

THE STATE

v.

THE GOVERNOR OF THE RESERVE BANK OF FIJI

ex parte

REDDY'S ENTERPRISES LIMITED

[HIGH COURT, 1990 (Byrne J) 28 November]

Revisional Jurisdiction

Exchange Control- refusal of request to retain proceeds of insurance claim overseas- purpose of exchange control legislation- construction of penal legislation- powers of governor of Reserve Bank- whether refusal unreasonable- Exchange Control Act (Cap 211) Sections 2, 4, 9, 26, 33 & 39- Reserve Bank of Fiji Act (Cap 210) Sections 4, 10, 15, 48, & 52.

With the permission of the Reserve Bank the Applicant insured its Fiji property overseas. Following loss, payment of the claim was received overseas. The Applicant wished temporarily to retain these funds overseas but the Reserve Bank refused permission. The Applicant sought Judicial Review of the refusal. Dismissing the application the High Court examined the relevant legislation and HELD: (i) that the primary purpose of the Exchange Control Act which was penal in nature was to control Fiji's monetary resources; (ii) that the Governor of the Reserve Bank was entitled to exercise powers delegated to the Bank by the Minister and (iii) that the decision reached by the Governor was not "Wednesbury" unreasonable.

Cases cited:

Allingham v. Minister of Agriculture [1948] 1 All E.R. 780

Associated Provincial Picture Houses v. Wednesbury Corporation [1947]
2 All ER 680

Barnard v. The National Dock Labour Board [1953] 2 Q.B. 18

Burmah (1982) STC 80

Bull v. The Attorney-General for NSW (1913) 17 CLR 370

Contract and Trading Co. (Southern) Ltd. v. Barbey and Ors [1960] AC 244

CSSU v. The Minister for the Civil Service [1984] 3 All ER 935

Ex parte Fitzgerald: Re Gordon (1945) 45 SR (NSW) 182

Fiji Bank Employees Union v. The Prices & Incomes Board & A-G
(CA 73/1985)

Financial Corporation Ltd v. NZ Kiwifruit Authority [1986] 1 NZLR 159

Furniss (Inspector of Taxes) v. Dawson 15 ATR 255

General Council of Medical Education and Registration of the United Kingdom v. The Dental Board of the United Kingdom [1936] 1 Ch. 41

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1

- Lloyd v. McMahon* [1987] 1 All ER 1118
London & Country Commercial Property Investments Ltd v. Attorney-General [1953] 1 All ER 436
- A *Luby v. NewCastle-Under-Lyme Corporation* [1964] 1 All ER 84
Magor and St. Mellons Rural District Council v. Newport Corporation [1952] AC 189
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 60 ALJR 560
Nothman v. Borough of Barnet [1978] 1 All ER 1243
- B *NZ Employees Industrial Assn. of Workers v. Attorney-General & Ors* [1976] 2 NZLR 521
NZ Fishing Industry Assn v. Minister for Agriculture & Fisheries (1988) 1 NZLR 544
Parshuram v. R (FCA Reps 83/172)
Pickett v. Fesq [1949] 2 All ER 705
- C *Posluns v. Toronto Stock Exchange* [1968] 67 DLR 165
Prices and Incomes Board & Ors v. Fong and Anr (Civ. App. 1/1979)
Ragless v. The District Council of Prospect (1922) SASR 311
Ramsay (1981) 11 ATR 752
Re Chromex Nickel Mines Ltd [1970] 16 DLR 273
Re: H.P.C. Productions Ltd [1962] 1 All ER 37; [1962] 2 WLR 51
- D *Ridge v. Baldwin* [1964] AC 40
Rowling and Anr v Takaro Properties Ltd [1988] 1 All ER
Talga v. M.B.C. International (1976) 8 ALR 266
United Australia Ltd v. Barclays Bank Ltd [1941] AC 1

- B.C. Patel and J.R. Flower for the Applicant*
M.J. Scott and N. Nand for the Respondent
- E Motion for Judicial Review in the High Court.

Byrne J:

- F This Application for Judicial Review is made pursuant to leave granted by Mr. Justice Palmer on 30th of March 1990.

- G The relief sought is for an Order of Certiorari, to remove into this Court and quash a decision dated the 8th of June 1989 of the Governor of Reserve Bank of Fiji ("The Governor"). The Applicant also seeks an Order of Mandamus directing the Reserve Bank (hereinafter called "The Bank"), in the event that the decision of the Governor is quashed, to determine the matter according to law, and within the limits which may be indicated by this Court. I have been told by counsel that the proceedings are in the nature of a test case and thus may be described as friendly in the sense that both sides are anxious to have the important matters raised in the application decided in the hope that the Court's decision will be of assistance and guidance not only to the parties but to the commercial community of Fiji also.

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I said the proceedings are important because they raise questions about the right of the Reserve Bank of Fiji to control the investment abroad of funds owned by residents of Fiji. As stated by senior counsel for the Applicant at the beginning of the hearing before me, the Applicant wants the Court to hold that a Fiji resident is entitled to retain Fiji dollars abroad without breaching the Exchange Control Act, Cap 211.

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The other reason why the case may be regarded as important is that it involves the application of well-known principles of statutory interpretation, particularly the so-called "purposive" rule, in relation to legislation such as the Exchange Control Act.

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During the course of very full and helpful argument by counsel I have been referred to much case law and authoritative text books dealing with administrative law, insurance law and financial law as it applies especially to exchange control, and books on statutory interpretation. In addition I have done some research of my own in an effort to do justice to the arguments addressed to me.

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FACTS

The applicant is a local private company resident in Fiji, and was the owner of the Tanoa Hotel at Nadi. As a result of the first military coup of 14th of May 1987 insurance companies in Fiji withdrew cover for risks against riot, civil commotion and arson. The applicant with permission of the Commissioner of Insurance and the Reserve Bank of Fiji obtained from the 20th of November 1987, insurance for the Tanoa with London Underwriters. That cover was renewed in November 1988. On the 17th of December 1988 the Tanoa Hotel was totally destroyed by fire.

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Following lengthy negotiations with the loss adjuster appointed by the insurance underwriters the claim was agreed at \$F5.1m in May 1989.

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Of this \$F4.59m was payable and subsequently paid, in London. The remaining 10 percent was paid in Fiji by PanPacific Insurance Co. Ltd.

Following agreement on the claim, the applicant resolved not to re-instate the hotel to its pre-fire condition but to look to the long term tourist needs of Fiji, to undertake a study of world tourism trends and engage overseas experts to carry out concept planning and design work for the new hotel. This entailed considerable detail. In order to off-set the loss of income effects of inflation and increased construction costs during the period of planning and design and construction of the new hotel, estimated in May 1989 to take up approximately 27 months, the applicant decided, as a matter of sound business management, to retain off shore pending construction, the proceeds to earn a higher rate of return than that available within Fiji.

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It is common ground that interest rates outside Fiji were much higher than those available within Fiji, for example in June 1989, on a deposit of \$F5m, interest

A available in Fiji was 6 percent on 12 months and 7.25 percent on 24 months, while 14.25 percent and 14 percent respectively were available in the United Kingdom. On the 22nd May 1989 and before the proceeds or part thereof were received the applicant sought permission of the Reserve Bank. That application was declined on the 8th of June.

On the 15th of June 1989 the applicant sought re-consideration by the Governor. That was declined on the 20th of June 1989.

B An appeal was then lodged to the Minister of Finance. That too was declined. The applicant accepts that there is no clear provision for such appeal.

The insurer, which really consisted of a consortium of insurance companies in England and Europe, paid the claim to Sedgwick London in the following manner:

C	<u>Date Received</u>	<u>Fiji Dollars</u>	<u>Sterling Pounds</u>
	07/06/89	473,196.87	192,356.45
	08/06/89	354,898.80	144,267.80
	14/06/89	2,815,515.18	1,144,518.37
	26/7/89	946,389.15	384,711.04
D		<u>\$4,590,000.00</u>	<u>£1,865,853.66</u>

(See paragraph 1, second affidavit by Mr. Yanktesh Permal Reddy dated 7th September 1990.)

