subsequently to the formation of the contract was void.

Per Curiam: the Application Form for consent as used by the Ministry is a nullity and of no effect.

Cases cited:

Chalmers v. Pardoe [1963] 3 All ER 552
Cope v. Rowlands (1836) 2 M&W 149
D.B. Waite (Overseas Ltd) v. Sidney Leslie Wallath (1972) 18 FLR 141
Denning v. Edwardes [1961] AC 245
George v. Greater Adelaide Land Development Co. Ltd 43 CLR 91
Harnam Singh & Bakshish Singh v. Bawa Singh (1958) 6 FLR 31
J. Kissun v. Sumintra (1970) 16 FLR 165
Ogden Industries Ltd v. Lucas [1969] 1 All ER 121
Phalad v. Sukh Raj FCA Reps 78/471
St. John Shipping Corporation v. Joseph Rank Ltd [1957] 1 QB 267

K. Chauhan for the Plaintiffs
D. Whippy for the Defendants

Trial of preliminary issue in the High Court.

Palmer J:

By a Writ of Summons issued on the 29th of August, 1986 the Plaintiffs instituted proceedings against the Defendants in respect of the purchase of certain lands and some assets associated therewith from the Defendants. The Defendants

have defended the action and have counter-claimed in respect of the same transaction. The matter has been lying dormant for some two years, but now the parties have agreed to seek from the Court a ruling upon a preliminary point of law arising in the action.

The point of law submitted by consent to the Court for determination is as follows:-

> "Having regard to the provisions of Section 6 of the Land Sales Act Cap 137 is the agreement or contract for sale and purchase of land dated the 30th day of October, 1985 between the Plaintiffs and the Defendants (hereinafter called "the said agreement") unlawful, illegal and unenforceable at law, as contended by the Plaintiffs or is the said agreement a lawful and enforceable contract of sale and purchase as contended by the Defendants."

The parties have agreed the following facts:-

1. The Plaintiffs at all material times were non-residents of Fiji as defined in the Land Sales Act;

2. The Defendants at all material times were residents of Fiji as defined in the Land Sales Act.

3. The Plaintiffs and the Defendants entered into the said agreement whereby the Plaintiffs agreed to purchase and the Defendants agreed to sell to the Plaintiffs certain freehold lands comprised and described in CT Nos. Volume 46/4581, Volume 46/4582 and Volume 46/4583 containing in the aggregate an area of 850 acres for the price of $US475,000;

4. The sum of $US150,000 was paid as a deposit by the Plaintiffs to the Defendants' agent Ragg and Associates and the same being held by the said agent as stake-holder for both of the parties.

5. The said Agreement was made conditional upon:
"the consent of the Minister of Lands to the transfer of property under the Land Sales Act to the purchaser."

6. At the time of the signing of the said Agreement no application had been made to the Minister of Lands for his consent.

7. An application for consent was subsequently made and the Minister of Land's consent was granted on the 2nd day of May, 1986.

8. The said Agreement provided that the settlement date be on or before the 1st day of June, 1986.

9. By letter dated 11th July 1986 the Defendants through their Solicitor gave notice of their rescission of the said Agreement and by letter dated 21st August, 1986, the Plaintiffs through their Solicitors repudiated the contract of sale and issued the Writ herein on 29th August, 1986.

The Land Sales Act (Cap 137) which was passed on 22nd February, 1974 contains the following preamble:-

> "An act to provide for the regulation of certain speculative and other dealings in land and the taxation of profits thereon."

Section 6 of the Act is headed "Purchase of land by non-resident." The Section is as follows:-

"(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land;

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

(2) The Minister responsible for land matters may require any application for his consent mentioned in subsection (1) to be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms whether by way of imposition of bond or otherwise upon which such consent is conditional.

(3) No appeal shall lie against a decision by the Minister responsible for land matters made under this section.

(4) The provisions of this section shall not apply to dealings in native land, as defined by the Native Land Trust Act, or to the original grant of any lease or licence by the Native Land Trust Board."

The Agreement as already noticed was made on the 30th October, 1985. The original has been exhibited on this application. There has also been exhibited the original application to the Minister which is signed by the vendors on the 16th of December 1985 and by the purchasers on the 24th January, 1986. The approval of the Minister endorsed thereon is dated the 2nd May, 1986.

