IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND

C.A. 7/91

IN THE MATTER of the Companies Act 1970

BETWEEN RAYMOND STANLEY PRESTON Mechanic, and RONGOMATE PRESTON Married Woman both of Rarotonga

Appellants

AND JOHN DENIS TIERNEY of Rarotonga

Respondent

Coram: McMullin JA (presiding)
Speight JA
Barker JA

Hearing: 23/24 April 1992

Counsel: V.A.T.K. Ingram and R. Ingram for appellants
T.G. Nicholas for respondent
B.H. Giles and Miss Dervan for Attorney-General as amicus curiae

Judgment: 2 July ~~June~~ 1992

JUDGMENT OF THE COURT DELIVERED BY SIR DUNCAN MCMULLIN

This appeal is brought from the judgment of Roper CJ, given in the High Court of the Cook Islands on 22 November 1991 upholding the validity of a debenture given by a company called Auto Marine Limited ('Auto Marine') in favour of a Mr Bert E. Anderson to secure past and future advances made by Mr Anderson to Auto Marine. The

appellants are directors of and shareholders in Auto Marine. The respondent is the duly appointed Receiver of the company.

The relevant facts may be shortly stated. Auto Marine has for some years carried on business in the Cook Islands, importing cars, motor cycles and outboard motors. At least from 1986 onwards it experienced cash-flow problems which were alleviated, in part at least, in 1986 and 1987 by advances made by Mr Anderson, a Canadian, but a frequent visitor to the Cook Islands and well known to Mr Preston.

The first advance was for $20,000 and was made on or about 17 January 1986. It was acknowedged by a document signed on 17 January 1986 on behalf of Auto Marine by Mr and Mrs Preston as managing director and secretary respectively of the company.

On 21 January 1986 an agreement was made between Short & Tylor Nominees Limited as lender and Auto Marine as borrower in which it was recorded that Short & Tylor were "acting in a nominee capacity only for the purpose of protecting its principal's desire to remain anonymous". This recorded the terms on which the $20,000 had been advanced on 17 January 1986 and on which further advances might be made. Short & Tylor Nominees Limited did not in fact advance any money to Auto Marine at all, nor to Mr and Mrs Preston. Mr Preston knew that it was Mr

Anderson who was the person making the finance available through Short & Tylor Nominees Limited. Therefore Short & Tylor Nominees Limited can for all practical purposes be identified with Mr Anderson.

At a later date, Mr Anderson established two letters of credit with the Bank of Nova Scotia in Vancouver to a total value of $NZ127,526. On 30 June 1986 a further $35,000 was paid into Mr and Mrs Preston's bank account in New Zealand. Some of the advances were later repaid but, at the hearing in the High Court, the respondent alleged that the amount owing to Mr Anderson at 31 July 1990 was $82,829. The Chief Justice accepted this figure.

On 25 February 1987, Auto Marine gave a debenture over all its property and assets to Short & Tylor Nominees Limited to secure past and future advances. Mr and Mrs Preston guaranteed that debenture. Auto Marine failed later to meet Mr Anderson's demand for the $82,829 alleged to be owing under it. The respondent was then appointed receiver of the company. On 26 June 1991, he attempted to take possession of Auto Marine's premises. Mr and Mrs Preston refused him entry with the result that he applied for an order that Mr and Mrs Preston deliver up the premises and all of Auto Marine's assets.

At the hearing of that application, a number of defences were raised and, as issues of fact were involved, the

Chief Justice dealt with the case as though it were the hearing of an action. In view of the decision which we have reached on the illegality of the transaction, a challenge to which was first signalled in a letter from Mr and Mrs Preston's solicitor to the respondent on 17 April 1991, it is unnecessary to consider these other defences, some of which the Chief Justice robustly and justifiably dismissed as being completely without merit.

