IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 80 OF 1991
(High Court Civil Action No. 145 of 1988)

BETWEEN:

BOARD OF FIRE COMMISSIONERS OF SUVA — APPELLANT

-and-

FIJI PUBLIC SERVICE ASSOCIATION — RESPONDENT

Mr. S. J. Stanton and Mr. S. Sharma for the Appellant
Mr. V. Kapadia for the Respondent

Date of Hearing : 17th February, 1994
Date of Delivery of Judgment : 24th February, 1994

JUDGMENT OF THE COURT

The appellant ("the Board") is a statutory body corporate established by the Suva Fire Brigade Act (Cap. 129). The respondent ("the FPSA") is a registered trade union which represents most of the Board's employees. On 21 January 1988 the Board decided to reduce the salaries of all its employees by 15% with effect from 1 January 1988. On 8 March 1988 the FPSA applied to the High Court by originating summons for declarations that the reduction breached an agreement ("the master agreement") between it and the Board relating, inter alia, to the employees' salaries and was an illegal act, and also for an order for the employees' salaries to be restored to their normal rates with effect from 1 January 1988.

The application was not heard by the High Court until September 1990. Before then the employees' salaries had been partially restored with effect from 1 July 1988 and totally restored to the level for which the master agreement, as amended from time to time, provided with effect from 1 January 1989. For some reason not apparent from the appeal book counsel did not present arguments to the Court on the day of the hearing. Instead Byrne J. ordered that written submissions be lodged within five weeks. That order was not complied with by counsel for the Board; a long delay occurred before his written submissions were lodged. There was then a further considerable delay before his Lordship delivered his judgment. He made the declarations sought by the FPSA but no order except as to costs.

The Board's grounds of appeal are:-

> *"1. THE Learned Trial Judge erred in law in holding that there was no frustration of the contract. Hence there has been substantial miscarriage of justice.*
>
> *2. THE Learned Trial Judge wrongly exercised his discretion in granting the Declaration."*

The affidavits filed by the parties in the High Court established that from February 1979 onwards there had been a written agreement between them, varied from time to time, which provided inter alia for the rates at which salaries were to be paid by the Board to its employees. It was a collective agreement, as that expression is defined in section 2 of the Trade Disputes Act (Cap.97). If it was duly registered, as

required by section 34 of that Act, its provisions were an implied condition of contract between the Board and its employees (section 34(7)). It has not been suggested that the agreement was terminable at will by the Board. Undoubtedly the reduction in the rates of the employees' salaries was contrary to the obligations imposed on the Board by the agreement, if, when the reduction was made, the agreement was still in existence and binding in respect of the rates of the salaries. However, the Board submitted in the High Court that the contract, or at least those provisions of it which were in issue, had been frustrated; it submitted also that the declarations sought ought not to be made because they could serve no useful purpose. The Judge rejected both those submissions.

The evidence in the High Court was given entirely by affidavit. The evidence which was contained in the affidavit of the Chief Fire Officer, Mr. H.J.O. Henderson, was not disputed; unfortunately, however, in respect of some important matters, the affidavit lacked clarity. Ground 1 of the appeal raises the question whether the facts constituted an event which frustrated the contract and discharged it. The facts clearly established were that, following the first coup in 1987, the economy of the country had declined seriously. The government's income was well below the amount of revenue estimated when the annual appropriation legislation had been enacted. As a result there was what was referred to in a circular issued at the time as a "critical cash shortage" affecting the government's ability to carry on the administration of the country and to provide the

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services which it had previously provided. The Secretary of the Public Service Commission issued the circular in August 1987 announcing that the salaries of the government's employees were to be cut by 15% with effect from the pay period ending on 9 September. On 10 September 1987 the Permanent Secretary for Finance and Economic Planning issued a Finance Circular to the other Permanent Secretaries and Heads of Departments. In it he stated that the decision to reduce salaries had been made by the government and that "we would like all Ministries to inform the boards of the statutory bodies" for which they were responsible to reduce the salaries and wages of their employees by the same percentage.