In this judgment I am dealing only with the land content of the agreement. Nothing I say herein is to be taken as affecting any property other than land which was to pass between the parties.

Counsel on both sides have made written submissions in support of their respective contentions on the preliminary point. I am grateful to counsel for these lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

The first thing to note in the Act is that Section 6 is directed specifically at a potential purchaser. The next point to note is that Section 17 provides that:-

"Any person who wilfully contravenes the provisions of this Act or of any terms of any consent thereunder shall be guilty of an offence and liable on conviction to:-

(a) a fine of one thousand dollars or of an amount equal to one-quarter of the purchase price or to total or partial forfeiture of any bond required by this act or by any order made thereunder, whichever is the greater; or

(b) imprisonment for a period not exceeding five years; or

(c) both such fine or forfeiture and imprisonment."

Counsel for the Plaintiffs have referred to authorities on the question whether any purported contract made without the Minister's prior consent in a case such as this is void rather than voidable at the option of one or other of the parties and that this can be deduced on the basis of the test of the purpose of the act, which is plainly described in the preamble and also the presence of the penalty provision.

I will refer to this when I come to the authorities.

The Plaintiff's case essentially is that as the Minister's consent in writing was not obtained prior to the making of the agreement the same is unlawful and unenforceable. The Defendant's case is that the agreement was made conditional upon the consent of the Minister of Lands to the transfer of the property and that such consent was granted by the Minister in writing on the 2nd May 1986. On that basis the Defendants say that the agreement was not a contract of purchase of land under the Land Sales Act until the Minister granted his consent on the 2nd May 1986 and that thereafter the sale agreement became a lawful and enforceable contract of sale and purchase of the land under the laws of Fiji. However, the Plaintiffs in reply to that contention say that the obtaining of the prior consent in writing of the Minister is a condition precedent and not a condition subsequent to the making of any contract to purchase.

Therefore, they say, the Minister's purported consent subsequent to the making of the agreement is ineffective and does not validate it and likewise the condition contained in the agreement does not serve to do that either. They say that any

such contract is void, being prohibited by the statute, and it matters not whether it happens to be a conditional agreement or otherwise.

As I understand the Defendant's case a real difficulty in this matter is that if the Section is interpreted literally no Agreement can ever be made. In order to obtain the Minister's consent some agreement must have been reached and on a literal interpretation of the Section such Agreement is unlawful and therefore the question is to be asked how can the Minister's consent ever be obtained. Counsel have made detailed submissions and cited authorities in relation to that point and I will now turn to some of these.

The Defendants rely very heavily on an argument that the consent required by Section 12 of the Native Land Trust Act (Cap. 134) is much akin to the consent required under Section 6 of the Land Sales Act. It is common ground among the parties that there seems to be no case in the Fiji Courts which dealt with the consent required under Section 6 of the Land Sales Act. Indeed it may be said that the Defendant's case rests on applying to Section 6 of the Land Sales Act the same interpretations which they say Section 12 of the Native Land Trust Act has received.

Section 12 of the latter Act is as follows:-

> "12(1) Except as may be otherwise provided by Regulations made hereunder it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof whether by sale, transfer or sub-lease or in other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board and any sale, transfer, sub-lease or other unlawful alienation or dealing affected without such consent shall be null and void."

There follows a proviso which is not relevant.

> " (2) For the purposes of this Section 'lease' includes a sub-lease and 'lessee' includes a sub-lessee"

The preamble to the Native Land Trust Act, which was first passed in 1940, reads as follows: "An Act relating to the control and administration of native land." Under the Act the control of all native land is vested in the Native Land Trust Board (Section 4). Native land may not be alienated by any means except to the Crown (Section 5). The Board may grant leases or licences (Section 8) but not without satisfying itself of certain matters prescribed by Section 9. It is in that situation that one comes to Section 12 which, as has been seen, prescribes for the consent of the Board in its capacity as the lessor or head-lessor. It seems to me therefore that the purpose and scheme of that Act is quite a different one

from the Land Sales Act.

A The Land Sales Act, as already noticed, aims directly at the non-resident. It provides a mechanism to ensure that a non-resident cannot obtain any enforceable right in relation to land right at the outset, the Minister has had the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent to the same.