In the High Court and in this Court, counsel for Mr and Mrs Preston submitted that Mr Anderson in advancing money to Auto Marine contrary to the provisions of the Development Investment Act 1977 had engaged in an illegal activity with the consequence that his claim for the repayment of the moneys advanced was unenforceable, being in contravention of the statute just cited.

The Development Investment Act 1977 was enacted on 19 December 1977 to regulate foreign investment in the Cook Islands. It provides for the registration of foreign enterprises carrying on business in the Cook Islands and for applications for registration to be made to a body called the Development Investment Council. There are definitions in the Act of "activity", "carrying on business" and of "foreign enterprise".

Ss. 26(1) and 42 of the Act are important. S.26(1) provides that no foreign enterprise shall carry on business in the Cook Islands in any activity unless that

foreign enterprise is registered in respect of that activity pursuant to the Act. S.42 provides that every foreign enterprise which carries on business in contravention of S.26(1) commits an offence and is liable on conviction to a fine not exceeding $5,000 and, where the offence is a continuing one, to a further fine not exceeding $500 for every day or part thereof during which the offence continues.

It is common ground that Mr Anderson was not registered under the Act. But before the Chief Justice, it was contended that, in making the advances to Auto Marine which he did, Mr Anderson was not "carrying on business" in the Cook Islands and that therefore he did not need to be registered.

The Chief Justice held that because of the wording of the Act, Mr Anderson was carrying on business, that his activities required registration, and that he had committed an offence under S.26(1) and was liable to the monetary penalties prescribed by S.42. Therefore, he held that the respondent's claim was based on an illegal contract and was of no effect unless the Illegal Contracts Act 1987 could be prayed in aid of it.

The Illegal Contracts Act 1987 was enacted on 2 July 1987. S.6 of the Act empowers the Court to grant relief to any party to an illegal contract or to any party to a contract who is disqualified from enforcing it by reason

of the commission of an illegal act in the course of its performance or to any person claiming through or under any such party.

As the Chief Justice observed, Mr Anderson could have sought relief under that Act but he did not do so, even after the letter of 17 April 1991 had been sent to the receiver. Then on 1 July 1991, the Cook Islands Parliament passed an amendment to the Development Investment Act 1977. It was the Development Investment Amendment Act 1991. S.2 of the Amendment Act provides as follows -

> "S.46. **Loans and Contracts:** In any case where a foreign enterprise carries on business in the Cook Islands in contravention of S.26 of this Act, any loan or contract entered into by that foreign enterprise shall be illegal and of no effect, and none of the provisions of the Illegal Contracts Act 1987 shall be available to that foreign enterprise, nor to the party who contracted with that foreign enterprise if that party knew at the time of entering into the loan or contract that the foreign enterprise was operating in contravention of S.26."

This provision was considered by the Chief Justice in the light of submissions made to him as to whether or not the amendment had a retrospective effect and as to whether relief under the Illegal Contracts Act was still available. As he put it, "In my opinion, the real issue is whether the amendment has retrospective effect. Does it apply to the case where an individual, who had been party to an illegal contract entered into before the passing of the amendment, had an existing right to apply for relief?".

Mr Ingram, who appeared for Mr and Mrs Preston both in the High Court and in this Court, argued before the Chief Justice that relief under the Illegal Contracts Act only arose at the time when the Court declared that the contract was illegal which, in the present case, was after the amendment had been passed. The Chief Justice did not accept that. He held that the contract between Mr Anderson and Auto Marine was illegal at its inception, that the right to apply for relief arose then, that the effect of the amendment was to indicate to foreigners intending to carry on business in the Cook Islands and their advisers that, as from the passing of the amendment, they would proceed at their peril.

Finally, after considering the matters made relevant to the grant of relief under S.6(3) of the Illegal Contracts Act, he validated the contract and held the debenture to be a good security for the sum of $82,829.

