PORT DENARAU MARINA LTD v TOKOMARU LTD (ABU0026U of 2005S)

COURT OF APPEAL — CIVIL JURISDICTION

EICHELBAUM, PENLINGTON and SCOTT JJA

1 November, 6 December 2006

Contract — agreements — whether agreement void ab initio for illegality — whether Respondent entitled to recover possession — High Court Rules O 33 r 3 — Land Sales Act (Cap 137) 1974 s 6(1).

Real property — Torrens system — indefeasibility — Land Transfer Act 1971 ss 3, 42.

Statutes — interpretation — Land Sales Act (Cap 137) 1974 prevailed over Land Transfer Act 1971.

The Respondent and a trustee for the Appellant entered into an agreement for the sale and purchase of a marina business on Denarau Island and associated assets as a going concern. The Respondent, as the prospective lessee from the Crown in respect of two parcels of land, was to sublease the areas to the Appellant. The assets to be sold included the subleases. Both parties were non-residents and s 6(1) of the Land Sales Act (LS Act) stated that no non-resident shall make any contract to take any land on lease, without the prior consent of the minister responsible for land matters. The Respondent commenced proceedings in the High Court and the issues were whether: (1) the sale agreement was void ab initio for illegality pursuant to s 6 of the LS Act; (2) the Respondent was entitled to recover possession; and (3) the registration of the subleases conferred indefeasible title on the Appellant even if the agreement was regarded as illegal or void. The High Court affirmed the first two issues. The Appellant appealed the High Court's decision.

Held — (1) It was concluded that the contract was distinguishable from those in issue in *Hunter v Apgar*, *Kikuo Sakashita v Concave Investment Ltd* and *Jennyne Gonzalez v Mohammed Akhtar*. It was sufficiently plain that the obligation to grant the subleases did not arise unless and until satisfaction of the condition that the Minister of Lands consented to the grant. The minister had the opportunity to consider the proposed subleasing "right at the outset". The agreement did not infringe s 6(1) of the LS Act and question 1 should be answered in the negative.

(2) Where an agreement breached s 6(1) of the LS Act, to leave a purchaser or lessee in the Appellant's position in possession, thus circumventing the prohibition, would be contrary to the spirit and purpose of the section. Cumulatively, these considerations have led the court to conclude that s 6(1) must be construed as if it provided that agreements in breach were ineffective to pass any interest.

(3) The LS Act was a subsequent legislation. One pertinent general principle of statutory interpretation was that an earlier statute may be overridden by a later statute. Another was that general legislation may be regarded as overridden by special legislation. In this case, both point in favour of the LS Act prevailing. Neither principle, however, was decisive nor was the court's conclusion based on an interpretative approach. As the High Court of New Zealand said in *Housing Corporation of New Zealand v Maori Trustee*, the question that remained was one of interpretation by way of reconciliation of the two statutes. On this basis, there was no doubt the Land Sales Act should prevail. Clearly, based on the policy of the LS Act, the legislative intent was that it should prevail; and in relation to the transactions it covers, the subsection should be regarded as amending the indefeasibility provisions by necessary implication.

Appeal allowed.

Cases referred to

Bevin v Smith [1994] 3 NZLR 648; *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662; *Joe v Young* [1964] NZLR 24; *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530; (1988) 7 NZAR 229; *Singh v Sardara Ali* [1960] AC 167; [1960] 1 All ER 269; *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; [1940] ALR 1, cited.

Miles v Watson [1953] NZLR 154, considered.

Hunter v Apgar [1989] 35 FLR 180; *Jennyne Gonzalez v Mohammed Akhtar* [2004] FJSC 2; *Kikuo Sakashita v Concave Investment Ltd* [1999] 45 FLR 13, distinguished.

Frazer v Walker [1967] 1 AC 569; [1967] NZLR 1069; [1967] 1 All ER 649, followed.