B The Defendants are relying on two cases. The first is D.B. Waite (Overseas Ltd) v. Sidney Leslie Wallath (1972) 18FLR 141 and the second is a case referred to therein: Denning v. Edwardes [1961] AC 245.The latter is a Privy Council decision. In the D.B. Waite case, there was an Agreement between the parties for the sale and purchase of a parcel of land held under a native lease. It was held by the Fiji Court of Appeal that the Agreement was one in which the parties intended to effect the transfer of the native lease after satisfying the requirements C of the law as to the consent of the Board; not having being implemented in any way except by payment of the deposit the Agreement had not been vitiated by lack of consent. It was further held that pending the granting of the consent the Agreement was inchoate or inoperative and could not therefore be made the basis of an action for damages when the consent was not forthcoming. Gould V.P. on p. 145 referred to Chalmers v. Pardoe [1963] 3 All E.R. 552 That was D an appeal concerning the Native Land Trust Act to the Privy Council. His Lordship said on that page:-

> "The Privy Council considered the transaction as a sub-lease but even regarding it as a licence to occupy coupled with possession their Lordships held that it was a 'dealing' within the meaning of E Section 12 and consequently unlawful. They referred however to the fact that in Harnam Singh & Bakshish Singh v. Bawa Singh (1958) 6 FLR 31, the Fiji Court of Appeal had said that it would be an absurdity to say that a mere Agreement to deal with land would contravene Section 12 for there must necessarily be some prior agreement in all such cases. The Privy Council did not F dissent from this, but said that in the case before them there had been on one side full performance.
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> In J. Kissun Singh v. Sumintra (1970) 16FLR 165 this Court relied upon that aspect of the judgment in Chalmers v. Pardoe to which I have just referred and held that an agreement for the sale of a native lease under which the purchaser had, on his own showing, G taken over possession of control for a number of years, had passed the stage at which it could be called a permissible agreement and had become unlawful as a 'dealing' contrary to Section 12.
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> It was not sought in that case to say exactly at what point an agreement, lawful when made, becomes unlawful but I have no doubt on the facts as found and outlined above, that the present

agreement never reached the latter stage and it was never intended that it should do so. The payments of $2.00 on signature and $2,000 the following day were obviously by way of deposit; completion was to be after fourteen days and possession was not taken, even when the date for completion had passed. It was a straight-forward dealing pursuant to which the parties intended, after satisfying the requirements of the law, to affect the transfer of the native lease. I accept therefore that the agreement was lawful and remained so right up to the time it was repudiated by the appellant company; up to that time the consent of the Native Land Trust Board could have been applied for without any impropriety and given or refused."

And on page 146 His Lordship said at letter C:-

"But though the Privy Council did not quote this part of the judgment in Harnam Singh's case, that judgment went on to say that such an agreement would be inoperative until such consent had been given. The Privy Council cannot therefore be taken as saying that a binding and enforceable agreement would be lawful. Having regard to the wording of Section 12, 'it shall not be lawful for any lessee .... to alienate or deal with the land .... whether by sale, transfer or sublease or in any other manner whatsoever,' I am impelled to the conclusion that an operative agreement for same must be a contravention of the Section. Such an agreement creates an interest in land in the purchaser and must therefore amount to a dealing in land."

And at letter 'G"-

"On the case as a whole, I have reached the conclusion (although as I have already said, with some reluctance) that no action for damages for breach to of contract was available to the respondent and that the trial judge erred in including in his judgment damages for loss of the respondent's bargain."

Marsack J.A. at p. 147 at letter 'G' said this:-

"The fate of this appeal in my view depends upon the determination of the difficult question as to what rights are acquired by the parties *inter se* under a preliminary agreement for the sale and purchase of land subject to the provisions of Section 12 of the Native Land Trust Ordinance. Section 12 has been considered by the Privy Council in Chalmers v. Pardoe (supra), and by this Court in the cases to which references is made in the judgment of the learned Vice-President. Briefly, it has been held that the preliminary agreement between the parties cannot be held to be unlawful or null and void *ab initio* because the consent of the Board has not been first obtained to it; as was said in Harnam Singh's case there must

necessarily be, in all cases, some prior agreement to submit to the Board. Otherwise, to quote from the judgment in Denning v. Edwardes [1961] AC 245 negotiation would be impossible."