Before dealing with the issue as to whether or not, in view of the passing of the Development Investment Amendment Act 1991, the respondent can invoke S.6 of the Illegal Contracts Act (the point which we conceive is determinative of this appeal), we propose to consider a submission made on the respondent's cross-appeal namely, that the Chief Justice was wrong in holding that Mr Anderson was carrying on business in the Cook Islands pursuant to the Development Investment Act 1977. As

already mentioned, S.26(1) of the Act provides "No foreign enterprise shall carry on business in the Cook Islands in any activity unless that foreign enterprise is registered in respect of that activity pursuant to this Act."

By S.2 of the Act "foreign enterprise" is widely defined to include "an enterprise that is a person other than a local person". "Carrying on business" is also defined in S.2 -

> "Carrying on business" means carrying on an economic activity pursuant to the objects of the enterprise and includes;
>
> (a) establishing or using a share transfer or share registration office; and
> (b) administering, managing or otherwise dealing with property as an agent, legal personal representative or trustee, whether by servants or agents or otherwise; and
> (c) maintaining an agent for the purpose of soliciting or procuring orders whether or not the agent is continuously resident in the Cook Islands; and
> (d) maintaining an office, agency or branch whether or not that office, agency or branch is also used for one of these purposes by another enterprise; and
> (e) undertaking a building, construction or assembly project which will not be completed within twelve months:
>
> but an enterprise shall not be regarded as carrying on business by reason solely that it
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> (f) is or becomes a party to an action or suit or any administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of a claim or dispute; or
> (g) maintains a bank account; or
> (h) secures or collects any of its debts or enforces its rights in regard to any securities relating to any such debts; or
> (i) conducts an isolated transaction that is completed within a period of 31 days, not being

one of a number of similar transactions repeated from time to time; or

(j) collects information or undertakes a feasibility study:

and "carry on" in relation to a business, has a corresponding meaning."

"Activity" is defined in S.2 as including "any single commercial, industrial or trade enterprise carried on with the object of pecuniary gain and "single activity" includes any activity carried on in association with "another activity which is normally related with it".

In the High Court, it had been contended that Mr Anderson was not a money-lender and only agreed to lend provided the legalities had been complied with; that he charged a lesser rate of interest than he could have obtained in New Zealand; and that none of the loans was made in the Cook Islands, being lodged either in Mr Preston's New Zealand bank account or remitted directly to the Suzuki company in Japan.

The Chief Justice held that these matters had no bearing on the issue, nor did the fact that it was Mr Anderson's solicitors who failed to lodge an application for registration under the Development Investment Act 1977. He did, however, comment that this last factor might have some bearing on the grant of relief under the Illegal Contracts Act.

In this Court, Mr Nicholas repeated the substance of these submissions, emphasising that Mr Anderson had not

demonstrated any intention to get involved in the business of Auto Marine; that he had not become involved as a director of the company; that he had used a nominee company because he did not wish to get involved in business in the Cook Islands and that he had left everything to his solicitors.

All these matters may have been relevant, if the issue had been whether Mr Anderson had, in common parlance, been carrying on business in the Cook Islands; but the terms "activity" and "carrying on business" have been defined in the Act in a comprehensive way and undoubtedly cover activities which would not normally be considered to be the carrying on of a business or the carrying out of an activity. As the Chief Justice observed, the Act cast "a wide net of fine mesh" and "it was very difficult to imagine an economic activity which would not be caught by the Act ..."

The Chief Justice thought that Mr Anderson regarded his dealings with Auto Marine as a serious business venture to the extent that he sought to control Auto Marine's finances in contemplating from the beginning that he might become a shareholder in Auto Marine; that the transaction was not confined to a single loan; and that repayment of the loans was to come from the Cook Islands economy.

Mr Nicholas also argued that in accordance with the majority decision of the New Zealand Court of Appeal in Department of Civil Aviation v McKenzie [1983] NZLR 78, S.26 provided for a public regulatory welfare offence where, once the conduct was proved, a defendant could escape liability by showing no want of care on his part. He submitted that, in the present case, Mr Anderson had relied on his solicitors taking all appropriate steps to ensure that all legalities were observed.

