

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

CIVIL APPEAL NO: ABU/0054, 63 & 68/1998S

[High Court Civil Action No: HBC0073/1992]

[High Court Civil Action No: HBC0141/97L]

BETWEEN:

MOHAMMED AKHTAR  
HAROON KHAN  
MURRAY MERCHANT PACIFIC FINANCE  
AND INVESTMENTS LIMITED

-Appellants-

AND:

JENNYNE GONZALEZ

-Respondent-

AND BETWEEN:

JENNYNE GONZALEZ

-Appellant-

AND

MOHAMMED AKHTAR  
HAROON KHAN  
MURRAY MERCHANT PACIFIC FINANCE  
AND INVESTMENTS LIMITED

-Respondents-

Coram:

Hon. Justice Ian Sheppard, Presiding Judge  
Hon. Justice Sir Rodney Gallen, Justice of Appeal  
Hon. Justice Robert Smellie, Justice of Appeal

Hearing:

Friday 24<sup>th</sup> August 2002, Suva  
Saturday 25<sup>th</sup> August 2002, Suva

Counsel:

Mr. G. P. Shankar for the 1<sup>st</sup> Appellant  
Mr. M. Maurice & S. D. Sahu Khan for the 2<sup>nd</sup> Appellant  
Mr. M. Raza for the 3<sup>rd</sup> Appellant  
Mr. B. C. Patel & C. B. Young for the Respondent

Date of Judgement: Friday 30<sup>th</sup> August, 2002

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### JUDGMENT OF SMELLIE JA

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1. I have seen the judgment in draft of my brethren Sheppard and Gallen JJA and I agree with the conclusions they reach. I also will refer to the parties as Plaintiff and Defendants rather than Appellants and Respondent.
2. I have elected to write this short concurring judgment because for me the issue on both the 3<sup>rd</sup> defendant's appeal and plaintiff's cross-appeal has crystallized into a simple and compelling conclusion.
3. The factual background is set out in the lead judgment and need not be rehearsed again here.
4. The first and fundamental issue in the case is whether the Plaintiff in fact ever had an enforceable contract for the sale of the twelve acres of land in the sea-front title.
5. I have reached the conclusion she did not. My conclusion does not rest solely on the resolution of the conflicting views of Palmer J. in Hunter -v- Adgar (unreported 923/96 judgment 5/9/89) and the trial judge in this case as to the correct interpretation of section 6 of the Land Sales Act Cap 137(LSA).

Indeed whether a contract entered into before such consent is obtained is illegal, unenforceable, void or voidable is a question which does not require to be answered for the resolution of issues between the 3<sup>rd</sup> defendant and the plaintiff.

6. The relevant portions of section 6 of the LSA are as follows:

***6(1) "No non-resident ... shall without the prior consent in writing of the Minister ... make any contract to purchase ... any land.***

***(2) The Minister ... may specify terms ... upon which such consent is conditional"***

7. In this case the Minister's consent (albeit obtained some 5 years after the contract was entered into) is contained on page 608 of the record (reverse side) which is the application made pursuant to Section 6 of the LSA. His consent is recorded as follows:

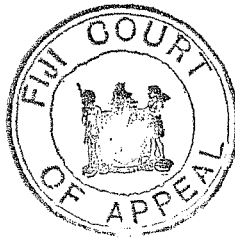
***"I hereby approve the transaction subject to:***

***The vendor to obtain clearance from the Commissioner of Inland Revenue, who will ensure the necessary clearance is also received from the Governor of the Reserve Bank.***

***6.10.90 Minister of Lands and Mineral Resources'***

8. This document is so vital to a resolution of the disputes between the 3<sup>rd</sup> defendant and the plaintiff that it is attached as a schedule to this judgment.
9. No evidence was called at trial to show that the clearances from the Commissioner of Inland Revenue and The Reserve Bank were ever obtained. Furthermore there was no application on the appeal for leave to adduce further evidence in that regard. So the consent remains to this day conditional. The consequence of that is that the Plaintiff has never been in a position to enforce the contract and therefore has not now, and never has had, a registerable interest that could be defeated by fraud under the provision of the Land Transfer Act Cap 131(LTA).
10. Once that is appreciated it becomes immediately obvious that on the claim pleaded and argued by the Plaintiff both at trial and on appeal there is no foundation upon which either specific performance or damages in the alternative can be justified as against the 3<sup>rd</sup> defendant.
11. That conclusion also renders it unnecessary to decide whether the scheme devised by the solicitors for the defendants was, as the judge below held a "web of deceit", or as argued by the Plaintiff on appeal, one not necessarily involving moral turpitude but nonetheless, viewed objectively, fraudulent because it accomplished its objective. On either view the objective was to

defeat the Plaintiff's registerable interest. Both are flawed because in the absence of an unconditional consent there was no interest to defeat.



A handwritten signature in cursive script, reading "Robert Smellie".

.....  
Hon. Justice Robert Smellie  
Justice of Appeal

Solicitors:

Messers. G.P. Shankar & Company, Ba for the 1<sup>st</sup> Appellant  
Messers. Sahu Khan & Sahu Khan, Ba for the 2<sup>nd</sup> Appellant  
Messers. M. Raza & Associates, Suva for the 3<sup>rd</sup> Appellant  
Messers. Young & Associates, Lautoka for the Respondent

SCHEDULE

I hereby approve the transaction subject to:

The Vendor to obtain clearance from the Commissioner of Inland Revenue, who will ensure that necessary clearance is also received from the Governor of the Reserve Bank.

Date.....16/10/90.....

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MINISTER FOR LANDS & MINERAL RESOURCES

"IMPORTANT NOTICE"


My consent to this dealing is being given on the understanding that the Purchaser and all those who may reside on this property shall respect and comply with the Laws of Fiji, more particularly in relation to the following:-

- (a) the acceptance of Fiji's sovereignty and jurisdiction over the property;
- (b) the right of public access to all parts of the foreshore, including beaches up to the high-water mark;
- (c) the laws and practices on Fijian customary fishing rights in the surrounding foreshore areas; and
- (d) the right of access to public officials in the performance of statutory duties and functions.

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MINISTER FOR LANDS & MINERAL RESOURCES

Date.....16/10/90.....

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SMELLIE J.A.