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And at page 149 at letter 'C':-

"The preliminary agreement contains all the essential ingredients of an agreement for the sale and purchase of land; and if it is to be regarded as completely effective from the time of signing it must be held to be a dealing in land and consequently, under section 12, unlawful, null and void. But it has been authoritatively decided that the preliminary agreement does not in itself convey an interest in land; and therefore in my opinion it must be that the preliminary agreement is inchoate in its character and would remain incomplete, and not fully effective until the Board's consent has been given."

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Denning v. Edwardes was an appeal to the Privy Council from Kenya. On page 252, the Privy Council said this:-

"It is also contended that the agreement is void by reason of the provisions of section 88 of the Crown Lands Ordinance which says: '88-(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situated in he Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this subsection without the written consent of the Governor:

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(3) Any instrument, in so far as it purports to effect any of the transactions referred to in subsection (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument.

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Subsection (2) has no bearing on the case. It is argued that the agreement to sell is void by reason of the provisions of subsection (3). There was an admission in the course of the proceedings in Kenya that the Governor's consent to the agreement has been obtained subsequent to execution by the parties. It is argued by the appellant that the consent should have been obtained prior to execution and that in any case it should be endorsed on the

instrument before it can be regarded as valid.

> Subsection (3) is applicable only to an instrument which "purports to effect any of the transactions referred to in subsection (1)," for instance, a conveyance which makes a sale effective. Their Lordships are of opinion that an agreement to sell does not "effect a transaction" and that therefore subsection (3) is not applicable to the agreement in question.
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> The view that subsection (3) is applicable to an agreement to sell necessarily involves the view that an agreement for any of "the transactions referred to in this subsection," namely, subsection (1), is also a "transaction" within the meaning of subsection (1). Their Lordships are unable to take this view and are of opinion that subsection (1), is not applicable to agreements for such transactions."

Counsel for the Defendants has also placed strong reliance upon the following passage, on page 253, of that Judgment:-

> "Subsection (1) requires the written consent of the Governor to an "agreement or any of the transactions" set out in the subsection. They include a transaction of sale. It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."

In deference to the industry of Counsel, I have referred at some length to the authorities cited. However, I think the point can be dealt with fairly briefly. It has been said often enough that every case must turn upon its own facts, and likewise the interpretation of statutory provisions must turn upon the wording of the same, subject to the rules of construction. In my view Denning v. Edwardes may be clearly distinguished on two grounds, (1) Section 88 of the Crown Lands Ordinance requiring written consent of the Governor does not require his *prior* consent. Therefore quite clearly any transaction affected by that Ordinance may be valid as long as the Governor's consent is obtained at some time. It is clear from the extract from page 252 just cited that the proposition that the consent should have been obtained prior to execution of the agreement was merely an argument by the Appellant but is not, as in the instant case, part of the statutory provision. The other reason for distinguishing that case from the present one is

that, as clearly expressed on page 252, that Ordinance was concerned with the consent to transactions and not to agreements. It must be steadily borne in mind that Section 6 in the present case prohibits the making of the contract not the transaction, as is the case of Section 12 of the Native Land Trust Board Act.

For that latter reason, in my view, the D.B. Waite case can also be distinguished from the present one. As I have endeavoured to show earlier on, the two pieces of legislation although superficially concerned with similar subject matter are quite different and distinct. The prohibition in Section 12 is against alienation or dealing with the land by sale, transfer, sub-lease or other manner. This clearly is a prohibition against a transaction without consent being obtained prior to the transaction. It is a prohibition of the performance of a contract, not against the making of the contract as in section 6.

The High Court of Australia in George v. Greater Adelaide Land Development Company Ltd. reported in 43CLR 91 had before it a similar point. Section 23 of the Town Planning and Development Act 1920 of South Australia made it unlawful for any person to subdivide any land into allotments or to offer for sale or to sell or to convey, transfer or otherwise dispose of any existing allotment or parcel of land except in accordance with the provisions of the Act, and Section 44 imposed a penalty on any person acting in contravention of this provision. The Act in question and its Regulations required the lodging of subdivision plans with the appropriate authority before any of the otherwise prohibited acts took place. In that case the contract for the sale of certain allotments was entered into at a time when the provisions of the Act had not been complied with. The contract was expressed to be subject to the provisions of the Act having been complied with. Subsequently to the contract, the Act was complied with.