J. S. Kos and *N. Barnes* for the Appellant

A. M. Daubney SC and *W. W. Clarke* for the Respondent

Eichelbaum, Penlington and Scott JJA.

Background

[1] In 1999, the Respondent (Tokomaru Ltd) and a trustee for the Appellant, Port Denarau Marina Ltd (PDML) entered into an agreement for the sale and purchase of a marina business on Denarau Island, and associated assets, as a going concern. Pursuant to the agreement, Tokomaru, as the prospective lessee from the Crown in respect of two parcels of land, was to sublease those areas to PDML; by definition, the assets to be sold included the subleases. Both parties were non-residents, and s 6(1) of the Land Sales Act states that no non-resident shall make any contract to take any land on lease, without the prior consent of the minister responsible for land matters. In proceedings commenced by Tokomaru in 2004, the High Court directed under O 33 r 3 that the following questions were to be decided as preliminary points:

(a) Whether the sale agreement dated 8 September 1999 made between [Tokomaru] as vendor and [PDML] as purchaser was and is void ab initio for illegality pursuant to s 6 of the Land Sales Act.

(b) In the event that it is void ab initio for illegality, is [Tokomaru] thereby entitled to recover possession?

PDML appeals against the High Court's affirmative answers to both questions.

[2] Section 6(1) provides:

> 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.

[3] The Act provides significant penalties for wilful breaches: a fine of $1000 or of an amount equal to one-quarter of the purchase price or total or partial forfeiture of any bond required by the act or by any order made under the act, whichever is the greater; or imprisonment for up to 5 years, or both fine or forfeiture and imprisonment.

[4] Although, as will appear, the agreement envisaged that all necessary consents would be obtained, it is common ground the minister did not give the consent s 6(1) requires. Since the issues are confined to the construction of the agreement and the legal consequences flowing from that, we are not concerned to go into how or why that happened. We underline the first question relates to the legality of the agreement. The subleases themselves, having been executed without the minister's prior consent, breached s 6(1); but Tokomaru's challenge is to the agreement not the subleases.

[5] The agreement is an elaborate document running to 38 pages with numerous schedules in addition. Following detailed definitions of terms, the agreement provided for payment in three stages: a payment on account of the deposit on execution, the balance of the deposit (which was 10% of the purchase price) upon satisfactory due diligence, and the balance on completion, which was to take place 10 days after satisfaction of the conditions, or such other date as may be agreed. The conditions were defined as the conditions precedent referred to in clause 4.1. It is sufficient to quote the following:

> The purchaser and the Vendor are only obliged to proceed to Completion if the following conditions are satisfied or waived:
>
> (a) all Authorisations necessary for:
>
> (i) the parties to sign and complete this Agreement; and
>
> (ii) the Purchaser to own, operate and conduct the Business and enter into the Sub-Leases as Sub-Lessee.

[6] Although there is no explicit reference to the Land Sales Act the definition of "Authorisation", read in conjunction with the definition of "Authority", is sufficient to encompass the ministerial consent required by s 6(1). Clause 4.2 provided that the parties must each use reasonable endeavours to satisfy the conditions, and each must promptly notify the other on becoming aware that a condition was satisfied, or became incapable of being satisfied. Under clause 4.2(c) the purchaser was entitled to terminate the agreement if a condition which had not been waived was not satisfied within a specified time.

[7] In relation to leases, clause 10.1 provided:

> As soon as practicable after execution of this Agreement, the Vendor shall:
>
> (a) use its best endeavours to obtain all Authorisation to enter into the Leases and the Marina Channel Licence;
>
> (b) use its best endeavours to enter into and validly execute the Leases and the Marina Channel Licence with the Crown;
>
> (c) upon the valid execution of the Leases and Marina Channel Licence by the Crown and the obtaining of all necessary Authorisations, to use its best endeavours to attend to registration of the Leases and if possible the Marina Channel Licence, with the Titles Office.

