

TREVOR ROBERT GALLAGHER and Anor v ALLAN CHARLES NEWHAM (CBV0003 of 2003S)

5 SUPREME COURT — CIVIL JURISDICTION

FATIAKI P, GAULT and MASON JJ

18, 21 May 2004

10 **Trusts — declaration of trust — whether declaration of trust constituted settlement of property — whether deed of trust valid — whether invalid settlement capable of validation — Exchange Control Act (Cap 211) ss 10, 11, 11(1), 20, 20(1), 20(2), 20(3), 31, 31(1), 31(3)**

15 The first Appellant, Trevor Robert Gallagher (A1) executed a deed of trust by which he declared a trust in favour of Allan Charles Newham (the Respondent) in respect of the 10,000 shares he held in the second Appellant (A2) company Nadi Contractors Ltd.

20 The Respondent sought a declaration in the High Court that the trust was valid and legal by way of originating summons. However, the Appellants opposed on two principal grounds which were: (a) the declaration of trust was unlawful and invalid because it was made without the consent of the Reserve Bank of Fiji acting as the delegate of the minister required under s 11 of the Exchange Control Act (Cap 211) (the Act); and (b) the introduction of issues of facts for which the originating summons procedure was not appropriate. The court determined that it was not necessary to go outside the deed which made no mention of any wider transaction and held there was no failure of consideration and since the Respondent was a non-resident of Fiji the deed did not effect a transfer of 25 the shares pursuant to s 11(1) of the Act. The court likewise granted an injunction restraining A1 and A2 from disposing of its assets or dissipating funds pending determination of the action.

30 On appeal, the Appellants' maintained that the declaration of trust was invalid and the argument resting on the Act was expanded to include a submission that there had been circumvention of s 10 which prohibited the issue of securities by the company to a non-resident without the minister's consent. The Court of Appeal focused on s 11 which was interpreted to prevent the transfer of the legal interest in the securities but not the equitable interests and discharged the injunction.

35 The Appellants applied for leave to appeal which was later granted. The Appellants argued that the trust was invalid because the declaration of trust constituted a settlement of property conferring an interest on a non-resident of Fiji and required the permission of the minister under s 31 which was not obtained.

40 **Held** — (1) The declaration of trust and the deed constituted a settlement under s 31 of the Act which required the permission of the minister. Without the permission, the settlement was invalid but capable of validation under s 20(2). It is for the minister or his delegate, the Reserve Bank of Fiji to determine whether to issue a certificate of validation of a settlement.

Cases referred to

45 *Multicon Engineering Pty Ltd v Federal Airports Corp* (1997) 47 NSWLR 631, cited.

Giuseppe Ruggiero v Alessandro Bianco [1998] FJCA 58, considered.

B. C. Patel and *C. B. Young* for the Appellants

A. H. Silvester and *B. Singh* for the Respondent

50 **Fatiaki P, Gault and Mason JJ.** Pursuant to leave granted by the Court of Appeal on 16 May 2003 this appeal is brought in respect of the judgment of that court delivered on 15 November 2002.

At the centre of the case is the issue of the validity of a deed of trust executed by the first Appellant Mr Gallagher by which he purported to declare a trust in favour of the Respondent Mr Newham in respect of 10,000 shares in the second Appellant company Nadi Contractors Ltd (the company). The deed states:

5 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:

- 10 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.
- 15 2. I will at your request attend all meetings of shareholders or otherwise which I shall be entitled to attend by statute of being the holder of the said share and will vote at every such meeting in such manner as you shall have previously directed in writing and in default of and subject to any such direction, at my discretion, and further I will if so required by you execute all proxies powers of attorney, or other documents which shall be necessary or proper to enable you to vote at any such meetings in my place.
- 20 3. You may at your absolute discretion at any time by registered deed or deeds do either or both of the following things, that is to say:
 - (a) Remove me as trustee of the said share with or without assigning any reason so doing.
 - 25 (b) Appoint a new or additional trustee or trustees of the said share.
- 30 4. I hereby nominate constitute and appoint you to be my lawful attorney for me and in my name and as and for me act to sell and/or transfer the said shares to any person, firm or company and to procure the terms of this instrument any or one or more of them to be observed and properly carried out into effect and for those purposes to sign execute and do all such documents, deed and things as may be reasonably requisite or necessary and I hereby undertake to ratify and confirm all that you may do or purport to do in exercise of the foregoing powers or any of them.