We can give no indication as to what attitude the Courts in the Cook Islands will take on the application of the majority decision in McKenzie when that question arises; but, even if the view advanced by Mr Nicholas were to be accepted, we cannot see the relevance of the McKenzie case to the present. The circumstances in which the advances were made amounted to the carrying on of a business and constituted an offence under the legislation. The agreement between Mr Anderson and Auto Marine was an agreement to do something which the Development Investment Act specifically forbade. For these reasons, we reject the cross-appeal.

We turn now to the argument which we think disposes of the appeal in the appellants' favour. That argument was presented by Mr Giles who appeared on behalf of the Attorney-General, and with the leave of this Court, as amicus curiae to address arguments on the construction and interpretation of the Development Investment

Amendment Act 1991, the inter-relationship and application of the Development Investment Amendment Act 1991, the Illegal Contracts Act 1987 and the principles of law which should be applied in the context of the present litigation to the Illegal Contracts Act 1987.

The thrust of the argument of Mr Giles who reinforced his submissions with references to an article by Professor J.F. Burrows entitled "The Retrospective Effect of Changes in the Law" (1976) NZLR 343, was as follows -

(1) As the Chief Justice had held, S.26 of the Development Investment Act 1977 applied to the present case;

(2) S.46 of the Act, i.e. the 1991 amendment, applies to all transactions in contravention of the principal Act whether entered into before or after the amending enactment, except where an application for relief under the Illegal Contracts Act 1987 had actually be made to the Court prior to 1 July 1991 when the amendment came into force (which was not the case here);

(3) In the absence of a clear indication in the amending enactment, the substantive rights of the parties to any civil legal proceeding fall to be determined by the law as it existed when the action commenced.

Accordingly, S.46 applied and rendered inapplicable the provisions of the Illegal Contracts Act 1987.

As the first of these points does not challenge the judgment in the High Court, we need say no more about it. The other points do call for comment. In the High Court, Roper CJ considered that the real issue was whether the amendment had retrospective effect. Mr Ingram argued that relief under the Illegal Contracts Act only arose when the Court declared that the contract was illegal which, in the present case, was after the amendment had been passed. To the contrary, Mr Giles submitted that the contract was illegal at its inception and the right to apply for relief arose then; that the application of S.46 was not resolved merely by referring to the principle of construction against retrospectivity (as to which see Smith v Callender, [1901] AC 297, 305 and R v Ipswich Union (1877), 2 QBD 269, 270); that the words of the section required a closer look to determine whether "rights" are affected in such a way to affect the principle against retrospectivity; that there was no rule against retrospective legislation, only a presumption which must yield to the intent of the statute as that is expressed in the amending Act.

The opening words of S.46 are relevant namely "In any case....". This is a phrase not much different from the words "in all leases" used in West v Gwynne [1911] AC 1 which the Court of Appeal held applied to all leases

whenever entered into, whether before or after the amending legislation, even although such wording deprived the lessor of the contractual "right" to receive a payment in consideration of consenting to a sub-letting or assignment.

Although S.64 goes on to use the present tense when it refers to a foreign enterprise which "carries on business" in the Cook Islands in contravention of S.26, the expression is neutral. More to the point is the fact that the section goes on to refer to any loan or contract "entered into" and "the party who contracted with that foreign enterprise", making it plain that S.46 applies to all transactions whenever entered into, in the past or in the future, once they have been entered into in fact. The consequence of the use of the past tense in the underlined words, after the words "in any case", is that after the passing of S.46, a contract entered into cannot be subject to an application for relief offered by the Illegal Contracts Act. Had the framers of S.46 intended it to apply only to transactions entered into after 1 July 1991, they could quite simply have said so by enacting a limiting subsection to that effect. Such a construction accords with the policy of the legislation. Prior to the passing of S.46, the most direct way of enforcing the legislation was by way of prosecution but this may have been ineffective against those foreign enterprises which were not resident within the Cook Islands.