[8] Then clause 10.2, relating to subleases, is important. It read:

> The Vendor shall:
>
> (a) prior to or immediately upon registration of the Leases with the Titles Office submit the Sub-Leases to the Crown and any other relevant Authority for approval and all necessary Authorisations without conditions or upon terms and conditions satisfactory to the Vendor and the Purchaser;
>
> (b) upon receipt of approval and all necessary Authorisations referred to in Clause 10.2(a) to forward to the Purchaser the Sub-Leases in triplicate for execution by the Purchaser and the Purchaser's Guarantors and a copy of the

> said approvals or Authorisations and the Purchaser shall:
>
> (i) validly execute and cause the Purchaser's Guarantors to validly execute and then stamp the Sub-Leases within 14 days of receipt of the Sub-Leases from the Vendor; and
>
> (ii) return all copies of the validly executed and stamped Sub-Leases and Sub-Licence to the Vendor immediately they are stamped and executed …

[9] As previously noted, the term "Authorisations" includes the Minister of Lands' consent.

[10] In clause 15, each party gave a number of warranties. In relation to the subleases however clause 10.2 provided as follows:

> The Vendor gives no warranty to the Purchaser that the Sub-Leases will be approved by the Crown or any other Authority or that the Sub-Leases will be approved on terms and conditions which are satisfactory to the Vendor and the purchaser.

[11] As the judge recorded, there are no facts in dispute. The parties effected completion of the sale agreement, and entered into the subleases; and PDML went into occupation of the land described in the subleases. In 2004 Tokomaru issued originating summons proceedings seeking a declaration that the agreement was void, and an order for possession of the land.

Question (a)

[12] In brief, the Appellant's case, as put by Mr Kos, is that the contractual arrangements involved two stages: first, a contract to obtain the minister's consent; second, on such consent being given, to enter into the subleases.

[13] Mr Daubney SC, counsel for the Respondent did not dispute that in principle, it may be possible to draw up a two-stage contract of the kind envisaged by the Appellant, without infringing s 6(1). His case was that the present agreement did not fulfill that description. In this court, as in the High Court, counsel for the Respondent submitted a straightforward argument that the statute meant what it said; s 6(1) prohibited the making of a contract to take land on lease without prior consent, and the present agreement was such a contract.

[14] Asked by the court whether, on execution of the contract, the purchaser obtained a caveatable interest, or a right to specific performance, Mr Daubney replied that but for s 6(1) these might be interesting questions but they did not constitute the appropriate test. After reserving judgment, we found *Bevin v Smith* [1994] 3 NZLR 648 where the New Zealand Court of Appeal held that one test to determine whether an equitable interest passed was whether the court will intervene, by injunction or otherwise, to prevent the vendor from dealing with the property in a manner inconsistent with the vendor's contingent ownership rights. In the absence of argument it would not be appropriate to consider whether that represents the law of this country, or whether, on the present facts, that would assist the Respondent. It is conceivable the argument, while helping the Respondent on question (a), might work against it on question (b).

[15] On the arguments submitted, the issue of construction may be posed as follows: in relation to the subleases, is the agreement one to seek consent to proposed leases and, if consent is given, or obtained on acceptable conditions, to enter into the subleases; or is it an agreement to take land on lease, subject to conditions? If the latter, then under *Hunter v Apgar* [1989] 35 FLR 180 (*Hunter*), by which effectively we are bound, the agreement infringes s 6(1).

[16] Clause 10 of the contract sets out a logical progression of steps (we omit the references to "best endeavours"):

(1) the vendor is to obtain the consents needed to enter into the head leases;

(2) those leases are to be executed and registered;

(3) next, the vendor is to submit proposed subleases (in a form scheduled to the agreement) to the Director of Lands and any other relevant authority for all necessary authorisations. It was at this stage that the consent of the Minister of Lands had to be sought;

(4) when, and only when, all the required authorisations were received, the vendor was to forward the subleases to the purchaser and the purchaser's guarantors for execution.