On 18th of August 1989 such sums were paid to Westpac Banking Corporation in London.

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THE DECISIONS

The relevant part of the application, dated 22nd May 1989 was in the following terms:

F “You may be aware that one of our four hotels in Fiji, the Tanoa at Nadi, was completely destroyed by fire late last year. Insurance on the hotel was arranged by our brokers Sedgwick Fiji Limited and 90% of the risk was placed on the London market. The remaining 10% was with Pan Pacific Insurance Company Limited.

G The claim is being presently adjusted by Toplis & Harding (South Pacific) Limited, and following settlement, \$5.1 million will be paid under the policy. Of this 90% will be paid by the insurance underwriters to our brokers in London To avoid such loss of income we would like to invest \$5.1 million in New Zealand and seek your permission to invest, pending reconstruction of the hotel, on term deposit of 24 months.”

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The relevant part of the letter dated 8th June 1989, conveying the decision of the Governor, reads:

"With reference to your letter of 22 May 1989 seeking permission under the Exchange Control Act to invest \$5.1 million insurance claim in New Zealand, pending construction of the new hotel. We have thoroughly considered your application to invest overseas in light of information provided and regret to inform you that we are unable to accommodate your request.

Would you please therefore ensure that funds totalling \$5.1 million are repatriated to Fiji when received and confirmed by your banker direct to the Reserve Bank.

This letter is copied to Sedgwick Fiji Limited for their information."

The letter dated 15th June 1989 by the applicant seeking reconsideration by the Governor is exhibit D to the first affidavit Mr. Reddy swore in these proceedings dated 1st of November 1989.

The relevant part of the letter dated 20th of June 1989, by the Governor, declining the request for reconsideration reads:

"In our meeting on 13 June 1989 I did explain as a matter of policy the Reserve Bank does not allow Fiji residents to invest overseas. During 1988, when there was surplus funds in the system arising from lack of investment opportunities in Fiji, there was considerable pressure from banks, insurance companies and other institutions like FNPF, to invest the surplus funds overseas. To date we have not approved any such application You will appreciate that by investing funds in Fiji it will be contributing towards increased investment and employment creation in Fiji whilst at the same time receiving a reasonable return on your money.

Following this rejection by the Governor the applicant's solicitors wrote to the Minister of Finance on the 22nd of August 1989 in a letter marked exhibit "F" to Mr. Reddy's first affidavit. Among other things that letter stated that permission had been granted to hold the proceeds of the insurance off-shore in London until the 8th of September 1989 and stated the following on pages 7 and 8 of the letter.

1. That our clients' funds have arisen abroad in circumstances which would not make such funds form part of Fiji's foreign reserve until the funds are received in Fiji: therefore, to permit the funds to remain abroad in the special circumstances surrounding this case will not decrease, or adversely affect or infringe any aspect of our national policy on the preservation of Fiji's current foreign reserve.

- A 2. That this application is not simply for an ordinary investment scheme abroad, it is specifically intended to take full advantage of the comparatively better environment of investment overseas for a specific period of not more than 24 months and not for an indefinite period of time.
- B 3. That the specific period of investment requested for these funds is directly related to the specific use to which the funds are intended to be put upon receipt in Fiji, and that is the multifarious aspects of the total reconstruction of our clients' Tanoa Hotel at Nadi.
- C 4. That the planning and related detailed preparations for the reconstruction of the Tanoa Hotel will take months before construction and refurbishing will commence. To ensure the attainment of a level of tourist hotel development which can cope with the increasing demand for up-market tourists, this construction and refurbishing project will necessarily take several months. Our clients are determined that the end product shall be a source of pride for local entrepreneurs in this highly competitive industry into which foreign investors have come to Fiji with the benefit of much healthier cash deposit investment prevailing in their countries.
- D 5. That our clients do not need these funds in Fiji now for their continuing participation in the hotel industry, since they have and still operate three (3) other hotels with reasonable success.
- E The funds in question are, therefore, intended solely for the Tanoa Hotel reconstruction programme."

At page 9 the letter continued:

- F "That our clients applied to the RBF for this special permission (i.e. to purchase insurance cover for the Tanoa abroad) with the candid forthrightness which has characterised their family business enterprises in Fiji, for decades and they have instructed us to assure Government that, if granted, their investment of these funds for the limited period stipulated above will be on a full disclosure basis. That is to say, that details of the Bank, the rate of interest, the total investment potential, the actual account as well as the total tax liability thereon will be among the facts which our clients will provide as and when required by RBF."
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The letter continued that the basis of the policy on which the Governor had rejected the applicant's application was not clear and continued:

"To the extent that in the same paragraph our clients' case is compared to the previous requests made by commercial Institutions

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in Fiji to invest their surplus funds in Fiji overseas, we submit with respect that it would be harsh and unjust to our clients that their application be refused on the same policy decision. Our clients' funds in this case do not form part of their surplus funds in or derived in Fiji which they wish to invest abroad indefinitely."

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The letter then stated:

"The higher returns on the investment during this limited period will clearly be for the mutual benefit of both the Government and the local investor, the appellants."

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The Minister replied to this letter on the 13th of October 1989 and his reply exhibit "G" to Mr. Reddy's first affidavit, is set out in full after omitting all formal parts:

"I refer to your letter of August 22, 1989 wherein you had appealed against the decision of the Reserve Bank to allow your client Reddy's Enterprises Limited to retain and invest overseas for up to two years the sum of F\$4.59 million being insurance claim arising from the fire at the Tanoa Hotel in December 1988.

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I have very carefully considered your grounds of appeal in the light of the present policy of the Reserve Bank of Fiji, of not allowing Fiji residents to invest overseas and advise that the reasons submitted do not justify a change in the Reserve Bank's policy.

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I have also noted your claim that millions of dollars have found their way abroad for investment without proper permission being obtained from the Reserve Bank. I would be grateful if you could provide the Reserve Bank with the details of your claim to enable them to take remedial actions.

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I trust that you will appreciate that by investing funds in Fiji, your client will be positively contributing towards increased investment and employment creation in Fiji whilst at the same time receiving a reasonable return on his money.

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I view of the above, would you kindly inform Reddy's Enterprises Limited to repatriate the funds to Fiji forthwith."

The above recitation suffices to show the matters in issue between the parties. The grounds seeking an Order of Certiorari as filed, are:

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- (1) The making of the decision was an improper exercise of the power conferred by the Exchange Control Act, Cap 211, in pursuance of which it was purportedly made, in that, the Governor:

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- (i) took into account irrelevant considerations;
 - (ii) failed to take into account relevant considerations;
 - (iii) exercised his discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - (iv) otherwise exercised his discretion without regard to the merits of the particular case.
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- (2) There was no evidence, or other material to justify the making of the decision by the Governor.
- (3) The decision was irrational and in excess of powers granted to the Governor.
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- (4) The decision is unreasonable, arbitrary and void.

THE RESPONDENT'S CASE

The respondent says that the application is governed by the Exchange Control Act and the Reserve Bank of Fiji Act, Cap 210. He says that in reaching his decision:

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- (i) He has taken into account the policy of the Exchange Control Act. That policy, he says is to be found in Sections 26 and 33.
 - (ii) He has taken into account all the submissions made by the applicant.
 - (iii) He has made a value judgment, in that, "the public interest aspects relevant to the application outweighed those pertaining to the private commercial interests of Reddy's".
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F Later in this judgment I shall quote certain passages from an affidavit sworn on the 24th of July 1990 by the Governor of the Reserve Bank. This affidavit was of course not before Palmer J. when he gave the applicant leave on the 30th of March.

G I consider the following sections of the Exchange Control Act to be relevant: 2, 4, 9, 26 and 33, and it will be convenient to set out these sections or relevant parts thereof here. Section 2, which is an interpretation section, "Foreign currency" means any currency other than Fiji currency, and includes a reference to any right to receive foreign currency in respect of any credit or balance at a bank.