SCHEDULE

35 10,000 ordinary shares of \$1.00 fully paid in NADI CONTRACTORS LIMITED.

In granting leave to appeal, the Court of Appeal formulated as a question of significant public importance:

40 Was the Court of Appeal correct in holding the Deed of Trust dated 2 June 1990 was valid and legal as it did not require the Minister's consent under the Exchange Control Act, Cap 211.

Mr Newham commenced this proceeding in the High Court on 14 May 1999 by way of originating summons. He sought a declaration that the trust was valid and legal and certain consequential relief. The present Appellants opposed on two principal grounds. The first was that the declaration of trust was made without the consent of the Reserve Bank of Fiji (as the delegate of the minister) required under s 11 of the Exchange Control Act and therefore was unlawful and invalid. The alternative ground was that the declaration of trust was part of a wider transaction imposing obligations on Mr Newham which he had repudiated so that there was a failure of consideration for the declaration of trust. The second of these grounds introduced issues of fact for which the originating summons

procedure is not appropriate, but as the matter developed in the courts below questions of law were determinative and the wider dispute was left for separate proceedings.

5 In his judgment delivered on 5 May 2000, Madraiwiwi J determined that it was not necessary to go outside the deed which made no mention of any wider transaction and held there was no failure of consideration. With reference to s 11(1) of the Exchange Control Act, which prohibited the transfer of securities to non-residents without the minister's consent, he held that although Mr Newham was resident outside Fiji, the deed did not effect a transfer of the
10 shares. Relying on the decision of the Court of Appeal in *Giuseppe Ruggiero v Alessandro Bianco* [1998] FJCA 58 (*Ruggiero*), he construed the deed as constituting an undertaking to transfer the shares in the future which did not contravene s 11(1) because the required consent could be obtained for that transfer at the relevant time.

15 The judge granted an injunction restraining Mr Gallagher and the company from disposing of assets of the company or from dissipating its funds pending determination of the action.

On appeal to the Court of Appeal, counsel for Mr Gallagher and the company advanced substantially the same arguments contending that the declaration of
20 trust was invalid. However, the argument resting on the Exchange Control Act was expanded to include a submission that there had been circumvention also of s 10 which prohibited the issue of securities by the company to a non-resident without consent. There was no clear factual or jurisdictional foundation for that submission.

25 In its judgment, the Court of Appeal focussed on s 11. This was construed as preventing the transfer of the legal interest in securities but not equitable interests. After referring to the *Ruggiero* decision the court said:

30 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.

35 The court also rejected the argument directed to failure of consideration. The judgment states:

40 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
45 to establish that there were other terms in the overall agreement between the parties that have been breached.

In the light of its decision the Court of Appeal discharged the injunction.

50 The Appellants applied for leave to appeal to this court and sought to have certified as a question of significant public importance whether the Court of Appeal had correctly distinguished between legal and equitable interests when applying s 11. However, when supporting the application for leave to appeal, the

Appellants raised for the first time the contention that the declaration of trust contravened s 31 of the Act. It is convenient to set out ss 31(1), (3) and 20:

5 31(1) Except with the permission of the Minister, no person resident in Fiji shall settle any property, otherwise than by will, so as to confer an interest in the property on a person who, at the time of the settlement, is resident outside Fiji, or shall exercise, otherwise than by will, any power of appointment, whether created by will or otherwise, in favour of a person who, at the time of the exercise of the power is resident outside Fiji

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(3) Subsections (2) and (3) of section 20 shall apply in relation to a settlement or the exercise of a power of appointment prohibited by this section as they apply in relation to a transfer prohibited by this Act of a security.