[17] We do not need to continue in detail through the subsequent steps, involving execution by the purchaser and the guarantors, stamping, execution by the vendor, and the vendor holding the subleases in escrow pending completion. We underline however that under clause 4.2, already noted, the purchaser was entitled to terminate the agreement if the minister's consent was not forthcoming, or was only available on conditions unacceptable to the purchaser.

[18] Counsel referred to three reported cases, in particular, raising similar issues under s 6(1). Before *Jennyne Gonzalez v Mohammed Akhtar* [2004] FJSC 2 (*Gonzalez*) was decided in this court and the Supreme Court (the decision in the latter reported *Gonzalez* the leading case on s 6(1) was *Hunter*, decided in the High Court in 1989. A key passage in the judgment reads:

> 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 until, 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.

[19] "Until" is not in the judgment as reported *Hunter* at 185 but in the signed judgment on the court file, the word appears as a handwritten insertion.

[20] *Hunter* proceeded on an agreed statement of facts which summarised the effect of the agreement. However, the full agreement was before the High Court, as it was annexed to the agreed statement. The critical condition was one of two, introduced in clause 3 by the words "This agreement is conditional upon". The condition required "the consent of the Minister of Lands to the transfer of the Property under the Land Sales Act to the Purchaser". The agreement continued:

> If either of these consents be denied by the appropriate authorities by the said February 28, 1986 (subject to extension by agreement) this Agreement shall be cancelled and the deposit monies shall forthwith be refunded in full to the purchaser without interest.

[21] We adopt the view expressed in *Cheshire & Fifoot's Law of Contract*, 6th Australian ed, 1992, at [170] (*Cheshire & Fifoot*) that (putting aside the well known "subject to contract" cases) conditions phrased "subject to" may operate merely to suspend performance of an already binding contract. The same, in our view, applies to the language we set out above. As the learned authors say, the courts are inclined to construe such conditions as precedent to performance, not formation. Reading the *Hunter* agreement as a whole, we do not consider the condition can be regarded as other than, in popular terminology, a condition subsequent, that is a condition precedent to performance, not contract.

[22] To a point the *Hunter* agreement satisfied the perceived statutory requirement that the minister should have "the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent". Clearly, under a condition drawn in *Hunter* terms, if the minister declined to give his consent, or did so on an unacceptable basis, the agreement would terminate. However, in the language of the judgment, the minister did not have that opportunity "right at the outset".

[23] The next case was the decision of the High Court in *Kikuo Sakashita v Concave Investment Ltd* [1999] 45 FLR 13 (*Sakashita*). On 15 May 1997, the plaintiff, a non-resident, entered into an agreement to purchase land at Nadi, subject to a condition that the purchaser obtain the approval of the Minister of Lands. The minister subsequently gave his approval to the transaction. When the plaintiff was unable to obtain the defendant's consent to cancellation of the purchase, he issued proceedings seeking a declaration that the agreement was in breach of s 6(1) and therefore null and void. As the judgment noted, the condition, with others, was described as a "condition precedent". Perusal of the agreement however shows that clearly the condition was not a condition precedent to the formation of the contract. The respective arguments, so far as they appear from the judgment, seem to have focused on the issue whether the statute was regulatory or prohibitory, and whether the minister's consent was valid notwithstanding it was given after the agreement had been signed. Following *Hunter* in preference to the first instance judgment in *Gonzalez*, Fatiaki J (as the Chief Justice then was) held that the agreement was in breach of s 6(1), and that the minister's purported consent, given after execution, was ineffective. Referring to the requirement for *prior* consent in writing, the judge posed the question: prior to what? and answered it by reference to the evidential requirements of s 59(d) of the Indemnity Guarantee and Bailment Act (Cap 232):

> prior to the execution by a non-resident of a written memorandum or note evidencing such purchase, lease or disposition of land

In the case before us, neither side invoked that principle. In the absence of argument we do not propose to consider this approach further.

