Micronesian Yachts Co. v. Palau Foreign Inv. Bd., 7 ROP Intrm. 128 (1998)

MICRONESIAN YACHTS CO., LTD.,
DOUGLAS F. CUSHNIE,
Appellants
v.

PALAU FOREIGN INVESTMENT BOARD,
ERMAS NGIRAELBAED - CHAIRMAN, and the
REPUBLIC OF PALAU,
Appellees.

CIVIL APPEAL NO. 42-97

Supreme Court, Appellate Division
Republic of Palau

Argued: September 25, 1998
Decided: October 16, 1998

Counsel for Appellants: Douglas F. Cushnie
Counsel for Appellees: Janine Udui, Assistant Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY BEATTIE, Associate Justice; and R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

INTRODUCTION

In this appeal we consider some of the provisions of the Foreign Investment Act. 28 PNC §101 *et seq* . Micronesian Yachts Co., Ltd., ["MYC"] a corporation chartered in the Commonwealth of the Northern Mariana Islands, and Douglas Cushnie, its principal shareholder, are the appellants. The Appellees will collectively be referred to as "the Board." Mr. Cushnie and MYC appeal the grant of summary judgment in favor of the Board. We affirm.

FACTUAL BACKGROUND

MYC obtained a foreign investment certificate in 1986, with an option to renew the permit for five years. Both the original permit and the renewal certificate expressly stated that they were not transferable. At the time of the renewal, the Board added a provision that the foreign investment certificate was subject to revocation if any shares in MYC were transferred to a non-citizen without "a written statement of non-objection" from the Board before the transfer.

In 1993, Mr. Cushnie sought Board approval for the transfer of MYC stock to Mr. Peter Hughes, apparently through a corporation owned by him. The plan was for Mr. Hughes to operate a scuba diving business under the license held by MYC, which would, it was presumed,

allow Mr. Hughes to engage in business in Palau without having to obtain his own foreign investment certificate. In a letter dated January 3, 1994, the Board declined to approve the transfer.

> The Board regards the proposed transfer of 100% of your common stock ownership in MYC, Ltd. to the Hughes Corporation as an attempt to transfer the current [certificate] issued to MYC, Ltd. to the Hughes Corporation. Such a transfer is expressly prohibited on the face of the certificate. Moreover, the Board has determined that the proposed activities of the Hughes Corporation in the Republic ⊥129 will not amount to carrying on the business of MYC, Ltd. under the scope of the existing [certificate] but rather will constitute a different, greatly expanded, business enterprise. As such, the Act requires that the Hughes Corporation apply for and obtain its own [certificate] before carrying on its business enterprise in the Republic. See 28 PNC 103(1).[1]

Mr. Hughes met with the Board that January, and in February notified the Board that he had decided to end efforts to purchase shares in MYC. Appellants then commenced this action seeking a declaration that the Board was not authorized, for various reasons, to disapprove the transfer and also asked for damages.

ANALYSIS

The first issue we are asked to review is whether the decision of the Board to place an additional condition on the certificate at the time of renewal was an unlawful taking of property, and hence a violation of Art. IV, § 6 of the Palau Constitution. We agree with the Trial Division that it was not.

The court first noted that the original certificate was non-transferable, so adding to the renewed certificate a method of approving a stock transfer could not be said to be a substantive change. The court properly considered substance over form and concluded that the proposed sale of the corporation's shares effected a transfer of the certificate. The court stated

> it seems fair to say that the only loss suffered by MYC by the imposition of the stock transfer restriction and to Cushnie by the enforcement of that restriction was the value to a third party of MYC's certificate. Since that value was something they were never properly entitled to in the first place, it also seems fair to say that plaintiffs suffered no cognizable loss whatsoever, and certainly no taking for which compensation is constitutionally required.

We adopt that position here.

The Foreign Investment Act ["the Act"] prohibits the inflow of foreign capital investment into the country unless approved by the national government. The Act states that "[n]o non-citizen shall carry on a business enterprise in the Republic, either directly or indirectly, without

[1] The correct statutory reference is 28 PNC 103(a).

first obtaining a foreign investment approval certificate in accordance with the provisions of this chapter." 28 PNC § 103(a). The term "non-citizen" means "any person, natural or legal, who is not a citizen and includes a business enterprise, in which a non-citizen owns an interest." 28 PNC § 102(b). To "carry on a business" means "engaging in any kind of business enterprise, profession or trade, as an owner or part -owner, for the purpose, in whole or part, of commercial gain or profit." 28 PNC § 102(d). The term "business enterprise" means "any sole proprietorship, partnership, corporation, trust, joint venture, association, or any other ⊥130 form of business organization established in the Republic for the purpose of carrying on a business." 28 PNC § 102(c).[2]

The upshot of these provisions is that the Foreign Investment Board was correct to state that Mr. Hughes needed a foreign investment certificate, and the Trial Division properly held that the certificate transfer restriction did not deprive Appellants of anything of value, because all that restriction did was enforce the original certificate's nontransferability clause.