S.46 gave further teeth to the legislation by making the transactions entered into in breach of it illegal and of no effect; it provided that none of the provisions of the Illegal Contracts Act should be available to the foreign enterprise or the other party, if that other party knew the transaction was in contravention of S.26.

It is now convenient to note the provisions of S.20(e) of the Acts Interpretation Act, 1924. S.20(e) provides -

> "The repeal of an Act or the revocation of a bylaw, rule, or regulation at any time shall not affect -
>
> (i) The validity, invalidity, effect, or consequences of anything already done or suffered; or
> (ii) Any existing status or capacity; or
> (iii Any right, interest, or title already acquired, accrued, or established, or any remedy or proceeding in respect thereof;"

The reference in S.20(e) is to the "repeal" of an Act; not to its "amendment". But there is no difference in substance between the two in the case of S.46 because this section effectively repealed the right hitherto open under the Development Investment Act 1977 to apply for relief under the Illegal Contracts Act. Such a construction is supported by the decision of the New Zealand Court of Appeal in Chaplin v Holden & NIMU [1971] NZLR 374.

Did then Mr Anderson or the respondent have a right at 1 July 1991, when S.46 was passed, to apply for relief under the Illegal Contracts Act, which right was not

affected by the passing of S.46. The Chief Justice seems to have suggested that they did, notwithstanding the passing of S.46. However, there are a number of authorities, none of which was referred to the Chief Justice, which establish that this is not so. Overall, these authorities draw a distinction between "rights" which have become acquired rights through the taking of some step or the happening of some event which had to occur before the right could be said to have "crystallised" (to use an expression in the article by Professor Burrows) and rights which are available to the public at large.

In the article mentioned, Professor Burrows instances cases on each side of the line. The principle to be determined from the cases was stated by Lord Herschell in Abbott v Minister of Lands [1985] AC 425, 431, as follows-

> "It may be ... that the power to take advantage of an enactment may without impropriety be termed a "right". But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed."
>
> "Their Lordships think that the mere right ... existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be termed a "right accrued"."

To the same effect is the later case of Director of Public Works v Ho Po Sang [1961] AC 901. In Ho's case, prior to the repeal of the Landlord and Tenant Ordinance

1947 (H.K.), a lessee had negotiated a renewal of a lease of premises upon terms which required rebuilding. Upon issue of the rebuilding certification he was entitled to vacant possession of the premises. Such a certificate was sought and notification procedures initiated but no decision was made by the Governor in Council before the Ordinance was repealed by the Landlord and Tenant (Amendment) Ordinance 1957, with effect from 9 April 1957. A rebuilding certificate was issued and the tenants challenged its validity. It was contended that the lessee had an accrued right under the H.K. equivalent of S.20(e)(iii) of the Acts Interpretation Act 1924. The Privy Council held that he had no accrued right to a certificate, only a hope that a certificate would issue.

Lord Morris of Borth-y-Gest, delivering the advice of their Lordships, said -

> "The further and perhaps more attractive submission which was presented on behalf of the lessee was that on April 9 he had an accrued right to have the matter taken into consideration by the Governor in Council and to that such right was (by reason of the Interpretation Ordinance) unaffected by the repeal, and that consequently the Governor in Council necessarily acted after April 9 and that in the result a rebuilding certificate of full validity was issued, which led to entitlement to vacant possession of the premises. These submissions raise an interesting question."
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> "Was the lessee therefore possessed on April 9 of a "right" or "privilege" within the meaning of the Interpretation Ordinance. In their Lordships' view the entitlement of the lessee in the period prior to April 9 to have the petitions and cross-petition considered was not such a "right". On April 9 the lessee was quite unable to know whether or not he would be given a rebuilding certificate and until the petitions and cross-petition were taken into

> consideration by the Governor in general no-one could know. The question was opened and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even thought he may have had grounds for optimism as to his prospects."