[24] Although, as noted, the judge referred to the condition relating to ministerial approval as a condition precedent, the judgment makes no mention of any argument based on a possible distinction between the facts of *Hunter* and the case before him, on that score.

[25] The starting point in the *Gonzalez* case was a 1985 agreement between Mr Gonzalez, a US citizen, and a Mr Mohammed under which Mr Mohammed agreed to sell, and Mr Gonzalez agreed to buy, a 12-acre block of land in the Nadroga district. The land was part of a holding of 101 acres which had yet to be subdivided. While the contract was subject to conditions, and the purchase price was payable in instalments over 5 years, Mr Gonzalez was entitled to possession upon execution.

[26] There were difficulties in fulfilling the conditions, and in 1990 Mr Mohammed and Mr Gonzalez agreed to a variation of the contract, providing a basis for completion of an access road, and making Mr Mohammed responsible for complying with all approvals required for the subdivision. Soon afterwards, the subdivision was approved. At about this stage, the parties learned for the first time of the existence of s 6(1) of the Land Sales Act. They applied for the minister's consent, which was granted but subject to a condition that clearances

be obtained from the Commissioner of Inland Revenue and the Reserve Bank. In the event, as these were never received the minister's consent did not become effective.

[27] It is unnecessary to go into the further difficulties which arose before Mr Gonzalez commenced proceedings for specific performance and other remedies. Nor do we need to detail the scheme which was subsequently formed under which a company named Murray Merchant Pacific Finance and Investment Ltd became registered as owner of the 101-acre block. When the litigation went before the High Court for determination the essential question, according to the judge, was whether s 6(1) was to be interpreted so as to render unenforceable any contract entered into without the minister's consent first being obtained. The judge accepted the subsection did have that effect, but went on to hold that a contract contravening the requirements could still be enforced.

[28] The Court of Appeal, having reversed the finding just mentioned, later certified the following question as being one of significant public importance for determination in the Supreme Court:

> Did the Court of Appeal … place the correct interpretation upon s 6 of the Land Sales Act (Cap 137)?

[29] In its judgment, the Supreme Court recorded the arguments for the Appellant. First, s 6(1) neither expressly nor impliedly prohibited the 1985 agreement. Then counsel contended that the 1985 agreement was impliedly subject to the minister's consent. Counsel also argued that a party was not entitled to avoid a contract in reliance on his own default in fulfilling the conditions necessary to obtain the minister's consent. Counsel submitted that even if wrong in his primary contention that the 1985 agreement was neither expressly nor impliedly prohibited by s 6(1), the agreement was nevertheless enforceable. Finally, he challenged the correctness of *Hunter*.

[30] The Supreme Court rejected each of these arguments. Most of the reasoning concerned the issue whether the agreement was enforceable notwithstanding breach of s 6(1). The proposition that *Hunter* should be overruled was dismissed in one sentence. But obiter the court said [91]:

> [Counsel] next submitted that it was always open to the parties to enter into a contract for the sale of land subject to a condition that the contract would not become effective unless, and until, the Minister's consent had been obtained. He referred to *Butts v O'Dwyer* (1952) 87 CLR 267 at 279–80; [1953] ALR 117 for that proposition. That submission was not challenged. It is obviously correct and nothing more need be said about it.

[31] *Butts v O'Dwyer* (1952) 87 CLR 267; [1953] ALR 117 (*Bower*) (cited by counsel, not the court) is unconvincing support for counsel's proposition. Taken in conjunction with the court's approval of *Bower*, however, it may be deduced first, the court considered an appropriately drawn contract under which obtaining the minister's consent was a condition precedent, would not infringe s 6(1); and second, the form of the contract in *Hunter* did not meet that specification. In *Gonzalez* itself, of course, as demonstrated by counsel's argument that a condition for the minister's consent should be implied, the contract was not subject to any express condition.