"4.(1) Every person in or resident in Fiji who is entitled to sell, or to

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- procure the sale of, any gold, or any foreign currency to which this section applies, and is not an authorised dealer, shall offer it, or cause it to be offered, for sale to an authorised dealer, unless the Minister consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Minister. (Amended by Legal Notice 112 of 1970; Act 24 of 1979; s.4.) A
- (2) The foreign currency to which this section applies is such foreign currency (hereafter in this Act referred to as "specified currency") as may, from time to time, be specified by order of the Minister. (Amended by Legal Notice 112 of 1970.) B
- (4) A person who acquires any gold or specified currency from an authorised dealer shall be treated, for the purposes of this section, as if the Minister had consented to the retention and use by him of that gold or currency (subject, however, to any conditions notified to him in accordance with subsection (2) of section 3), and as if any statement made by him in an application for that gold or currency as to the purpose for which he requires it had been made by him in an application for the Minister's consent to his retention and use thereof. (Amended by Legal Notice 112 of 1970; Act 24 of 1979, s.4.) C D
- 9.(1) Except with the permission of the Minister, no person in or resident in Fiji shall make any payment to or for the credit of any person as consideration for or in association with - E
- (a) (Immaterial.)
- (b) the transfer to any person, or the creation in favour of any person, of a right (whether present or future, and whether vested or contingent) to receive a payment outside Fiji or to acquire property which is outside Fiji. (Amended by Legal Notice 112 of 1970; Act 24 of 1979, s.8.) F
- (2) Nothing in this section shall prohibit the making of any payment in accordance with the terms of a permission or consent granted under this Act. G
- 26.(1) Except with the permission of the Minister, no person resident in Fiji who has a right (whether present or future and whether vested or contingent) to receive any specified currency, or to receive from a person resident outside Fiji a payment in Fiji currency, shall do, or refrain from doing, any act with intent

to secure or shall do any act which involves, is in association with or is preparatory to any transactions securing -

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- (a) that the receipt by him of the whole or part of that currency or, as the case may be, of that payment in Fiji currency, is delayed; or
- (b) that the currency or payment ceases, in whole or in part, to be receivable by him:

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Provided that nothing in this subsection -

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- (i) shall, unless the Minister otherwise directs, impose on any person any obligation, in relation to any debt arising in the carrying on of any trade or business, to procure the payment thereof at an earlier time than is customary in the course of that trade or business; or

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- (ii) shall, unless the Minister otherwise directs, prohibit any transfer a person resident in Fiji and not elsewhere of any right to receive any specified currency or payment in Fiji currency.
- (2) Where a person has contravened the provisions of subsection (1) in relation to any specified currency or payment in Fiji currency, the Minister may give to him or to any other person who appears to the Minister to be in a position to give effect thereto (being a person in or resident in Fiji) such directions as appear to the Minister to be expedient for the purpose of obtaining or expediting the receipt of the currency or payment in question, and, without prejudice to the generality of the preceding provisions of this subsection, may direct that there shall be assigned to the Minister, or to such person as may be specified in the directions, the right to receive the currency or payment or enforce any security for the receipt thereof.
- (Amended by Legal Notice 112 of 1970; Act 24 of 1979, s.20.)

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- 33 Any provision of this Act imposing any obligation or prohibition shall have effect subject to such exemptions as may be granted by order of the Minister, and any such exemption may be either absolute or conditional."

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The applicant argues principally on the effect of section 26 on its case but has also mounted an alternative argument under section 9 claiming in both cases that it has satisfied the requirements of either section.

Before dealing with the respective submissions to me it is desirable to say something about Exchange Control. The Exchange Control Act is modelled on the English Exchange Control Act (1947) which was repealed in 1987 by the

Finance Act 1987. The two Acts are broadly similar though there are some differences which it seems to me for the purposes of this case are immaterial.

Like its English counterpart the objects and scheme of the Act imposes Reserve Bank control on a wide variety of transactions included directly or indirectly in dealings with gold and foreign currencies, payment to persons resident outside Fiji, the import and export of bank notes, treasury bills and certain other items, and payment for the export of goods. The general purpose of exchange control is to conserve a country's overseas funds and foreign exchange resources. Speaking of the former English Exchange Control Legislation H.P. Sheldon and C.B. Drover in their "The Practice and Law of Banking" 9th Edition (1962) say at page 622:

"Prior to the War, movements of goods and foreign currency were, as far as this country was concerned, entirely free from Government control, and a man could buy, sell or invest in any currency and dispose freely over the whole of his assets without restriction.

The War altered all this completely. The Government, using the wide powers granted by the Emergency Powers (Defence) Acts, 1939 and 1940, issued the Defence (Finance) Regulations, 1939, which were designed to ascertain, collect and utilise our Foreign Exchange resources to the best advantage. As a practical effect of this, it was no longer possible to deal freely in foreign exchange; instead, a system of Licences and Controls was introduced, operated on behalf of the Treasury by a special department of the Bank of England, which, in turn, delegated certain powers to nominated Commercial Banks known as "Authorised Dealers," for, as they are now known, Authorised Banks."

The authors say that in order to understand the English regulations, it must be realised from the outset that, for the purpose of the Controls, the residence of the applicant was the basic consideration.

In their book "Banking Law and Practice in Australia" by Weerasooria and Coops, 1976 at page 420 the authors say this:

"The objective of exchange control is to conserve the country's overseas funds and foreign exchange resources.

The latter consists of -

- (i) balances with overseas banks and other financial institutions which may be owned by the Australian government, the trading banks, corporations, firms, or individuals resident in Australia,
- (ii) foreign currency whether in notes, coins, bills of exchange,

letters of credit, travellers cheques etc. otherwise than in Australian currency, and

- A (iii) foreign securities of any kind such as shares, bonds, deposit receipts or debts owing by overseas persons to Australian residents. These resources arise largely from exports but also derive from other sources such as dividends from overseas, foreign currency brought by tourists, shipping, insurance and from other business transactions and capital transfers.”

B It is important to note these statements when considering the issues in this case. It is acknowledged by both parties that the texts from which I have just quoted are by authors of high standing in matters of banking and exchange control.

I turn now to consider in detail the various submissions made to me.

- C It is first submitted by the applicant that the Exchange Control Act is a penal Act and therefore must be construed strictly. The applicant here relies on a judgment of Plowman J. in Re. H.P.C. Productions Ltd [1962] 1 All E.R. 37 where at page 41 his Lordship said this:

- D I approach the question of the construction of the Exchange Control Act, 1947, in the light of the principles stated by Upjohn J., in London & Country Commercial Property Investments Ltd v. Attorney-General [1963] 1 All E.R. 436 at page 441.

- E “In these circumstances, what are the proper canons of construction? I do not propose to refer to the authorities at any length. I think the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, i.e., I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must above all, give effect to the words that have been used in the section. That is plain from the Privy Council case of Dyke v. Elliott, The Gauntlet, and, particularly,
- F from the language of James, L.J., who delivered the judgment of the Board. If, in construing the relevant sections of the Act and of the order, there appears any reasonable doubt or ambiguity, then, as it is a penal statute, I must apply the principles laid down succinctly by Lord Esher, M.R., in Tuck & Sons v. Priester. Lord Esher, M.R., says: ‘But then comes the question whether the
- G plaintiffs are also entitled to recover penalties under s.6 [of the Fine Arts Copyright Act, 1862]. We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections. There is another principle

that I must have in mind, and that is that a man is entitled so to order his affairs as to avoid the provisions of the order. This is a genuine transaction. There is nothing colourable about it. The whole question I have to determine is whether, on the true construction of the Act and the order and on the true interpretation of the acts and deeds of the parties, that transaction falls fairly and squarely within the provisions of the Act and the order. In St. Aubyn (L.H. 2 v. A-G. (No. 22) Lord Simonds was dealing with a taxing Act, but his remarks apply, in my respectful view, a fortiori to a penal statute when he says: 'The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits.' I have to see whether, construing the Act and the order and giving the words their natural meaning, the Act and the order fairly and squarely hit this transaction."

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It is therefore my duty first to consider what the natural meaning of s.1 (1) of the Act is, and then to consider whether it fairly hits the transactions with which I am concerned."