Both Director of Public Prosecutions v Ho Po Sang and Abbott v Minister of Lands were referred to in the New Zealand case of Wellington Diocesan Board of Trustees v Wairarapa Market Buildings Ltd [1974] 2 NZLR 562, in which the plaintiff had given a perpetually renewable lease to the defendant. Pursuant to S.26(3) of the Public Bodies Leases Act 1969 (which applied to the above lease) provision could be made for periodic rent reviews to be included in such leases. Prior to expiry of the term, the defendant advised that it wanted to renew the lease, and the lessee sought to include a provision for periodic review of rent. The lease expired. The defendant accepted the plaintiff's legal right to seek inclusion of such a provision. Arbitrators were appointed to determine the appropriate rental. Before they made an award, the Public Bodies Leases Amendment Act 1971 was passed which repealed S.26(3) of the 1969 Act. The Court was asked to determine, inter alia, whether in the circumstances, the plaintiff was entitled to include a provision for periodic rent reviews in any renewal of the lease.

Cooke J said -

> "But one can obtain real help from the distinction drawn by Lord Morris in delivering the judgment in

> Ho Po Sang's case and applied by Lord Evershed in delivering the judgment in Free Lanka case. I think those cases show that an application for a purely discretionary benefit should not be treated, for the purpose of S.20(e)(iii), as giving even an inchoate or contingent right to such a benefit. A feature of the present case is that although the lessor in pursuance of its then statutory right had required a review provision in the event of a renewal lease being accepted by the lessee, it was still (as was admitted in argument) for the lessee in its discretion to decide whether to accept a renewal lease. That is to say, if the lessee chose to enter into a contract with the lessor, the contract had to contain the review provision required by the lessor. I accept Mr Richardson's submission, founded partly on what was said by Sugerman P in Boyce v Hughes [1970] 1 NSWR 75, 78, that "right" in S.20(e)(iii) should be given a broad meaning. The precision of Hohfeld's analysis is not to be expected of Parliament. But I still find it difficult to regard something of no benefit to the lessor unless the lessee elects to take a renewal lease as a right acquired by or accrued to the lessor. Mr Hurley's submission seems to me more realistic. In essence it was that here the lessor had merely taken preliminary steps which might have led to the acquisition of a right, and that in a situation like the present right means contractual right. In principle Ho Po Sang's case appears to be the closest parallel in the authorities. Further, while the injunction in the Acts Interpretation Act regarding a fair, large and liberal interpretation no doubt applies to that Act itself, there is no obvious reason why in enacting S.20(e)(iii) Parliament would have intended such a position as the lessor enjoyed in this case to have been preserved in the face of a reversal of legislative policy and the attitude adopted by the lessee in the negotiations."

Mr Giles referred us to other cases in which these principles have been discussed and applied but in view of what was said at such high level in Abbott v Minister of Lands and Director of Public Works v Ho Po Sang, there is no need to mention these other cases individually. Applying those and Ho Po Sang we have come [illegible] Mr Anderson nor the respondent had any "accrued right" which would have survived the enactment of S.46.

Consequently, there was no room for the application of the ameliorating provisions of the Illegal Contracts Act to the loans made by Mr Anderson to Auto Marine or the debenture to secure them. It is unnecessary to consider whether the provisions of the Illegal Contracts Act would have saved the loans or the debenture, an issue on which counsel made submissions, in the event that the substantive point should have been determined otherwise.

The appeal must therefore be allowed and the judgment of the High Court validating the loan contracts and holding that the debenture is good security for the sum of $82,829 set aside. The debenture is therefore unenforceable.

We are grateful to Mr Giles for his most helpful and constructive argument and to him and Miss Dervan for their researches in preparing it. Had an argument of that kind been addressed to the Chief Justice in the High Court we are confident that he would have reached the same conclusion as we have. However, he was given no real assistance on the relevant issues. For that reason, we propose to allow no costs to the appellants in this Court or the High Court.

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Clarkes, Rarotonga, for respondent