> Nothing in *Gonzalez* prevents a finding that s 6(1) will not be breached by an appropriately worded contract, binding the parties to try to obtain Ministerial consent to a proposed sale or lease and, if obtained, to sell or lease on predefined terms. Indeed the obiter passage quoted above supports that conclusion.

[32] The present agreement is more elaborate than that in *Hunter*, and sets out a more extensive transaction than the sale or lease of land. We should note that the Appellant did not overtly argue the outcome turned on whether the condition in question was to be regarded as a condition precedent. However, effectively his case was that the obtaining of the minister's consent was a condition precedent to the execution of the subleases.

[33] As *Cheshire & Fifoot* state at [166], when considering whether a condition is a condition precedent, one has to ask, precedent to what? Undoubtedly, the agreement gave rise to binding obligations, to be performed on execution. But the aspect of the agreement invoking the requirement of the minister's consent under s 6(1) was the proposed taking of land on sublease. In deciding whether to consent or not, or consent with conditions, the minister would be entitled to consider the agreement as a whole. But it was the subleasing, alone, which attracted s 6(1). At step 3 in the tabulation above (see [16]), the minister, in terms of *Hunter* "had the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent to the same". If the minister declined consent, or gave consent on unacceptable conditions, it may be expected the subleases would not proceed. At any rate, the purchaser could not be compelled to proceed. Theoretically, the purchaser might decide to take the risk and execute the subleases, which would then be in breach of s 6(1); but that alone cannot render the agreement in breach of the subsection. The same could be said in the case of any proposed transaction requiring s 6(1) consent.

[34] In reply, counsel for the Respondent pointed to two provisions in the contract in particular. Clause 2, headed "Sale and Purchase and basis of Sale", states:

> (a) The Vendor shall:
>
> (a) sell and assign to the Purchaser, and the Purchaser shall purchase and accept an assignment from the Vendor of the Assets: and
>
> (b) the Vendor shall grant to the Purchaser the Sub-Leases in accordance with this Agreement:
>
> for the Purchase Price, free of Encumbrances.

[35] It is true that on its face this provides the vendor "shall grant" the subleases, words which on their own and in the absence of prior written ministerial consent would point to an infringement of s 6(1). But given all that follows it is clear this is no more than a broad description of the overall purpose of the agreement, and has to be read as subject to the many detailed limitations set out subsequently. On execution, the agreement did not convey any leasehold interest to the purchaser. In any event, as clause 2(b) states, the proposed grant is "in accordance with this agreement", and as pointed out there is no obligation to execute the subleases until the steps earlier set out have been negotiated successfully.

[36] The second provision is clause 6.6 reading:

> *Sale and purchase of Assets interdependent*
>
> The sale and purchase of each of the Assets and the granting of the Sub-Leases to the purchaser are interdependent and shall be completed simultaneously.

(See also clause 6.2: "completion is subject to and conditional upon all conditions being either satisfied or waived …".)

[37] From clause 10.2 it is apparent the proposed grant of the subleases could fail notwithstanding that both parties had fulfilled their contractual obligations. Despite best endeavours the vendor might not obtain the necessary authorisations

to the head leases: clause 10.1(a). Or the vendor might not obtain the approval and authorisations required for the subleases: clause 10(2)(a). In this respect, it is relevant the vendor did not give any warranty that the authorisations required for the subleases would be obtained, or obtained on satisfactory terms and conditions: clause 10, last paragraph. So clause 6.6 makes it clear, partial completion is not contemplated. If the necessary authorisations to the subleases were not obtained, the purchaser could not be compelled to proceed to completion. Nothing in this helps the Respondent. To the contrary it supports the Appellant's two-step analysis.

