IN THE SUPREME COURT OF FIJI

COURT OF REVIEW

No.10 & 16 of 1985

BETWEEN:

REDDY'S ENTERPRISES LTD - Appellant -

AND THE COMMISSIONER OF INLAND REVENUE - Respondent -

AND

BETWEEN ANTONY WILLIAM WOOD - Appellant -

AND THE COMMISSIONER OF INLAND REVENUE - Respondent -

(CONSOLIDATED APPEALS)

Mr. B. C. Patel for the first appellant.

Mr. F. G. Keil for the second appellant.

Mr. M. J. Scott for the respondent.

JUDGMENT

These two appeals were consolidated and arise from the sale of shares in a company called Woodlands Ltd of which Reddy's Enterprises Ltd ( who I will call Reddy) and Antony William Wood (who I will refer to as Wood) were at all material times the only shareholders and held equal shares.

The story begins in November 1970 when Wood who was at all material times a civil engineer and planning consultant practising in Suva and throughout Fiji, bought from Main Weston Ltd, a company of which a man named Wallath was the mainspring, a sublease of land known as Vulani Islands, situated between Nadi and Lautoka, and containing 56 acres 1 rood 12 perches. The price was $25,000. The sublease was registered as No. 114104. At the same time, because the sublease had no right of renewal, he entered into negotiations with Bhan Pratap Singh, father's name Seombar Singh for the purchase of the head lease which was for 125 acres and for that he paid $20,000. The purpose which Wood said he had in mind was the development of the land into a tourist hotel. It had a beach frontage and was convenient to Nadi Airport, although it was not subject to the noise of aeroplanes at Nadi Airport. However, although Wood was a civil engineer, he had no expertise in building hotels and he therefore sought to interest Reddy in the project. With Mr. Y. P. Reddy, Reddy's managing director, he walked over the land and Y P Reddy was so impressed with its potential that Reddy joined with Wood to form a company, Woodlands Ltd, to develop the project. Reddy is a company which owns and operates several hotels in the Western area of Viti Levu, and had not long before built the Tanoa Hotel on the Nadi side of the Airport, and was reaping a satisfactory profit therefrom. In April 1971 Wood completed the negotiations with Bhan Pratap Singh and took a transfer of his lease and at once transferred it to Woodlands Ltd. It is true that this was a few days before the Company was registered, but nothing turns upon that. At the same time Wood transferred the sublease which he had bought to Woodlands Ltd. He told the Court that he made no profit on the transfers of the land to Woodlands Ltd. The nominal capital of the company was $50,000 in $1 shares, and at all times the paid up capital was $37,000 held as to $18,500 by each of the appellants.

.../3

Reddy and Wood agreed that Wood was to be left to obtain the necessary consents to enable the hotel building to go ahead. No development in fact took place and in 1983 the land was sold for $225,000 the sale being effected by the transfer of the shares in Woodlands Ltd to the purchasers. Of this sum after payment of expenses Reddy received $79,804 and Wood $86,065. The Commissioner respondent raised income tax assessments against the appellants in respect of these sums. Objections were made and disallowed, and appeals followed. Reddy's appeal was scheduled to be heard in November last, but when it became apparent that the same evidence would be tendered in each appeal, the Court decided that both appeals should be heard together. They were, by consent, later consolidated. Wood came specially from New Zealand to give evidence on his appeal and also on Reddy's appeal, and by arrangement between counsel his appeal was heard first. The Court was told that the only evidence in each appeal was that of Wood and Mr Y P Reddy, the managing director of Reddy. The Commissioner called Mr Pita Nacuva, Director of Town & Country Planning.

In tax appeals the onus of proof is upon the appellant. The Provisions of Section 71(2) are very direct and very simple.

"On the hearing and determination of all objections to assessments under this Act the onus of proof shall be upon the taxpayer".

The proof necessary to discharge the onus is upon the balance of probabilities. Fullager J in the High Court of Australia, in Pascoe v Federal Commissioner of Taxation (1956) 6 A.I.T.R. 315, 323, in a situation somewhat similar to the present, said,

.../4

> "The question, therefore, which I have to ask myself is: Am I convinced - not beyond reasonable doubt but as a matter of belief - that the partners, in making the acquisition, were not actuated by a dominant purpose of profit making by sale?"

In the present case Wood and Reddy were, in effect, partners in Woodlands Ltd. The Australian statute talks of profit - making by sale. The Fiji statute says that taxpayer becomes liable to tax "if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it....". I do not think that for the purpose of this case there is any essential difference between the Fiji statute and the Australian statute. It is clear also from judgment of the Fiji Court of Appeal in George Alexander Thompson v. C.I.R. : Civil Appeal No. 8 of 1979, that the dominant purpose is to be looked for in Fiji as in New Zealand and Australia.