Isaacs J. on p. 101 said this:-

> "Murray C.J. thought that the words 'subject to' ..... the provisions of the Town Planning and Development Act 1920 being complied with saved the bargain, and on completion of all that the Act and Regulations under it require, the contract was binding and enforceable.
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> That depends on whether, before the Act is complied with, the law prohibits the making of the contract, or only the transfer of the land. In my opinion the effect of Sections 23 and 44 is to prohibit the making of the contract, either absolutely or conditionally. The purpose of the legislation is disclosed in Section 19 and extends to the promotion of public interests, convenience and safety. To this end traffic in land commencing with the offer to sell and continuing to the transfer and including all disposal is forbidden except in accordance with the provisions of the Act. Regulation 17 made in pursuance of Section 50 prescribes the duty of the owner who wishes, *inter alia*, to offer for sale or sell any land. That duty

> begins with the deposit of a plan, and includes an application for approval, and the Regulation read in connection with the Act itself connotes the obligation to await approval before even offering the land for sale. The attempted sale, having taken place before approval is invalid and the Appellant Defendant is entitled to succeed on the claim."

Starke J. on page 103 said this:-

> "The question therefore is whether a sale subject to the terms of the Act being complied with is in contravention of the Act. Murray C.J. in the Court below held that it was not, but consideration has led me to the conclusion that the decision cannot be supported. The principle is undoubted that a transaction expressly or impliedly forbidden by statute is unlawful. The Town and Planning and Development Act 1920 renders unlawful not only conveyances and transfers of allotments, but also the acts of offering for sale or selling of such allotments. Selling, in the case of land includes the making of agreements for its conveyance in consideration of the price in money; and this is so whether the agreement be absolute or conditional, for a conditional agreement for the sale of land is none the less a sale of land, and therefore a selling of it. Once this point is reached, the case becomes clear, for the Act prohibits the mere making of the agreement, and making the agreement 'subject to .the provisions' of the Act 'being complied with' cannot save it."

It will be remembered that in the present case a condition clause in the Agreement provides that the same is "conditional upon the consent of the Minister of Lands to the transfer of the property." On the basis of the authority just referred to such a condition may or may not be appropriate in the case of a Section 12 situation, but is not in my view appropriate to save the day in a Section 6 situation, since it is the making of the contract not the transfer which is prohibited.

It may also be noted that Section 88 referred to in Denning v. Edwardes requires in subsection (3) that "any instrument, insofar as it purports to effect any of the transactions referred to in subsection (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument." In the light of that provision it is not surprising that the Privy Council held that some kind of agreement must obviously be reached before the instrument effecting it can be presented to the Governor for his consent. In St John Shipping Corporation v. Joseph Rank Ltd., [1957] 1QB 267, Devlin J. at page 285 quotes with approval from Cope v. Rowlands (1836) 2 M&W 149 (per Parke, B):-

> "It is perfectly settled that where the contract which the Plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will

> lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such penalty implies a prohibition... And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statute means to prohibit the contract?"

Devlin J. went on to say:-

> "Now this language - and the same sort of language is used in all the cases -shows that the question always is whether the statute meant to prohibit the contract which is sued upon."

On the question of construction of such legislation in my view it is well established that decisions on more or less similar enactments cannot as a rule be regarded as giving more than analogies. In the case of Phalad v. Sukh Raj in the Fiji Court of Appeal (FCA Reps 78/471), Henry J.A. on page 5 cited what Lord Upjohn said in the Privy Council in Ogden Industries Ltd v. Lucas [1969] 1 All E.R. 121 at p 126 as follows:-

> "It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself. No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts, but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment."

Moreover it is a well established principle of construction that legislation is to be interpreted if possible so as to be effective. But in any event, reference to the construction of other legislation supposed to be *in pari materia* does not assist in a case such as the present because it comes into play only when there is an ambiguity. One only needs to refer to the well known passage in the Sussex Peerage Case (1844) 11 Clark & Finlelly 85; 8 ER 1034. Tindal C.J. on page 1057 in the latter report, reading the opinion of the Judges said:-

> "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambigous then no more can be necessary than to expound those words in their natural and ordinary sense. The words

> themselves alone do, in such case best declare the intention of the law giver."