[38] Section 6(1) does not prohibit the making of a contract to seek the minister's consent to a specified transaction. Otherwise, to what is the minister to consent? And it cannot make any difference whether the proposed transaction is described in general terms, or whether it is specified in the form of a proposed agreement of sale and purchase, or lease, annexed to the contract. Is it fatal that in a single document, the agreement goes on to provide that in the event the minister consents, the parties are bound to enter into a transaction in that form? This seems a critical feature. It would not be conducive to business development or investment if the only way to obtain the minister's consent was for the parties to agree to seek consent in a form that allowed either party to withdraw even if consent was obtained. One only has to consider the elaborate agreement in issue here, clearly the product of many hours of professional time, to see that any such approach would be unproductive and unrealistic. In the absence of clearer language courts should not ascribe such a legislative intent to a statute.

[40] We conclude the contract before us is distinguishable from those in issue in *Hunter*, *Sakashita* and *Gonzalez*. It is sufficiently plain that the obligation to grant the subleases did not arise unless and until satisfaction of the condition that the Minister of Lands consented to the grant. The minister had the opportunity to consider the proposed subleasing "right at the outset". The agreement did not infringe s 6(1), and question 1 should be answered in the negative.

Question (b) — Effect of illegality

[41] Although our conclusion on question 1 is decisive of the litigation, we will consider the Appellant's alternative arguments. The first is that even if the agreement was in breach of s 6(1), the Respondent is not entitled to recover possession of the land.

[42] In *Gonzalez*, at first instance the judge had noted the section did not expressly state noncompliance rendered the contract void and hence unenforceable. The judge appeared to regard the act primarily as a revenue provision. He concluded s 6(1) was merely declaratory or regulatory, and that a contract contravening its requirements could still be enforced. On appeal the Court of Appeal took a different view. It considered the policy of the act was to enable the Government to determine which non-residents should be allowed to own substantial areas of land and which should not. The Supreme Court (at 16) summarised the Court of Appeal's view of the consequences as follows:

> [76] In their Lordships' [of the Court of Appeal] view, it remained only to consider the effect, if any, of s 17 upon the construction of s 6(1). They noted that penalties under s 17 would only apply if there were a wilful contravention. If a contract entered into without ministerial consent were nonetheless enforceable, then at least in cases where there had been no wilful contravention, a breach of s 6(1) would be of no consequence whatever. It seemed unlikely that the legislature would have intended the subsection to have no substantive effect in what might be a significant number of cases.

> [77] Their Lordships noted that the legislature could have taken the extra step of expressly providing that any contract in breach of s 6(1) was void and of no effect. It had not done so, but, in their view, it had made clear that a contract entered into in contravention of the subsection was unlawful. In those circumstances, it was difficult to see how there could be any conclusion other than that the contract was void and unenforceable.

[43] *Joe v Young* [1964] NZLR 24 (*Joe*) concerned provisions of the Land Settlement Promotion Act 1952 requiring court consent. The act provided that where a transaction was entered into in contravention of the act, the agreement was deemed to be unlawful and shall have no effect. The Court of Appeal held that the italicised words were not mere surplusage, and must be given effect in accordance with their ordinary meaning. Accordingly the owner of a property who had leased it in contravention of the act could recover it during the currency of the term he purported to grant. In effect all members of the court approved the approach taken by Stanton J in *Miles v Watson* [1953] NZLR 154 where on this subject the judge said:

> … the section would mean that the land and the interests or rights of the parties therein would not be affected by the contract, and a purchaser could not claim any right to retain a possession which was referable solely to that contract.
> (See *Joe* at 45)

[44] This quotation neatly encapsulates the problem on this branch of the present case. If the agreement was effective to the extent that the leasehold interest passed to the Appellant, then by virtue of a long line of authority cited by counsel, provided the sublessee observed the provisions of the sublease the property "lay where it fell" (*Singh v Sardara Ali* [1960] AC 167 at 176–7; [1960] 1 All ER 269 at 272) and the sublessee was entitled to remain in possession for the term of the sublease. See *Halsbury's Laws of England*, 4th ed reissue, 1998, vol 9(1), at [880]. On the other hand, if s 6(1) were to be interpreted as if containing the words which proved decisive in *Joe* — "and shall have no effect" — the Appellant could justify its possession only by reference to an agreement which was not merely illegal, but ineffective to pass any property.