Later his Lordship quoted with approval a statement by Lord Tomlin in Inland Revenue Commissioners. v. Duke of Westminster [1936] A.C. 1 at page 19:

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"... it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter,' and that here the substance of the matter is that the annuitant was serving the duke for something equal to his former salary or wages and that, therefore, while he is so serving the annuity must be treated as salary or wages. This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and straight mete wand of the law'."

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Later at page 49 he continued:

"The conclusions which I draw from the authorities to which I was referred and to which I have referred are these: first, that in construing a penal statute with a view to deciding whether a particular act or a particular transaction is a prohibited act or transaction, no valid distinction can be drawn between a statute which prohibits a specified act and one which prohibits a specified transaction. Thus, in my judgment, there is no valid distinction of the kind suggested in argument between a statute which prohibits the act of payment and

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- one which prohibits the transaction of borrowing. Both are acts and equally both are transactions, though they may be of varying degrees of complexity. Secondly, in every case the question is simply: what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted."
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The respondent is critical of this judgment in as much as it says that it has been criticised by Dr. Mann in an article in 1962 Modern Law Review where the author says at page 237:

- C "There was always good reason for thinking that the term 'borrow' would be interpreted strictly, but that it would be construed with such technicality as to allow, for purposes of exchange control, a distinction between indebtedness arising from money lent and indebtedness arising from money paid at the defendant's request does come as a surprise."
- D He also refers to a letter written to the editor of The Times by a former director of the Bank of England who for 15 years was responsible for exchange control, calling it "the most detestable form of government interference" and administered with the idea in mind "that it is by its very nature hateful" Whatever weight one may give to this letter, it does appear to run contrary to the narrow interpretation which Plowman J. gave in the H.P.C. case. It also seems at variance with the remarks by Viscount Simonds in Contract and Trading Co. (Southern) Ltd. v. Barbey and Others [1960] A.C. 244 at page 250 that the English Act "was a far-reaching measure designed for the protection of the national economy." It is also interesting that one of the numerous cases which Plowman J. mentioned in his judgment, Inland Revenue Commissioners v. Duke of Westminster (supra) was criticised by the House of Lords 49 years later in Furniss. (Inspector of Taxes) v. Dawson 15 A.T.R. 255 at page 259 by Lord Roskill who recalled the warning given by Lord Atkin, who had dissented in the Duke of Westminster's case, in United Australia Limited v. Barclays Bank Limited [1941] A.C. 1 at 29, "when these ghosts of the past stand in the path of justice clanking their mediaeval chains, the proper course for the judge is to pass through them undererred". Lord Roskill said, "1936 a bare half century ago, cannot be described as part of the Middle Ages but the ghost of the Duke of Westminster and of his transaction, be it noted a single and not a composite transaction, with his gardener and with other members of his staff, has haunted the administration of this branch of the law for too long. I confess that I had hoped that ghost might have found quietude with the decisions of Ramsay (1981) 11 A.T.R. 752 and Burmah (1982) S.T.C. 80. Unhappily it has not. Perhaps the decision of this House in these appeals will
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now suffice as exorcism."

Thus in a case to which Plowman J. did not refer, Pickett v. Fesq. [1949] 2 All E.R. 705 at page 707 Lord Goddard C.J. said:

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"If a person commits an offence against this statute (i.e. the Exchange Control Act 1947), a statute for the breach of the provisions of which very heavy penalties have been provided by Parliament, the offence is serious. It is almost impossible to suppose that there could be circumstances which would justify a court in treating such offence as trivial. It may not generally be known how rigid and far reaching are the provisions of the Exchange Control Act, 1947."

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In that case the Court was dealing with an elderly woman who had deliberately tried to evade the Act by attempting to take abroad £85 sterling when the limit under the Act at the time was £5. Lord Goddard said that doubtless a good deal of sympathy could be felt for the woman but:

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"That Act was passed to protect sterling in the serious financial situation which exists in this country at the present time, and it is of utmost importance that its provisions should be observed by all citizens."

D

In Ex-parte Fitzgerald; Re Gordon (1945) 45 S.R. (NSW) 182 at page 186 Jordan C.J. said:

"If conduct of a particular kind stands outside the language of a penal section, the fact that a Court takes a view that it is through inadvertence of a Legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than its language admits. To do so would be to usurp the function of the legislature."

E

Similar words but, perhaps even stronger were used by Lord Simonds in Magor and St. Mellons Rural District Council v. Newport Corporation [1952] A.C. 189 when he criticised a dissenting judgment of Denning, L.J., who, had said that the duty of the Court was:

F

"To find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

G

Lord Simonds said that this general proposition cannot by any means be supported; that the duty of the Court is to interpret the word the legislature had used: "Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited". Shortly afterwards his Lordship said that to follow Lord Denning would be "a naked usurpation of the legislative function under the thin disguise of interpretation

and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in."

- A Similarly in Parshuram v. R (FCA Reps 83/172) the Fiji Court of Appeal observed-

- B "It must be acknowledged that the decision to which we have come results in some anomalies, but that is not a reason for adopting a construction which cannot otherwise be sustained. It may, of course, be a reason which could prompt the legislature to consider amendments to the law but that is not a matter for this court."

In the Parshuram case the Court of Appeal accepted the appellant's argument that a "special constable" was not a police officer within the definition of that term as used in section 274(b) of the Penal Code.

- C Relying on these cases Mr. Patel then submits that section 26 if considered literally contains nothing which requires the Applicant to return the money it has invested in London to Fiji. He says the section is aimed at ensuring the payment when it is due and payable, is received by the Respondent and not delayed. That is the policy of the section. He says the section applies to a situation where there is delay between the date when payment is due, by a non-resident to a resident, and the date of actual payment. It is not intended and does not apply where payment has already been received by a resident without delay, and the resident seeks to retain the money outside Fiji. He submits, but this is not contested by the Respondent, that the Applicant did all it could to obtain payment of the insurance claim as promptly as possible and furthermore that this money was paid in London from funds unrelated to the Fiji economy. In his alternative argument on section 9 counsel submits the Applicant has lawfully obtained payment outside Fiji and is entitled to retain it. He finally submits that if I were to uphold the Respondent's argument that the Respondent has the right to demand return of the money to Fiji I would be reading in to section 26 words which it does not contain, namely that to the expression in sub-paragraph (a)"that the receipt by him of the whole or part of the currency" should be added the words "in Fiji", and that since this is a penal statute there could be no justification for adding any such words.

- G In reply to the Applicant's submission on this point counsel for the Respondent referred me to various cases some of which I now mention. The first is the decision of Gibbs J. in Talga v. M.B.C. International (1976) 8 A.L.R. 266 where His Honour had to consider the provisions of section 5(1) of the Banking Act 1974 (Com) and particularly Regulation 8(3), paragraph (a) of which is almost identical with section 9(1) of our Exchange Control Act. At page 278 His Honour said:

"The provisions of section 5(1) clearly show what was already apparent from the words of Regulation 8 that the regulations are designed not for the protection of individuals but to enable certain financial transactions to be controlled in the public interest."

In Rowling and Another v. Takaro Properties Ltd. [1988] 1 All E.R., 163 at 173 the Privy Council per Lord Keith said that in administering exchange control regulations the responsible official, in that case the Minister, in exercising his statutory discretion, "is acting essentially as a guardian of the public interest; in the present case, for example, he was acting under legislation enacted not for the benefit of the applicants for consent to share issues but for the protection of the community as a whole." In Fiji the Court of Appeal has also considered the interpretation which should be given penal legislation in two cases namely The Fiji Bank Employees Union v. The Prices and Incomes Board and The Attorney-General of Fiji (FCA Reps 85/135) and The Prices and Incomes Board and Others v. Fong and Another (FCA Reps 79/344). Both these cases dealt with the Counter-Inflation Act, Cap 73. The first case was an appeal from Mr. Justice Rooney. The question for decision was whether a power to restrict or regulate authorises a total prohibition of wage increases. In the course of its judgment at page 3 of its report the Court of Appeal quoted with approval from a decision of the New Zealand Court of Appeal in NZ Employees Industrial Association of Workers v. Attorney-General and Others (1976) 2 N.Z.L.R. 521 at page 529 where the court said:

"The ambit of the Act itself must by reason of the nature of its subject-matter be regarded as a wide one. Measures to secure the economic stability of New Zealand need not be considered unless in some degree to be threatened; and in times of economic stress measures will of necessity be such as to impose some burdens and restrictions on a great proportion of the community, and even to result in widespread hardship in greater or less degree. Moreover, it will probably be found expedient in such situations to regulate and restrict the exercise of freedoms which in 'normal' times would be left unimpaired. I cannot think of a restriction which more readily comes to mind, as one likely to be imposed for the general purpose of this Act, in a time of economic instability, than a ceiling on salaries, wages, or other rewards for services. Without power to impose such a restriction any attempt at stability by legislation must be in vain."