15 20.(1) The title of any person to a security for which he has given value on a transfer thereof, and the title of all persons claiming through or under him, shall, notwithstanding that the transfer, or any previous transfer, or the issue of the security, was, by reason of the residence of any person concerned other than the first-mentioned person, prohibited by the provisions of this Act relating to the transfer or issue of securities, be valid, unless the first-mentioned person had notice of the facts by reason of which it was prohibited.

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 a 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.

25 (3) Nothing in this section shall affect the liability of any person to prosecution for any offence against this Act.

30 In the judgment granting leave the Court of Appeal reformulated the question to encompass the applicability of s 31. In this court that was at the forefront of the Appellants' case which contended, also for the first time, that, if s 31 applies, validation would not be possible under s 20.

35 The parties sought to present to this court a quite different case from that determined below. There are difficulties with new points being raised on appeal, particularly on a second appeal. These include matters of fairness to the opposing party in knowing the case to be met, and costs. There is also the important factor that the court is without the benefit of the views of the lower courts on the new points. Where only questions of law are involved, so long as the parties have the opportunity to present full argument, a new point may be allowed to avoid the costs and delay of further proceedings. But when it is clear that, had the new points been raised at the outset, further evidence might have been led, the new points will not be entertained. If authority is needed for these well-established propositions see *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645. These principles must be given even greater emphasis in originating summons proceedings.

45 The case for the Appellants in this court was that the declaration of trust constituted a settlement of property conferring an interest on a person resident outside Fiji and required ministerial permission under s 31. No such permission was obtained so that the trust is invalid. Whether that is so is the issue for which leave to appeal was granted.

50 In the argument in this court the Appellants wished to contend further, that the settlement is incapable of validation under s 20 because that section cannot apply to allow validation of a trust that was incompletely constituted. This trust, it was

said, was incompletely constituted because there was no trust property on the date it was executed. Two points were made. The first, was that at that date the shares were not owned by Mr Gallagher. The Appellants wanted to contend that Mr Gallagher did not acquire his shares in the company until *after* the date of the deed. The second point was that the shares were an unallocated portion of a larger parcel of shares and so could not be identified as having been appropriated to the trust — a fact assumed but not addressed in the evidence.

We are not prepared to enter upon an enquiry into whether the trust was properly constituted. That would raise questions not certified as of significant public importance. It would also involve factual issues not appropriate to be dealt with in originating summons proceedings and which are dependent upon evidence not before the court. In particular it would call for investigation of the circumstances in which shares in the company came to be acquired by Mr Gallagher (and Mrs Gallagher) from Romark Pty Ltd (Romark) a company in which, on Mr Gallagher's evidence, he and his wife held substantially all the shares though 50% were held for Mr Newham. It would be necessary also to consider the written confirmation, after the date of the deed of 2 June 1990 by Mr Gallagher that he would hold 50% of the shares in the company for Mr Newham.

In any event it is not apparent that these arguments could assist the Appellants because, if the trust is incompletely constituted (as they claim), then there has been no settlement to be invalidated by s 31. Yet there may very well remain a continuing obligation to allocate shares in accordance with an underlying agreement by which Mr Gallagher acquired the shares. The allocation could be made after obtaining the necessary consent, as in the *Ruggiero* case.

In this court the Appellants did not persist with the argument of failure of consideration for the deed of 2 June 1990 and we confine our decision to the issue of the validity of that document under the Exchange Control Act which the public interest plainly requires should be dealt with. We are satisfied it is appropriate also to determine the consequential discrete question of law, whether, on its face, the settlement is capable of validation under s 20.