[45] We have referred previously to the exposition of the purpose and object of s 6(1) in *Hunter*. Similarly in *Sakashita* at 18 Fatiaki J referred to the act's "discernible protective or public policy purpose, namely the prevention in the public interest, of the uncontrolled alienation of land in Fiji, to and by non-residents". Finally there is the Supreme Court's affirmation of the result in *Hunter* in *Gonzalez*, coupled with the citation, with implicit approval, of the passages from the judgment of the Court of Appeal extracted above. Together these various sources show a continued determination on the part of the courts, notwithstanding the limited content of s 6(1) regarding the consequences of breach, to "make the Act work" in accordance with "the general intention of Parliament as embodied in the act — that is to say, the spirit of the Act": *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 at 537; (1988) 7 NZAR 229; judgment of the NZCA delivered by Cooke P.

[46] Where an agreement breached s 6(1), to leave a purchaser or lessee in the Appellant's position in possession, thus circumventing the prohibition, would be contrary to the spirit and purpose of the section. Cumulatively these considerations have led us to conclude s 6(1) must be construed as if it provided that agreements in breach were ineffective to pass any interest.

Indefeasibility

[47] Counsel for the Appellant further argued that even if the agreement was regarded as illegal or void, registration of the subleases conferred indefeasible title on the Appellant. Section 42 of the Land Transfer Act 1971 legislates indefeasibility in familiar Torrens system terms, subject to fraud and other exceptions not relevant to the present case. Section 3 provides:

> All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate of interest therein.

[48] It is of course well-established that a registered transfer may be indefeasible notwithstanding it is based on a void instrument; *Frazer v Walker* [1967] 1 AC 569; [1967] NZLR 1069; [1967] 1 All ER 649. That principle has been followed in our courts.

[49] The Land Sales Act is subsequent legislation. One pertinent general principle of statutory interpretation is that an earlier statute may be overridden by a later. Another is that general legislation may be regarded as overridden by special legislation. In this case, both point in favour of the Land Sales Act prevailing. Neither principle, however, is decisive; and we prefer to base our conclusion on an interpretative approach. As the High Court of New Zealand said in *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662 at 677 the question remains one of interpretation by way of reconciliation of the two statutes. On this basis we have no doubt the Land Sales Act should prevail.

[50] Indefeasibility is a crucial feature of the Torrens system, and to confer certainty on entries in the register, the scope for any investigation into the validity of the preceding instruments has been strictly limited. Other things being equal, exceptions that would undermine the conclusiveness of the register are to be resisted. However, the provisions contained in s 6(1) of the Land Sales Act are also of fundamental importance to land ownership in this country. We referred earlier to the protective or public policy purpose. One may consider the hypothesis that s 6(1) contained a proviso to the effect that nothing in the section shall affect the principle of indefeasibility under the Land Transfer Act: such a qualification would be regarded as absurd, since it would signpost an infallible method of subverting the purpose and operation of s 6(1). Clearly, based on the policy of the Land Sales Act the legislative intent was that it should prevail; and in relation to the transactions it covers, the subsection should be regarded as amending the indefeasibility provisions by necessary implication. Section 3 is not a fatal obstacle, see *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603; [1940] ALR 1. Thus this ground of appeal fails.

[51] In the result, we are in agreement with the answer the High Court gave to question (b). The answer to question (a) however is decisive against the Respondent.

Orders

(1) Appeal allowed. The answer given in the High Court to question (a) is set aside and answered as follows:

(a) Whether the Sale Agreement dated April 1999 between the Plaintiff as Vendor and the defendant as Purchaser was and is void ab initio for illegality pursuant to s 6 of the Land Sales Act?
Answer: No.

(2) The answer given in the High Court to question (b) is affirmed.
(3) In the High Court, the Appellant is allowed costs $1000. In this court, costs in favour of Appellant, $5000.

Appeal allowed.