Operating grants payable to statutory bodies by the government were, to the extent that they had not yet been paid, reduced by 50%. Part of the income of the Board required for the operation of its fire brigade services was in the form of such a grant. However, no evidence was before the High Court that any part of the government's contribution to the Brigade's operating costs for 1987 was not paid.

Section 29 of the Suva Fire Brigade Act required the Board to submit to the Minister responsible for the administration of that Act for his approval each year an estimate of the expenditure necessary for the administration of the Act for the following calendar year. In November 1987 the Board's estimate of its 1988 expenditure was submitted to the Minister. Because of the government's economic problems the Board was instructed to

submit a revised estimate. It reduced its planned expenditure for 1988 from $891,589 to $737,010, described in an affidavit sworn by Mr. Henderson as "the minimum amount that could be allowed to ensure the Brigade operated efficiently". The affidavit does not state expressly what amount of expenditure was eventually approved by the Minister. No documentary evidence of the Board's estimate as approved was tendered. Mr. Henderson stated that in 1988 the income which the Board derived from insurance companies was less than in 1987 because of a reduction of more than one-seventh in the companies' insurance premium receipts. However, the evidence did not permit a finding to be made on what income the Board could have expected in January 1988 to receive in the 1988 calendar year and whether it could have been expected to be sufficient for the Board to discharge its duties under section 14 of the Act to maintain an efficient brigade and at the same time pay its employees on the scales for which the master agreement provided.

Frustration of a contract was described by Lord Reid in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at p.723 as "the termination of the contract by operation of law on the emergence of a fundamentally different situation". At p.729 Lord Radcliffe said:-

> *"... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract... It was not this that I promised to do."*

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He added that "there must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".

However, in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at p.357 Mason J. observed that to express a preference for that view of frustration "as against the theory of the implied condition and other suggested bases" was not to cast doubt on the authority of clear decisions such as F.A. Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 and Denny, Mott & Dickson v James B. Fraser & Co Ltd [1944] AC 265. There is some similarity between those two cases and the present one in that they both concerned restrictions imposed by the government. In Codelfa Construction Mason J. held at pp.357-8 that "in the case of frustration, and with the implication of a term, it is legitimate to look to extrinsic evidence in the form of relevant surrounding circumstances to assist us in the interpretation of the contract...." He then referred to the approval given by Lord Radcliffe in Davis Contractors at p.729 to the following remarks of Lord Wright in Denny, Mott & Dickson:-

> "The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred."

In Codelfa Constructions Aickin J. at p.376 said that the doctrine of frustration was "now generally expressed as depending

on changes in the significance of the obligations undertaken and the surrounding circumstances in which the contract was made". At p.409 Brennan J. expressed the opinion that there was much to be said for Lord Wilberforce's view in National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 at 693 that the various theories of frustration "shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration".

The surrounding circumstances in which the master agreement was made included the provisions of the Suva Fire Brigade Act in force in 1979. Part IV of that Act related to the finances of the Board. The Board's expenditure on the operation of the Suva Fire Brigade was to be met by contributions to the Board which were to be paid by the government, Suva City Council and the insurance companies. Each year each was to contribute one-third of the amount of annual expenditure estimated for that year, as approved by the Minister. Those provisions of the Act were in force in January 1988, the pre-coup legislation having been expressly revalidated, if such revalidation was needed, by a decree of the Commander and Head of the Interim Military Government of Fiji on 1 October 1987 and again by a Presidential decree made on 13 January 1988 which had effect from 5 December 1987. It was not amended by decree or otherwise to take account of the economic state of the country. If the evidence had established on the balance of probabilities that, due to government action, the Board had insufficient money to pay its employees's salaries from January 1988 at the rate provided for

by the master agreement, there might have been a basis for finding that the events causing that insufficiency frustrated the agreement. But the evidence lacked the clarity and specificity needed for such a finding to be made. As the Board raised the defence of frustration, the onus was on it to present all the evidence required to establish frustration; that it failed to do.