We reach this conclusion because, as a matter of law, the proposed arrangement between Mr. Cushnie and Mr. Hughes could not be structured so that Mr. Hughes could legally avoid directly complying with the Foreign Investment Act. If Mr. Hughes acquired all the shares in MYC, he would become an owner of a "business enterprise" that would be "carrying on a business" as defined in section 102(d). In that case, section 103(a) of the Act would require him to obtain a foreign investment certificate. If the deal was structured so that Mr. Hughes only bought some shares, he would be a "part- owner," which would still would place him within the class of persons needing a certificate. *See* section 102(d). If he owned 100% of the stock in a corporation, and that corporation bought MYC shares, then he would be "indirectly carrying on a business," and would still fall within the definition of section 103(a).[3]

In other words, the statute is drafted so that a non-citizen who decides to invest foreign capital in Palau must obtain a foreign investment certificate, and it does not matter whether this investment occurs through sale of stock, is filtered through a series of corporations, or occurs via partnership agreements, purported "employment" contracts, creative business "leases," or any other structural legerdemain.

Because the foreign investment certificate of Mr. Cushnie was nontransferable no matter how the transaction was structured, neither Mr. Hughes nor his corporation could obtain use of the certificate by purchasing MYC shares. Consequently, there was no taking of property, and summary judgment was in order.

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[2] Excluded from this definition are entities whose business in Palau is exclusively with the national government, non-profit corporations, and the practice of law and medicine. 28 PNC, § 102(c). These exclusions are not applicable here.

[3] In this appeal the facts concern Mr. Cushnie, Mr. Hughes, and their closely-held corporations. We are not suggesting that publically-traded corporations, or other multi-shareholder corporations, actively managed by a board of directors and appointed executives, need more than one foreign investment certificate. In such corporations, because the decision to invest in Palau would be made at the corporate level, it is the corporation that needs the certificate.

This analysis also resolves two other issues in this appeal. Mr. Cushnie argues that summary judgment should not have been entered, because it was granted on the basis of factual speculation by the court. We disagree. According to the Appellants, "Mr. Hughes caused the vessel Sun Dancer to be outfitted and brought to Palau from the United States to operate under the license held by MYC." If ⊥131 those are the facts, then, as stated by the Board, "the Act requires the Hughes Corporation to apply for and obtain" a foreign investment certificate.

Moreover if, as we hold, summary judgment for Defendants was proper, and Mr. Cushnie's foreign investment certificate was not transferable, there were no recognizable damages. The sole purpose of the transfer of shares was for Mr. Hughes to avoid the burden of directly complying with the Foreign Investment Act. It was proper for the Board to object to the transfer and tell Mr. Hughes he needed to comply with the Act.[4]

Finally, Mr. Cushnie argues that the acts of the Board violated the Compact of Free Association. This position is untenable. The Compact Implementation Act of 1993 was enacted by the Fourth Olbiil Era Kelulau in RPPL No. 4-9. It provided that the effective date of the Compact would be on a date negotiated by the President of the Republic of Palau with the United States. The date chosen was October 1, 1994. *See* Article I, section 1, Agreement Regarding the Entry into Force of the Compact of Free Association dated July 15,1994.

We agree with the Trial Division that this case does not require an interpretation of the meaning of Section 142 of the Compact of Free Association, since its effective date, October 1, 1994, occurred after the Board acted. The Board did not have to apply the Compact before its effective date. Secondly, the Compact is now in effect, but the certificate of MYC has expired. Therefore, this issue is now moot. This Court does not address moot issues. *Termeteet v. Ngiwal State*, 5 ROP Intrm. 236 (1996); *Salii v. House of Delegates*, 1 ROP Intrm. 708 (1989).

In accordance with the foregoing, the judgment of the Trial Division is hereby affirmed.

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[4] In his brief, Mr. Cushnie asserts that Mr. Hughes now operates his company in Palau without a foreign investment certificate, although he retreated somewhat from that uncategorical statement at oral argument. Mr. Hughes' current operations are not, of course, part of this appeal. We need only note that the Olbiil Era Kelulau has previously expressed concern that the government has not enforced the Act, and has therefore authorized private Attorneys General actions. *Tulmau v. R. P. Calma & Co.*, 3 ROP Intrm. 205 (1992).