In Fong's case the question before the court was whether a power to fix prices also included a power to lower prices where the circumstances warranted it. In holding it did the court looked at the objectives of the Counter-Inflation Act which it said had to be to counter inflation and said that the phrase in question had to be interpreted in accordance with the purpose of the Act. Here, I hold that the Counter-Inflation Act is just as penal as the Exchange Control Act. It is interesting to note that Mr. Justice Rooney in The Fiji Bank Employees Union case said at page 11 of the report in Civil Action No. 174 of 1985: "The order constitutes an interference with existing rights but, so do most statutes."

In his book Statutory Interpretation in Australia by D.C. Pearce (1974) the author also discusses the interpretation which should be given to penal statutes. He

A remarks at paragraph 184 that the desire of the courts in earlier days to abrogate the effect of provisions that visited barbaric penalties on wrong-doers led to the development of an approach to the interpretation of penal statutes that survived despite the passing of the reason for its adoption. This of course is the approach taken by Plowman J. in the H.P.C. case and earlier by Lord Esher in Tuck v. Priestler (1887) 19 Q.B.D. 629. I have already quoted this in Plowman J's judgment in the H.P.C. case.

B However the Exchange Control Act is not only penal but also remedial or beneficial because its objects are broadly to control the receipt into Fiji and payment out of Fiji of the country's monetary resources. The orthodox view of the manner in which such legislation should be interpreted is provided in the dissenting judgment of Isaacs J. in Bull v. the Attorney-General for NSW (1913) 17 C.L.R. 370. The question the court had to decide was whether a section of the Crown Lands Act validated all transactions under the Act or only those that independently of the operation of the Act were defective. Isaacs J. held the section was intended to validate all transactions concerning crown lands. At 384, he said:

D "In the first place, this is a remedial Act, and therefore if any ambiguity existed, like all such Acts should be construed beneficially This means, of course, not that the true significance of the provisions should be strained or exceeded but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow."

E Conscious as I am of the problem in this case where the Act penalises certain conduct of residents in order to achieve its beneficial purposes and having given much thought to the different interpretations of such legislation put to me, in the end I have concluded that I should construe section 26 in the way submitted by the Respondent. I do so for a number of reasons: First that if the argument for the Applicant is to be accepted as to the meaning of the section then, as I remarked during argument, it would seem to mean that the Government is far more altruistic in its concern for the collection of debts due not only to its citizens but even to ordinary residents in Fiji than might normally be supposed. If this indeed were the objective of section 26 then I fail to see what connection it has with an Act dealing with exchange control. In my judgment the receipt stipulated in section 26 must be construed as a territorial receipt because in my view that is the only receipt which can possibly have any significance from an exchange control point of view. I remind myself of Weerasooria's remarks quoted earlier in this judgment that the foreign exchange resources of a country consist inter-alia of balances with overseas banks and other financial institutions which may be owned not only by the Government of a country or its residents, and debts owing by overseas persons to residents of, in the present case, Fiji. If these are accepted to constitute the foreign exchange resources of a country, and it was not disputed by Mr. Patel that they do, then in my view the Government through its agent the Reserve Bank is entitled to require the return of the funds if it considers the circumstances

warrant it.

I appreciate that this involves reading certain words into section 26 but in my view, given that the public interest is the primary function of the Exchange Control Act, such a course is warranted here. Of course this does not accord with the views of the strict constructionist. Despite the criticism levelled at him by the House of Lords in Magor and St. Mellons Rural District Council case (supra) Lord Denning was clearly and perhaps characteristically undeterred because in Nothman v. Borough of Barnet [1978] 1 All E.R. 1243 at 1246 he again returned to the same theme as in his dissenting judgment in Magor. In Nothman's case the Court of Appeal was hearing an appeal from the Employment Appeal Tribunal which had very reluctantly found itself unable to uphold an appeal by a woman teacher against her dismissal before her retiring age. The Tribunal had described the situation in the case as absurd and unjust but held that they could do nothing about it. They said in part:

"We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or judicial tribunals.

At page 1246 Lord Denning quoted that passage and then went on:

"I have read that passage at large because I wish to repudiate it. It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive' approach. He said so in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd; and it was recommended by Sir David Renton and his colleagues in their valuable report entitled "The Preparation of Legislation". In all these cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose underlying the provision'. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done had they had the situation in mind."

I do not consider that it would be absurd or unjust if the Reserve Bank could not

A legally demand the return of these funds to Fiji but I hold that taking the purpose the Act as my primary concern, the Respondent is entitled to make such a demand. In any event I fail to see how the Applicant can legitimately complain about this apart from financial reasons. The argument presented to me on section 26 by the Applicant is totally different from that put to the Minister by the Applicant's own solicitors on the 22nd of August 1989 in their letter exhibit "F" to Mr. Reddy's first affidavit.

B At page 6 of that letter their solicitors say this:

 "Under section 26 of the Exchange Control Act no person resident in Fiji may, except with the permission of the Minister of Finance, inter-alia, delay or altogether avoid the transfer into Fiji of any funds due to him from any person outside Fiji."

C If ever there was an admission that the Applicant was obliged to bring these funds back into Fiji, surely this was it. If, as argued before me, the Applicant is under no such duty, why then write to the Minister in effect acknowledging that duty? To do so would surely be an exercise in futility.

D Of course, this is not conclusive against the Applicant who is entitled to have the opinion of this Court on the matter and put before it any arguments which on later reflection appear more correct in law than those previously put to the Governor and the Minister. Nevertheless I find the sudden change in the Applicant's stance on section 26 curious to say the least. It is true that the H.P.C. case has never been over-ruled but it is interesting to note that Pickett v. Fesq. was never cited to Plowman J. possibly because the Court in each case was considering a different section of the Act. In my opinion a distinction can be drawn between cases such as Ex-parte Fitzgerald; Re: Gordon (1945) S.R. (NSW) 182, Parshuram (supra), The Prices and Incomes Board and Others v. Fong and Another (supra), The Fiji Bank Employees Union v. The Prices and Incomes Board (supra) and the present case. Both in Ex-parte Fitzgerald and Parshuram the court in each case was dealing with a more limited class of person affected by the relevant legislation. In Fitzgerald's case the legislation concerned was the Lunacy Act of NSW and whether a doctor could be guilty of an offence of issuing a certificate relating to the sanity of a person admitted voluntarily into a mental hospital without first examining the person. It was clearly an offence to issue a certificate in these circumstances in the case of a person compulsorily committed to an asylum but the Act was silent in regard to voluntary admissions.

F G The Court therefore led by Jordan C.J. applied a strict construction of the Act and refused to read into it words which may have been omitted from it through inadvertence of the legislature.

Likewise in Parshuram the Court was dealing clearly with the liberty of the subject and the powers of arrest given under the Penal Code.