However, Mr. Stanton submitted that the circulars about salary reductions themselves compelled the Board to reduce its employees' salaries and that that was an event which frustrated the agreement. He drew attention to the fact that the circulars were issued at a time before an interim government had been appointed and before legislation by decree of the Commander and Head of the Interim Military Government had been commenced. There appear to be two flaws in that argument.

First, as Mr. Kapadia pointed out, the circular issued by the Permanent Secretary relating to the reduction of the salaries of employees of statutory bodies was not addressed to the Board. It was addressed to Permanent Secretaries and Heads of Departments. It was in terms that "we would like Ministers to inform the Boards of Statutory Bodies to reduce wages and salaries by 15%". Mr. Henderson stated in his affidavit that on 15 September 1987 the Board received a letter "from the Minister's office" enclosing the circular. That letter was not exhibited to the affidavit; nor was any evidence of its content before the High Court. It was not established, therefore, either that the Board was instructed to reduce its employees' salaries

or that, if it did so, it was in terms that left the Board no option but to comply. It seems that until January 1988 the Board did not act on the instruction or the request, whichever it was, beyond reducing overtime payments.

Second, by the time when the Board took action to reduce the salaries, i.e. in January 1988, the practice of issuing decrees had been instituted and, if the government had wished to compel any back-sliding statutory bodies to fall into line with the instruction or request made in September 1987, it might have been expected that an appropriate decree would have been issued for the purpose. No such decree was issued.

We have come to the conclusion, therefore, that the trial Judge did not err in law in holding that the evidence before the High Court did not establish that the master agreement had been terminated by frustration.

So far as ground 2 of the appeal is concerned, there is no doubt that the trial Judge had power to make the declarations which he made. The issue is, therefore, whether, as the granting of a remedy in the form of a declaration is discretionary, his discretion so far miscarried as to amount to an error of law. We cannot set his judgment aside simply because we might have exercised the discretion differently if we had been sitting at first instance.

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Although by the time of the hearing in the High Court the salaries had been restored to the rates for which the master agreement provided, the employees had still not been paid the amounts by which their salaries had been reduced throughout 1988 by the payment at the lower rates. If the proceedings had been commenced after the end of 1988, an action by writ of summons to recover the amounts lost by the employees would have been the proper course to follow and an originating summons seeking declarations and an order restoring the salaries to their pre-reduction rates would have been entirely inappropriate. However, the originating summons was taken out on 8 March 1988 while the salaries were still being paid at the reduced rates and there was, so far as the evidence reveals, nothing that might have caused the FPSA to believe that that situation would not continue indefinitely. The declarations made were, as sought, that the 15% reduction in the salaries was both illegal and a breach of the master agreement. Mr. Kapadia drew to our attention that, if the master agreement was still operative, the Trade Disputes Act rendered any breach of its terms unlawful. Mr. Stanton did not dispute that.

This is not a case where some other remedy should have been sought at the time when the proceedings were commenced (as appears to have been the situation in Gardner v Dairy Industry Association 13 ALR 55). The effect of the declarations is to establish that the Board remained liable throughout 1988 to pay the salaries at the rates set by the master agreement. All that remains to be done now is to quantify the amount by which each

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employee was underpaid and then for the Board to pay him. So it is not a case where the declarations will be of little practical use (as in Odhams Press Ltd v London and Provincial News Agency (1929) Ltd [1936] Ch. 357). The making of the declarations was the logical remedy to grant in the circumstances.

We have come to the conclusion, therefore, that the trial Judge did not exercise his discretion upon any wrong principle.

Accordingly, the appeal is dismissed. The appellant is to pay the respondent's costs of the appeal.

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Sir Moti Tikaram
Acting President Fiji Court of Appeal

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Sir Edward Williams
Judge of Appeal

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Mr. Justice Ian R. Thompson
Judge of Appeal