There is, however, one further matter to be noticed when assessing the evidence of the appellants, particularly in a case like the present, where the evidence of the appellants is the only sworn evidence before the Court. In Pascoe's case, to which I have earlier referred, Fullager J observed at p.320 of this report.

> "where a person's purpose or object or other state of mind in relation to a given transaction is in issue, the statements of that person in the witness box provide, in a sense, the "best" evidence, but for obvious reasons, they must, as Cussen J. observed in Cox v Smail (1912) V.L.R. 274 283 "be tested most closely, and received with the greatest caution".

.../5

It is against this bacdground that the Court has to consider the evidence of Wood and Mr Y P Reddy, for the latter, as the Managing Director of Reddy, is the person who controlled that Company and his state of mind must be accounted to be the state of mind of Reddy (see Vesco Supermarkets v. Nattrass (1971) 2 WLR 1166, AC 153 : Federal Commissioner of Taxation v. Whitfords Beach (1982) 12 ATR 692, 701). In considering this evidence I have to bear in mind that counsel for the appellants told the Court that each appellant would be giving evidence in support of the other, and that therefore both members of Woodlands Ltd were giving evidence. Wood gave his evidence first and I shall accordingly treat first of his evidence.

Wood's evidence was that, because he was a civil engineer, he was left to get the necessary consents preliminary to building the hotel. He said that three things were necessary, first, to get the approval of the Director of Lands to the reclamation necessary for providing access to the hotel site secondly, to get the area re-zoned for commercial purposes - it was at that time agricultural land - and thirdly, to get a new ninety nine year lease, since the existing lease, only had 42 years to run from 1971. I must say that the need for converting a 42 year lease into a 99 year lease immediately escapes me. So the first thing Wood did was to get Nevile Burren of Burren & Keen, who was at that time practising in Suva as a town planning consultant, to prepare him a plan of the proposed development. Burren prepared a plan by June 1971 but unfortunately it was not at all the type of plan the appellants wanted. It provided for about 375 acres of reclamation for two hotels and for some residential sites. I can not understand that the reclamation of 375 acres at Vulani would be quite impracticable from an enviromental point of view. Burren estimated that the cost of reclamation would be $1,300,000 and the cost of providing roads and services $2,500,000. In his evidence Wood said after he received Burren's plan, "then I thought I could prepare a better plan". But he did not.

.../6

What he did do was to hold back Burren's plan, but to submit his brief or legend. He went with Mr Y P Reddy who was the Managing Director of Woodlands Ltd to see Mr R H Regnault the Director of Lands. Neither Wood nor Y P Reddy told the Court what transpired at that meeting, but on 23rd August 1971 Wood sent in Burren's brief as his company's submission without comment. On 7th September 1971 the Director of Lands wrote stating that Wood's brief gave "a clear picture of his client's intention", his client being Woodlands Ltd, but he wanted more information on the method of financing, on what market it was proposed to sell the house sites, and whether any proposals were being made for housing local people or employees. I can only say that unless the appellants' conference with the Director of Lands gave an entirely different picture from that conveyed by their sworn evidence the proposals conveyed by Burren's brief are entirely unclear. The Director's request for elucidation also indicates a picture quite different from appellants sworn evidence. Wood answered the Director's query by stating that there were to be four stages of development. He said that Reddy could finance the first stage of the project, that house sites would be sold mainly on the local market with some overseas participation - whatever that may mean - and that housing would be provided for local people similar to that provided by the Housing Authority and at similar rents. Here again, the appellant's sworn evidence, unless I have completely misunderstood it, envisaged a fairly small scale development to cost some where about $500,000, of which $300,000 would be spent on building and $200,000 on providing access and reclamation. A further letter was addressed to the Director of Lands on 21st December 1971 stating that the cost of the first stage would be $500,000 and that sum would be raised by Woodlands Ltd with local participation and overseas participation. This again is at variance with Mr Y P Reddy's evidence which, as I understand it, indicated that he could finance $500,000 through his company, just as he did in fact do when Reddy came to buy the Sky Lodge Hotel in 1973.

.../7

If the Director of Lands was told that Burren's plan was too grandiose for the appellants and at the same time given Burren's brief to work on it is perhaps of little wonder that he took six months to think about it, and probably to leave a decision to the Director of Town and Country Planning. That is where the project stopped. That was a full year before Wood became aware of the Belt-Collins report. He apparently had approached the Town and Country Planning Department, for a letter in October to Roger Mirams, who was interested so Wood said, in some film production, indicates that there were then no restrictions on development at Vulani although there might have been difficulties in access and water supply. Notwithstanding these verbal assurances Wood made no attempt to seek from the Town Planning Development the approval in principle that the Director of Lands asked him for. The only explanation he gave was pressure of his own professional work, and that, as Mr. Scott submitted, seems a very lame explanation, unsupported as it is by evidence.