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In the Prices and Incomes Board cases and in the present case the legislation is designed in my view for the benefit of the nation and not merely the individual. Nevertheless the Applicant now contends that the funds arose outside Fiji and that the proper law of the contract of insurance was English and not Fijian. I am prepared to accept this because the contract was dated in London and the proceeds of the claim were paid in London. I also accept as stated by Ivamy in his General Practice of Insurance Law 1986 at page 591; "the rule that where the contract affects immovables situated out of the jurisdiction, the *lex loci rei sitae* in general at least, must be taken as the proper law of the contract, has no application" but I am satisfied that in matters of exchange control the Exchange Control Act must prevail over matters of private law and that it is the law of Fiji which governs this matter. Before parting with section 26 and questions of interpretation I find assistance in the construction which I give to the section in some remarks of F.A.R. Bennion in his recent book on Statutory Interpretation published in 1984. At page 386 he states this:

"The decision whether to give a strict or liberal construction, or one which is neither strict nor liberal, will depend on the weighing of the factors. (As to this see ss 168 to 163 of the Code.)

For this reason over-simplistic judicial dicta on the point must be regarded with due reserve. A typical such dictum was that of Plowman J when he said: 'If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted'. (Re HPC Productions Ltd [1962] 2 WLR 51) Here those essential words 'other things being equal' must be written in."

For these reasons I reject the Applicant's argument on section 26.

This however does not end the matter because I must now consider the other arguments addressed to me by Mr. Patel and Mr. Scott on other aspects of the case. It would be convenient to turn now to Mr. Patel's submission on section 9.

Although he put this as an alternative submission in the course of argument he said that really section 9 was more appropriate to the position of the Applicant. According to counsel the Applicant has fully complied with the requirements of section 9. He says that here the Applicant, a Fiji resident, with the consent of the Reserve Bank makes payment i.e. of an insurance premium, as consideration to a London insurer (any person) who then creates by issue of an insurance contract, a right in favour of the Applicant (any person), which right is both future and contingent upon an event occurring to secure payment, under the policy, outside Fiji.

There is nothing in the section, or the Act, so counsel argues which requires prior approval of the Reserve Bank or the Commissioner of Insurance to either reach agreement on an insurance claim or to receive payment pursuant to such agreement

A when due. On the contrary it is said intentional and undue delay in receiving payment may breach section 26. Thus, it is said, the Applicant has lawfully obtained payment outside Fiji and is entitled to retain it.

B It will be noted that in this argument, which I have paraphrased I hope correctly, the Applicant uses the term "any person" to mean in the first case its insurance company and in the second case itself. Given the very wide language in which the Exchange Control Act is cast at first glance this submission is attractive. However, in my judgment it is not correct. First it ignores the heading of the section. I take the law on headings in statutes to be as stated by Murray C.J. in Ragless v. The District Council of Prospect (1922) S.A.S.R. at 311

"I think the rules (as to use of headings) may be stated as thus:

- C
- (1) If the language of the sections is clear and is actually inconsistent with the headings, the headings must give way.
 - (2) If the language of the sections is clear, but, although more general, is not inconsistent with the headings, the sections must be read subject to the headings.
 - D (3) If the language of the sections is doubtful or ambiguous, the meaning which is consistent with the headings must be adopted."

E The word "compensation" means a payment to make amends for loss or injury to person or property. In my judgment it is clear therefore that section 9 does not, apply to the facts of this case. In this regard I would apply rule 2 of Murray C.J. in Ragless. I am also supported in this view by the note given to the equivalent to section 9 in the English Exchange Control Act 1947 (Section 7) by Halsbury in his Statutes of England 3rd Edition, Volume 22 at pp.907-908. The author says:

F "This section in the first place prohibits arrangement between residents and non-residents by which each gains some advantage in the country of the other for example, an agreement by which A in England discharges a debt owed in England by B (a non-resident) in consideration of the discharge by B outside the scheduled territories of a debt due from A."

G In my judgment the word "compensation" must be given its natural meaning in section 9 to assist in the construction of the section. If that be so then in my view the section refers to a person in or resident in Fiji making payment in foreign currency for some loss or injury caused by him to the payee or as in the example given by Halsbury, a discharge of mutual debts. I take the expression "to acquire property" to mean chattels or real estate. Another example would be that of an English person who was involved in a motor accident in Fiji with a vehicle driven by a resident of Fiji and insured for Third Party damage with an insurance company in Fiji. The English person subsequently issues proceedings for damages

against the driver of the vehicle and later the claim is settled for an amount of Fiji dollars. The Englishman requests the insurance company to pay his damages into his bank in England in sterling. Such a transaction would clearly in my view require ministerial consent. These examples are of course only illustrative but in my view indicate the probable way in which the draftsman intended the section to operate. Essentially, therefore I consider that section 9 cannot be used in the way suggested by Mr. Patel because in my opinion the expression "any person" must mean "any other person".

A

Even if I am wrong in this, it seems to me that section 9 must be regarded as independent of section 26, so that compliance or non-compliance with section 9 is not necessarily compliance with section 26. Neither section says that it is subject to the other. For these reasons also I would reject Mr. Patel's argument although I would prefer those which I have mentioned earlier for so doing.

B

Next the Applicant submitted that in any event the funds in question here are unrelated to Fiji. I cannot accept this submission. In my view they are closely linked to Fiji in as much as the event giving rise to them namely the fire at the Tanoa Hotel occurred in Fiji and furthermore I am satisfied that they form part of this country's foreign exchange resources for reasons given earlier.

C

Then counsel for the Applicant argued that if the Exchange Control Act applies, whether it would be section 26 or any other, to this application, then the Governor wrongly assumed authority to consider and decide upon the application. The application should have been dealt with by the Board of the Reserve Bank and not by the Governor alone.

D

By Legal Notice No. 98 of 1981 the Minister delegated his powers to the Reserve Bank of Fiji. He has however, it is said, not authorised the Reserve Bank to delegate those powers.

E

The delegation is contained in section 39 of the Exchange Control Act and is in these terms; "The Minister has delegated to the Reserve Bank of Fiji all of his powers under the said Act other than the power to make orders or to give authority to apply for a search warrant."

F

"Reserve Bank" is defined in section 3 in the Reserve Bank of Fiji Act, Cap 210. By section 9 of that Act a Board of Directors of the Bank is created. That Board comprises seven Directors including the Governor. (Section 10;) the Board is required to meet at least ten times in each year and there is not to be an interval greater than two months between their meetings. (Section 16); The Governor, if available is to preside at such meetings (Section 16(3)); and the Board is required to keep minutes of its meetings. (By-law 4, Legal Notice 168) of 1974.

G

The duties of the Governor are set out in Section 15 and so far as relevant are contained in sub-section 1, namely to:

- (a) serve as Chief Executive Officer of the Reserve Bank

- responsible to the Board for the execution of its policy and the management of the Reserve Bank;
- A (b) except as may be otherwise be provided in this Act, the By-laws of the Reserve Bank or the resolutions of the Board, have the power to act, contract, sign instruments and documents on behalf of the Reserve Bank and, pursuant to the resolutions of the Board, delegate any of these powers to the Deputy Governor or to other officers of the Reserve Bank.
- B It is submitted that the section is clear and unambiguous in its terms. The powers delegated by the Minister under the Exchange Control Act are to be exercised by the Reserve Bank and not by the Governor.
- Counsel then cite several cases which are often said to fall under the *maxim delegatus non potest delegare*.
- C This maxim which Professor Wade points out really belongs to the law of agency, nevertheless has been used by the Courts in Administrative Law to indicate that normally, in the absence of clear statutory authority, a power conferred upon A may not be exercised by B. The vital question in most cases is whether a statutory discretion remains in the hands of the proper authority or whether some other person purports to exercise it.
- D The Applicant cites the well known cases of Allingham v. Minister of Agriculture [1948] 1 All E.R. 780 and Barnard v. The National Dock Labour Board [1953] 2 Q.B. 18. In each case the Court held that the relevant legislation did not allow a particular person vested with a power to act to delegate that authority to any person. It is unnecessary for me to refer here to the facts of those cases which are now well known. The Courts stressed that clear words were necessary in the governing legislation before any delegation could be permitted and no such words were apparent in the legislation before the Courts. The Applicant argues that no such clear words appear in the Reserve Bank of Fiji Act.
- E In addition to Section 15, Section 48 of the Act reads thus:
- F "The Reserve Bank shall exercise, as agent for the Government, such powers or functions under any law for the time being in force relating to exchange control and the regulation of financial institutions in Fiji as may be delegated to it by the Minister."
- G The Applicant argues that accordingly the Governor had no right to make any decision affecting the Applicant; that it was only the Reserve Bank which could make such a decision and therefore the Governor's direction to the Applicant to return the funds to Fiji is a nullity. The applicant relied also on the letter dated the 30th of July 1990 written by its solicitors to the Solicitor-General, which is exhibit "H" to the second affidavit of Mr. Reddy. That letter asked what sections if any of the Exchange Control Act were considered by the Governor in dealing

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with:

- (a) the initial application;
- (b) the request for consideration.