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Reference has been made to the fact that the term 'deal' appears in Section 12 of the Native Land Trust Act. It does not however appear in Section 6 of the Land Sales Act in the relevant portion. There is in the Land Sales Act in Section 2 an extensive interpretation of the word 'dealing' and that interpretation embraces not only transactions of sale or purchase but includes an agreement to enter into any such transactions. However, the only reference in Sections 6 and 7 to 'dealings' is in the respective subsections (4) which as already seen provide that the Section shall not apply to dealings in native land, etc. Apart from that the term 'dealing' is used in the Act only in connection with the collection of charges and tax upon the dealings under the Act. The Land Sales Act was passed some 34 years after the enactment of the original Native Land Trust Legislation. There is a presumption that the Legislature was aware at that time of the contents of the earlier legislation. Had it been intended to incorporate a reference to dealings or any of the judicial interpretations of the Native Land Trust Act which it had received since its inception in 1940, in the Land Sales Act, it would have been done so expressly. In my view therefore, for all those reasons, the Defendants' case in so far as it is based upon applying the interpretation of Section 12 of the Native Land Trust Act must fail. The Minister's purported consent given on the 2nd May, 1986 can be of no effect. He derives his powers in the matter from Section 6 of the Act and those powers are to consent or refuse consent prior to the making of the contract. Any consent he purports to give after that is in my view *ultra vires* and of no effect.

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For the sake of completeness I should make mention of the Form of A pplication for the Minister's consent which has been exhibited to the Affidavit. The combined effect of Sections 16 and 2 of the Land Sales Act is that the Minister may approve the Form to be used to apply for his consent. The Form exhibited in this case is headed "Application for consent to a dealing (Sections 6 and 7 Land Sales Act Cap 137)." It contains thirteen questions or paragraphs. The questions are concerned with eliciting description of the property, encumbrances, improvements, details of the vendor and purchaser with particular reference to citizenship, previous history of the property, purchase price, purpose of the purchase and other information. Paragraph 12 reads as follows:-

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> "I hereby certify that the information set out at paragraphs I to 5 (and 10 if applicable) is correct that I have agreed to sell the above-named property and there is provision for the signature of the vendor and a witness and the date.

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And Section 13 reads as follows:-

> "I hereby certify that the information set out in paragraphs 6 to 9 (and 10 if applicable) is correct that I have agreed to purchase the above-named property" and there is provision for the purchase and

his witness to sign and for the date.

A This might on the face of it be taken as suggesting that some agreement is indeed appropriate and valid before application for consent is made to the Minister. However, I am of the view that the making of the agreement being absolutely prohibited without the prior consent of the Minister by the Act itself, that absolute prohibition cannot be set aside by the side wind of something contained in a Form approved by the Minister. The Minister is as much bound by the statute as B is anyone else. The statute must prevail. In my view that Form in its present state is a nullity and of no effect as being contrary to the Act, at least in paras 12 and 13. The Minister may wish to reconsider the design of such an application Form in the light of this judgment.

There remains the proposition that the Act would be unworkable if the Section were interpreted literally, on the basis that there must be some agreement reached C upon which the Minister's consent may be sought. I find myself unable to accept that argument. The consent is required prior to the making of the contract. What this envisages in my view - and I see no difficulty with it - is that if a non-resident minded to purchase a property in Fiji is made an offer by a potential vendor or estate agent he can then apply to the Minister for consent to enter into that transaction and upon such consent being received he may then sign the D contract. Or if a non-resident were looking for a property to purchase in Fiji and let this be known, upon receiving a reply or offer which he would be minded to accept, again he may apply to the Minister advising him of the necessary details and that he is minded to accept the offer if the consent is forthcoming. At that stage there would be no agreement. The whole purpose of the legislation is to ensure that no contract is made without first giving the Minister the opportunity E of permitting or prohibiting it and in the former case of imposing conditions upon it.

I note that in some of the cases referred to earlier herein, there is a proposition that the agreement which is to be subject to the Minister's consent may be regarded as preliminary at some stage or that there is some line to be drawn beyond which F it is regarded as effective and in the same light as a transaction. This may be appropriate in interpreting Section 12 of the Native Land Trust Act, but because of the view I have taken in this matter I do not find it necessary to consider that matter further.

For the reasons which I have endeavoured to state I hold that the purported G Agreement in this matter is unlawful and therefore of no effect and unenforceable. Costs reserved to the trial Judge or further order. Liberty to apply as to costs.

(Ruling in favour of the Defendants.)