The Belt-Collins report came out in March 1973 and Wood said that he came to know of it about July. It contained a passage at page 102 which bears upon this appeal and I quote it in full. The word "Vulagi" in the report is accepted to be a misprint for Vulani. It reads:

> "The Vulagi area, the large area of mangrove located immediately north of Nasoso, is not shown for any tourism development because of the very limited amount of dry land, the lack of accessibility and unknown effects of filling mangrove in the vicinity".

Wood said that after this report he did not approach the Town Planning Department because he feared a rebuff which, if the report were translated in to action, would have been quite final. Mr. Pita Nacuva, in his evidence,

said that although his department would have liked to see the report adopted, the government did not do so, but it was used as a guideline. However he did say that in its early years the report would probably have inhibited development in the Vulani Area although he insisted that there was no rigid prohibition of development. Wood therefore did nothing. He said that Reddy agreed that Woodlands could do nothing further. Wood said that in 1972 he had one of his surveyors take levels throughout the site and do a soil survey. But quite apart from the Belt-Collins report, the oil crisis in 1974 produced a severe downturn in the number of visitors to Fiji, and a consequent depression in the tourist industry. It was not until approximately 1978 that the position began to improve. On 25 June 1976 Wood wrote to Gusti Heep of the Architects Pacific Design Partnership, shortly referred to as APDP, offering him part of Vulani. This was for the Fiji Cultural Centre, in which it would seem, Ratu Josua Toganivalu, a Cabinet Minister was interested. The matter apparently did not progress, for Wood wrote to Mr. W. J. Clark, MP, re-iterating the offer on 6 July 1977. Clark replied on 25 October, as Chairman of the Fiji Cultural Centre Board of Governors, asking for 30 acres of dry land on Nadi Bay foreshore, and intimating that the Centre proposed to ask for Government assistance in roading and access. By August 1977 the appellants were prepared to give the Cultural Centre an option to buy the whole of the land. Wood did not explain why the appellants were prepared to relinquish the land. The price was to be $165,000 although the Court was given no indication of how and why that price was fixed. The option is dated 20th September 1978 and was to be exercised by 31st October 1978. The Cultural Centre exercised the option, but failed to complete. Negotiations were reopened almost immediately for on 21st November 1978 Wood wrote to Bhupendra Patel, who represented Reddy in this appeal referring to a meeting the previous day between himself, Y P Reddy, Kapadia (appellant's accountant), Patel ( their solicitor) and Clark, Sharma probably Vivekenand Sharma Singh probably C D Singh, the Cultrual Centre's solicitor).

This provided for amendment of the agreement which had broken down, and reserved to Woodlands a 25 acre block consisting of 14 acres of lease and 11 acres of reclaimed land, to be leased back after the sale of the whole area to the Cultural Centre for $146,520 at $1,320 an acre for 111 acres. The Cultural Centre were to form and dedicate a legal road access from the Queen's Road to the hotel site, and were also to provide a water connection and a sanitary sewerage connection and were to obtain a reclamation licence for 11 acres. Unfortunately the Cultural Centre by March 1979 had rejected this arrangement, but made a counter offer to go back to the original agreement, but saying nothing about how or when the money would be paid. Discussions went on through 1979 and 1980, and by July 1980 it was agreed that Woodlands would retain 56 acres, 1 rood, 12 perches comprised in sub-lease 114104 and the balance was to be transferred to the Cultural Centre for a nominal consideration. The Cultural Centre were to provide access and road building, and were to ask the Government for assistance on these matters. Discussion still went on through July and August, and on 17 September 1980 APDP submitted a plan and a brief to the Director of Town and Country Planning. His reply on 28 November was not at all enthusiastic. Clark Wood and Heep met Steve Wood of the Director's Office and submitted a further brief, and in response the department on 10th January 1981 indicated that a small scale single-storey type of hotel might be acceptable. Then a planning application, on behalf of both Woodlands and the Cultural Centre was prepared by APDP and submitted to the Department. The Court was not told what the result was, save that Wood, with Reddy's approval entered into negotiations with Western Real Eestate Co of Nadi in November 1982, and by July 1983 had agreed to sell the shares in Woodlands Ltd for $225,000. That meant the land, as well, for the land was Woodlands only asset.