A

The Solicitor-General replied by letter of 10th of August 1990 (exhibit "I" to the affidavit) by saying sections 26 and 33. The Solicitor-General also said that the relevant policy on which the Governor relied was set out in section 26.

Then the Applicant's solicitors asked whether there was any document or documents on the file or files kept by the Reserve Bank relating to the application and if so the nature of the document(s). The letter also asked if there were any minutes or memoranda recording deliberation on the application.

B

I was informed that this inquiry was directed to find out whether the application was considered by the Reserve Bank itself. The Solicitor-General stated in his reply that there were no such documents or minutes or memoranda. I shall return to both these letters shortly when dealing with other submissions.

C

The Respondent admits that the decision was not made directly by the Reserve Bank but by the Governor who had full power under the Act to make the decision. The Respondent relied on a decision of Luxmoore J in General Council of Medical Education and Registration of the United Kingdom v. The Dental Board of the United Kingdom [1936] 1Ch. 41 where the Court had to consider section 16(4) of the Dentists Act, 1921. The Court held that although sub-section 4, if considered by itself, was wide enough in its terms to suggest that the General Council might delegate all its powers under the legislation to an executive committee as there provided, it was not prepared to construe the Act in this manner. This was because in the Court's opinion that to do so would render sub-section (1) of section 16 redundant. Under sub-section (1) the members of the General Council were to comprise the ordinary members of the Council and three additional members to be appointed by the Privy Council.

D

E

Sub-section 4 of section 16 stated:

"The General Council shall, for the purpose of the exercise of their functions under the principal Act [Dentists Act, 1878] and this Act, have power to act by an executive committee of the Council, including atleast one of the additional members of the Council appointed in pursuance of this section."

F

Luxmoore J. held that accordingly the Council could not delegate its disciplinary powers over dental practitioners to a committee.

G

The Respondent argues that this case can be relied on to show that normally the phrase "act for" gives full power and that in the instant case by section 15(1)(b) the Governor was entitled to make the decision against the Applicant. The Respondent also relied on by-law 6 of the Reserve Bank which begins thus:

- A 6. "The Governor shall be in charge of the day-to-day management and conduct of the Reserve Bank's affairs and operations in accordance with the policy of the Board and shall without prejudice to the generality of the foregoing also be responsible for"

The section then proceeds to specify particular duties of the Governor and I need not state these here.

- B The Respondent also relies on section 4 of the Reserve Bank Act which reads thus:

"The principal purposes of the Reserve Bank shall be -

- C (a) to regulate the issue of currency, and the supply, availability and international exchange of money;
- (b) to promote monetary stability;
- (c) to promote a sound financial structure; and
- D (d) to foster credit and exchange conditions conducive to the orderly and balanced economic development of the country."

On this aspect of the case in my judgment section 52 of the Reserve Bank Act is also relevant. Section 52 reads:

- E "The Minister may, after consultation with the Board, issue to the Reserve Bank such written directives of a general nature as may be necessary to give effect to the economic policies of the Government, and the Reserve Bank shall comply therewith."

- F At first glance there is some attraction in the Applicant's submission but, during argument I put it to Mr. Patel that surely it could be presumed that if the Minister considered that the Reserve Bank had carried out public policy and was administering the Act in the public interest he would not think it necessary to give any written directives. I cannot find any error by the Minister in this regard because it seems to me that if he thought the Reserve Bank were not acting in accordance with government policy only then would he deem it necessary to give written directions. It must be remembered that the Governor of the Bank is acknowledged to be a person of high qualifications befitting the responsible position which he holds. Combining this consideration with the effect of Section 4, section 15(1), section 48 and by-law 6 of the Reserve Bank Act and the decision in the General Council of Medical Education case, in my judgment this contention of the Applicant must fail.
- G

The Applicant also referred although not to any great degree to section 4 of the Exchange Control Act and submitted that it had complied with it. This section

concerns the surrender of gold and foreign currency. In the present context sub-section (1) and (4) appear relevant. Under sub-section (1) every person in or resident in Fiji who is entitled to sell any gold or foreign currency and is not an authorised dealer, shall offer it for sale to an authorised dealer unless the Minister consents to his retention of the currency. Authorised dealers under the Act are the Commercial Banks. Under sub-section 4 a person who acquires any gold or foreign currency from an authorised dealer may be treated as if the Minister had consented to the retention and use by him of that gold or currency subject to an exception not relevant here. The Respondent submits that section 4 is not relevant. I tend to agree with this but am prepared to hold that the Applicant has complied with the section. However that does not end the matter because in my view the Act is to be looked at as a whole so that this compliance does not necessarily help the Applicant if it can be shown that it has not satisfied the requirements of other parts of the Act bearing on it.

This leads to the final argument by the Applicant based on the so-called Wednesbury principles. This is a reference to the now famous decision of the Court of Appeal in Associated Provincial Picture Houses v. Wednesbury Corporation [1947] 2 All E.R. 680. In the years since this decision the judgment of Lord Greene M.R. has become the *locus-classicus* for defining the limitation on the powers of a court to interfere with the exercise of the discretion of administrative bodies. In language of great felicity at page 683 Lord Greene said:

“What, then are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty - those, of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word “unreasonable”. It is true that discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It is frequently

- used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must not exclude from his consideration matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.
- A
- B
- Warrington L.J., I think it was, gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense, it is taking into consideration what it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."
- C
- Following the decision a long line of cases in Australia, England and New Zealand, to name just three countries, have extended the Wednesbury principles from the area of Local Government law to the area of Ministerial Discretion and Statutory Discretions generally, for example in CSSU v. The Minister for the Civil Service the House of Lords [1984] 3 All E.R. 935 at 951 Lord Diplock in the House of Lords said that Wednesbury's "unreasonableness" meant "irrationality" and an irrational decision was one "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." Lord Diplock had classified under three heads the grounds on which administrative action was subject to judicial control. These were illegality, irrationality and procedural impropriety, being failure to observe basic rules of natural justice or failure to act with procedural fairness.
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- The Applicant submits that here the Governor and the Minister were affected by irrelevant considerations in making their decisions. It is said that they have misinterpreted the policy of section 26 of the Exchange Control Act because it is said this section is not relevant to the Applicant and by considering it, the Respondent has been influenced by this irrelevant matter. The Applicant then relies in support on certain statements made in paragraphs 12, 13 and 14 of the Respondent's affidavit sworn on the 24th of July 1990.
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- It is useful to quote more from paragraph 12 than the few lines mentioned by counsel. In paragraph 12 the Governor stated that he had thoroughly considered the Respondent's application and that he had fully considered the Respondent's submission in annexure "B". (That is the letter of the 12th of May 1989 from the Applicant to the Governor and annexure B to Mr. Reddy's first affidavit.)

Paragraph 12 then continues:

"I conducted discussions with Mr. Reddy and Mr. Naidu company representatives on 13th June 1989; I took fully into account Mr. Reddy's letter of 15th June annexure "D"; I also took into account

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the policy mentioned in my letter of the June 20th of not allowing Fiji residents to invest overseas.

13. That the above mentioned policy was not an invention of mine or of the Reserve Bank. Relevant policy is laid down by the Exchange Control Act itself which it is and was at all material times the statutory duty of the Reserve Bank to administer.