We see the matter as straightforward. As the Appellants contend, the declaration by Mr Gallagher to hold 10,000 shares in the company on trust for Mr Newham constituted a settlement (or confirmation of a prior oral settlement) of property upon a non-resident. That is abundantly clear from the provisions of s 31(4)(a) and (b) which read:

4. For the purpose of this section—

- (a) any reference to settling property includes a reference to the making of any disposition, covenant, agreement or arrangement whereby the property becomes subject to a trust, or (in the case of a resettlement) to a different trust; and
- (b) a person shall be deemed to have an interest in property if he has any beneficial interest therein, whether present or future, and whether vested or contingent, or falls within a limited class of persons in whose favour a discretion or power in respect of the property is exerciseable; and ...

The only argument advanced for the Respondent against the application of s 31 (raised in written submissions but not pressed orally) was that there was no settlement within s 31 because Mr Newham held the equitable interest in the shares prior to their transfer from Romark to Mr Gallagher so that there was, by the deed dated 2 June 1990, a transfer of interest and not a settlement. That raises

questions of fact we are not equipped to answer, but in any event seems to rest upon a fallacious proposition that, as a shareholder in Romark, Mr Newham had an equitable interest in the assets (shares in the company) which Romark owned. But even if it were correct, it does not address the question of resettlement under
5 the section. Further, having argued throughout the lower court proceedings that s 11 did not apply to transfers of equitable interests, Mr Newham could not now argue consistently that s 31 is inapplicable because there was a transfer of an equitable interest to which s 11 applies.

10 We do not accept the argument for the Respondent (also raised in written submissions but not orally) that a certificate of validation under s 20(2) is unnecessary because the deed of trust is valid and enforceable by operation of s 20(1). First, by s 31(3), it is only subss (2) and (3) of s 20 that apply to settlements made without the permission of the minister. Second, even if
15 Mr Newham could be regarded as a “*purchaser for value*” within s 20(1) he plainly had notice of “*the facts by reason of which [the ‘transfer’] was prohibited*”. The material fact was of course his own non-residence.

We also cannot accept the Respondent’s argument that the deed should not be declared invalid for illegality because to so hold would be to allow Mr Gallagher
20 to benefit from his own illegal act in failing to obtain consent to the settlement. The Act is clear. By providing in s 31(3) for subsequent validation under s 20(2), it clearly was intended that the consequence of making a settlement without ministerial permission would be invalidity, but subject to validation. It is for the minister or his delegate, the Reserve Bank of Fiji to determine whether to issue
25 a certificate of validation of a settlement and “*any acts done before the issue of such certificate*”.

After it was made clear that he could not argue that the trust was incompletely constituted, Mr Patel accepted that the settlement effected by the declaration of trust would be capable of validation by the minister under s 20(2). That plainly
30 is the position.

For the reasons given, now that s 31 has been invoked, the declaration made in the High Court and upheld in the Court of Appeal cannot stand and is set aside. The declaration of trust and the deed dated 2 June 1990 constituted a settlement
35 within s 31 which required the permission of the minister. Without that, the settlement was invalid but capable of validation under s 20(2) and we allow the appeal and substitute a declaration to that effect.

Mr Silvester informed the court that the Respondent received a certificate of validation just the day before the hearing. Counsel for the Appellant had had no
40 time to consider its effect and we heard no submissions on it. However, consistent with this judgment, a proper certificate under s 20(2) would overcome the invalidity we have found.

Costs would normally follow the event, but since the Appellants have succeeded in part only on a point not previously advanced, the orders for costs
45 in favour of the Respondent in the courts below should stand and in this court the parties should bear their own costs.

Orders

- 50 (1) Appeal upheld in part.
- (2) Set aside declarations made by the Court of Appeal on 15 November 2002.

- (3) Declare that the declaration of deed of trust dated 2 June 1990 constituted a settlement within s 31 of the Exchange Control Act (Cap 211) which required the permission of the minister but which was capable of validation under s 20(2) of that Act.
- 5 (4) Otherwise orders (including orders for costs) made in the Court of Appeal are to stand.
- (5) Each party to bear own costs in the Supreme Court.

Appeal allowed in part.

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