Reddy's evidence supported Wood. I accept the evidence of Y P Reddy that he could have built the hotel in 1971 for $300,000 for he had but recently built the Tanoa Hotel near Nadi Airport. I prefer his evidence here, in view of his experience, to the figure of $18,500 per room.

given by the Belt-Collins report at page 47. His financial expertise is indicated by the fact that he was able to finance the purchase of the Sky Lodge Hotel in 1973, partly from Reddy's own resources and partly by a bank loan. Mr Y P Reddy's evidence impressed me as being truthful and I do not accept Mr Scott's criticism of it by comparing it with his evidence on his wife's behalf in 1972. The real difficulty is with Wood, and the question which I have to answer is whether his backing and filling between 1971 and 1973 indicated that his real purpose when he bought the land in 1970 and 1971 was either an intention to sell as soon as reasonably possible at a profit or an intention to let matters ride and sell at a convenient moment. I have finally come to the conclusion that the appellants bought the land and founded the company with the dominant purpose of building a hotel. Any intention to sell did not come until after the Belt-Collins report. The question still arises as to why he dallied with Burren's plan after he knew it was unsuitable. In the absence of some admission from Wood himself I can reach no firm conclusion, although I think that the likely cost was getting beyond his resources. He said that the deposit he paid Main Weston Ltd was a significant sum to him. The building of a hotel was the purpose of his interesting Reddy, and he stuck to that purpose until 1981, even to the extent of transferring the greater part of the land to the Cultural Centre for a nominal sum - perhaps not so nominal when it is borne in mind that the Cultural Centre were to make a road and provide access, but nothing like half of $165,000. I do not regard clause one of Woodlands memorandum of association as militating against the conclusion to which I have come, for it is so comprehensive that it might very well include the development the appellants had in mind and which began to undertake.

The Commissioner's case is that the appellants are caught by both limbs of proviso (a) to Section 11 of the Income Tax Act. I have said enough to indicate that in my view they have discharged the burden of shewing that they acquired the property - either the land or the shares - for the purpose of selling or disposing of the ownership of them.

I have now to consider whether they were carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit. Here again, the burden of proof lies upon the appellants. Mr. Scott submitted that the scheme here is the incorporation of the company, the transfer of the land to the company, and the share promptly re-sold, the value of the shares being tantamount to the value of the land, and that all was in the nature of a business deal, and he submitted that what was done was a programme or a plan of action and he referred to the judgment of Stephen J in Steinberg v FCT (1974) 5 ATR 565, 590. I think, perhaps I could reject Mr. Scott's submission in limine, because there was no sale of Woodlands' shares until 1983. They were allocated to the appellants at the outset save that Wood took over his wife's shares, but not, so far as I am aware, for any substantial consideration. However, the most authoritative statement in Fiji as to a scheme or undertaking entered into or devised for the purpose of making a profit must be accounted to be McClelland v FCT (1970) 120 CLR 487, AITR : (1971) 1 WLR 19: a Privy Council decision on appeal from the High Court of Australia in which their Lordships, after pointing out that all schemes to produce a profit could be caught by the section, liberally construed, held that what was required was something in the nature of a business deal. Mr. Scott submits that McClelland's case is not in point. However, I am quite unable to see in the appellant's sale of their shares a business deal. It would seem to me much more likely the simple realisation of an asset. It is true that the appellants specified that they wanted a price of $2000 an acre, but eventually agreed to less, namely $225,000 for the whole area which works out at $1800 an acre. It is true also that this price exceeds the price of $1320 an acre discussed with the Cultural Centre in 1978. I find some difficulty in ascertaining what is meant by a business deal, but I would not have thought that the appellants sale came within any definition of that term. Their Lordships in McClelland's case equated it with an 'adventure in the nature of trade', an expression well known to English and Scottish income tax law. In Commissioners of Inland Revenue v Reinhold, a Scottish case (1953) 34 T.C. 389 the taxpayer

had bought four houses, admittedly with the intention of selling them, and instructed his agent to sell them as and when occasion offered. They were sold at a profit. However this was held not to be an adventure in the nature of trade. But I should say that Lord Keith considered the facts equivocal which might well have meant in Fiji that appellants would have been unable to discharge the burden of proof resting upon them, quite apart from the taxpayer's admission, which would bring him within the first part of section (a) of the proviso to section 11. Lord Keith considered that for the transaction to be in the nature of trade it had to be a dealing in commodities, and at page 396 quoted a number of examples. I expect dealings in land might fall into the same category. I cannot see that this is a dealing in land and I must hold against Mr. Scott also on this point. The Commissioner will therefore fail in both appeals, and they will be allowed. Both appellants will be entitled to their costs, unless application is made to the Court and opposing parties within twenty one days.

K.A. Grant

COURT OF REVIEW

21st July 1986

Solicitors : Stuart Reddy & Co., Lautoka: Mitchell Keil & Associates.

Suva: Solicitor to the Inland Revenue