A

14. That in making decision to refuse Reddy's permission to invest overseas sums being insurance claim arising from the fire at the Tanoa Hotel, I took fully into account all factors cited above, weighing as a value judgment the commercial interests of Reddy's against the public interests of enforcement of the relevant statutory policy. In making my decision, in my capacity as Governor of the Reserve Bank, I was fully aware of the impact upon Fiji's balance of payments of permitting the relevant payment to be made overseas. I was also aware of considerations of increased employment and investment in Fiji likely to be created by adherence to the statutory policy, resulting in bringing into and retention within Fiji of millions of dollars which in case of grant of permission would have been invested elsewhere. In particular in regard to statutory policy I was aware of the necessity in terms of Section 26 of the Exchange Control Act for Fiji residents of whom Reddy's was one, ensuring payment to themselves in Fiji of debts due to them in circumstances such as those in the present case. In my judgment, upon the merits of the case the public interest aspects relevant to the application outweighed those pertaining to the private commercial interests of Reddy's."

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The Applicant argues first that there is no policy of allowing Fiji residents to invest stated in section 26. It is said the policy of the Act is to regulate not absolutely prohibit such a transaction; secondly the basis of the policy is completely different from the basis of the application. Such policy, it is said, entails restriction on money earned within Fiji to be sent outside for investment purposes. This application, says counsel, on the other hand is concerned with money which was earned abroad and had never been within the financial system of Fiji.

G

I pause there. I have stated my understanding of the Act earlier, namely to conserve the country's overseas funds and foreign exchange resources. I cannot

A accept that this application was concerned with money which was earned abroad because in my view the source of the money in reality was Fiji in the sense that the event giving rise to the acquisition of the money by the Applicant occurred in Fiji. It is true that the money was paid by the Applicant's insurers in England but in my view that does not mean that it was earned abroad.

B Next it is said that the reports issued by the Reserve Bank, exhibited to the second affidavit by Mr. Reddy, clearly show a strong balance of payment position during 1988-1989. Also the reports issued by the Bank show high liquidity in the banking system and decreased demand for money during 1988 and 1989. Accordingly, it is argued the addition of \$5m to the system will not have created employment or investment opportunity. It is said then that the Respondent in the rejection of the Applicant's application made a value judgment of the public interest as against the private interest which, in fact, was wrong. Finally it is said
C that the special circumstances of this case render the decision unreasonable.

Time and again the Courts have said that it is not their function to substitute their opinion on matters of policy for that of the relevant official. Thus at page 683 of his judgment in Wednesbury Lord Greene said this:

D "The decision of the local authority, can be upset if it can be proved to be unreasonable in the sense not that it is what the Court considers unreasonable, but that it is what the Court considers is a decision that no reasonable body could have come to, which is a different thing altogether."

E In Luby v. Newcastle-Under-Lyme Corporation [1964] 1 All E.R. 84 at 89 Diplock, L.J. defined the powers of the Court in these cases as follows:

F "The Court's control over the exercise by a local authority of the discretion conferred on the authority by Parliament is limited to ensuring that a local authority has acted within the powers conferred. It is not for the Court to substitute its own view of what is desirable policy in relation to the subject-matter of the discretion so conferred. It is only if it is exercised in a manner which no reasonable man could consider justifiable that the Court is entitled to interfere".

G I regard this passage as definitive of the Court's powers, and should be adhered to in all cases in which it is claimed that an authority has misused its discretionary power. Similar statements to that which I have quoted appear in numerous cases for example Minister for Aboriginal Affairs v. Peko-Wallsend Limited (1986) 60 A.L.J.R. 560 at 566 per Mason J.; New Zealand Fishing Industry Association v. Minister for Agriculture and Fisheries [1988] 1 N.Z.L.R. 544, 522, N.Z.1 Financial Corporation Limited v N.Z. Kiwifruit Authority [1986] 1N.Z.L.R. 159 at 173.

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It seems to me that in this submission the Applicant is inviting this Court to substitute its decision for that of the Governor or the Minister and it is clear in my judgment that the Court cannot do that unless it can be shown that the Governor failed to take into account relevant considerations or took into account irrelevant considerations. I am satisfied here that this Court cannot interfere with his decision. In some respects the position of the Fiji economy in 1987 could be likened to that of England in 1947 when Lord Goddard commented on the serious financial situation existing in England at that time.

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In 1987 in Fiji according to the Reserve Bank report in 1987 which is exhibit "D" to Mr. Reddy's second affidavit, at page 16 the report said:

"The uncertainty prevailing at the time of the first coup had permitted heavy capital outflow. Foreign reserves came under extreme pressure causing a tightness in bank liquidity."

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Then later:

"Almost all the macro economic indicators slumped during the year. Gross Domestic Product fell by 7.8 percent, following a 8.8 percent Growth Rate in 1986."

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In 1988 the position had apparently improved as stated in the report of the Bank in that year at page 7:

"In view of the difficult economic situation at the end of 1987, the government adopted a tight fiscal stance in its 1988 budget." Gross Domestic Product showed considerable improvement in 1988.

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The report of 1989 exhibit "F" to Mr. Reddy's second affidavit is interesting. At page 11 the Governor says this:

"After reaching a peak in February of \$332m, the Reserve Banks's holdings of foreign reserves declined to as low as \$251m in August and then rose gradually to \$315m at year end. The level of broad money at the end of 1989 was \$809m some 10 percent above the 1988 level. Net Foreign reserves of the monetary system rose marginally in 1989 whereas Net Domestic Credit increased by 32 percent in 1989 after a decline of 7 percent in 1988."

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The report then mentions the high level of liquidity in the banking system during late 1988 and early 1989, which led the applicant to argue that the country had no need to require the Applicant to bring back its invested funds from London. I make two comments about the extracts from these reports:

First, in my view the 1989 report indicates the volatility of the economic situation here last year.

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Secondly there is nothing to indicate to me that the Governor's decision was based on irrelevant matters. At the end of the day it is the Reserve Bank's and the Reserve Bank's only, through the Governor, whose decision matters in cases of this nature, subject to the qualifications I have mentioned.

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It has been said that in such a situation the Governor or the Minister are involved in a balancing exercise, weighing the public interest as against the private interest. One can sympathise with the applicant, but, that said, I can see no error on the part of the Governor in his evaluation of the conflicting policy considerations.

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As to Mr. Patel's submission that the Governor applied the wrong section I only say that it is clear to me that although the Applicant and the Governor use the term "investment," as far as the policy of section 26 is concerned in reality they were both referring to the one thing namely the debt owing to the applicant, which, having been paid into Westpac Banking Corporation in London had then been invested by the Applicant. In my judgment there was no misunderstanding between the Applicant and the Respondent as to why the Respondent required the return of the funds to Fiji.

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Lastly I wish to refer briefly to one other submission by the Applicant which it seems to me was not pressed with any great enthusiasm by Mr. Patel.

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This relates to time failure by the Reserve Bank initially to give reasons for its rejection of the application. It is true that in its letter to the Applicant of 8th June 1989 rejecting the application the Reserve Bank gave no reasons for so doing. However when the matter was reconsidered by the Governor in his letter of 20th of June and later by the Minister in his letter to the Applicant's solicitors dated the 11th of November 1989 this fault was more than cured. Such a course is perfectly permissible. See – Ridge v. Baldwin [1964] A.C. 40 at page 79 per Lord Reid. There are other cases cited by counsel for the Respondent to a like effect.

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For example Posluns v. Toronto Stock Exchange (1968) 67 D.L.R. 165 particularly at page 174; Re Chromex Nickel Mines Limited (1970) 16 D.L.R. 273 especially at page 285 and Lloyd v. McMahon [1987] 1 All E.R. 1118. In that case in the Court of Appeal Woolf L.J. enquired at letter (d) "whether viewing the combined proceedings as a whole, the complainant has had a fair hearing?"

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I am satisfied the Applicant received natural justice at the hands of the Respondent in that it was given a fair hearing.

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The result is that for the reasons I have endeavoured to give in this judgment the application for judicial review is refused. In all the circumstances I make no order for costs.

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(Motion for judicial review dismissed.)

[*Editor's note:* an appeal against this judgment was allowed by the Fiji Court of Appeal in 1992 (FCA Reps 92/443). A further appeal to the Supreme Court in 1996 (FCA Reps 96/573) was also allowed and the judgment of the High Court was reinstated.)

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