IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0033 OF 2001S
(High Court Civil Action (J. Review No. 14 of 2000S)

BETWEEN:

FIJI AVIATION WORKERS ASSOCIATION

Appellant

AND:

AIR PACIFIC LIMITED

1st Respondent

AND:

ARBITRATION TRIBUNAL

2nd Respondent

Coram: Reddy, P
Kapi, JA
Sheppard, JA

Hearing: Monday, 24th February 2003, Suva

Counsel: Mr H. Nagin for the Appellant
Mr S. Kos with Ms G. Phillips for the First Respondent
Mr Y. Singh for the Second Respondent

Date of Judgment: Friday, 11th April 2003

JUDGMENT OF THE COURT

This is an appeal against a decision of the High Court (Scott J.) handed down on 8th May 2001. The Court set aside an award made by the Arbitration Tribunal in a judicial review proceeding under O 53 of the ***High Court Rules*** 1988 (as amended).

The relevant facts may be summarized as follows. The Fiji Aviation Workers Association (Association) entered into a Collective Agreement (Agreement) with Air Pacific Limited (Company) on 17th February 1995 to regulate their respective obligations and rights.

On 1st December 1997, when the Company appointed a new Chief Executive Officer, Mr Michael McQuay (CEO), it was experiencing a decline in profit margins. In assessing the Company's organizational structures, the CEO concluded that the management level was too high and the chain of decision-making promoted by the structure was too bureaucratic and cumbersome. He believed that part of the decline in profit margins was due to these problems.

Amongst other measures taken to improve the position, the management initiated steps to restructure the Company and its staff. On 18th February 1998, the CEO met formally with the representatives of the Association and two other Trade Unions and informed them, amongst other things, that there would be a need to consider staffing changes.

As part of the steps taken to implement changes, the management on 9th March 1998 replaced the then existing 4 functional divisions of the Company with 3 new divisions, with Mr Wong as the Head of Service Division, Ms Yee Joy as Head of Support Division and Mr Narayan as Head of Product Division. The three Divisional Heads were assigned the task of reviewing the existing job functions, responsibilities, levels and titles in the respective divisions with a view to ensuring efficiency.

So far as it is relevant to the appeal, the management identified 12 senior staff positions which were occupied by members of the Association for redundancy. The Company informed the Association of this but did not reveal the identity of the employees that would be affected. The discussions between the parties faltered and reached a stalemate.

In the meantime, on the 20th May 1998, the Company notified each of the 12 employees in writing that their employees would be terminated effective as from 25th May 1998. This was the first time the names of the employees were identified. This did not go down well with the Association and resulted in an industrial dispute being referred by the Permanent Secretary for Labour and Industrial Relations to the Arbitration Tribunal (Tribunal) under s 5A of the ***Trade Dispute Act*** (as amended by Decree 27 of 1992) to determine whether the Company:

> ***"1. Unfairly making 12 of the Association members redundant, namely Akisi Bavadra, Kamlesh Kuar, Sakaraia Caucau, Jone Tavuto, Robert Mohandas, Linda Mataika, Hussain Samut, Altaf Ali, Amy Chambers, Betty Matakibau, Alfred Williame and Saman.. Waqanivalu.***
>
> ***2. Breaching Clause 29.1 of the Collective Agreement by neither following the required redundancy selection procedure nor allowing the required time for discussion and union representatives, and refusing to discuss or justify its selection of redundancy persons."***

On 30th December 1999, the Tribunal made an Interim Award in the following terms:

> *"In terminating the employment of the 12 grievors for redundancy, the Company breached clause 29.1 of its collective agreement with the Association. It acted in a manner which was substantively unjustified and procedurally unfair.*
>
> *The parties are to appear before the Tribunal on a date to be agreed to be heard on the matter of an appropriate remedy."*

The Company applied to the High Court by way of judicial review under O 53 for an order to quash the decision of the Tribunal. The High Court set aside the Award on two bases (1) that the Tribunal erred in law in applying the wrong principles of law applicable in New Zealand (2) the Tribunal erred in finding that the Company was solely responsible for the breakdown of the consultations and found both parties responsible for not making the selection process work under clause 29.1 of the Agreement.

The Association appealed to this Court on the following grounds:

> *"1. The learned Trial Judge erred in law and in fact when he treated the Judicial Review application more like an appeal on merits when this is not allowed under Judicial Review procedure.*
>
> *2. The Learned Trial Judge erred in law and in fact by interfering with the findings of fact made by the Learned Arbitrator.*

3. The Learned Trial Judge erred in law and in fact when he failed to properly appreciate the differences between the arbitration proceedings under the Trade Disputes Act and court proceedings.

4. The Learned Trial Judge erred in law and in fact in holding that the grievors could not complain that the Employer had acted fairly

5. The Trial Judge erred in law and in his criticism of the Learned Arbitrator's adoption of the international practice under the Constitution.

6. The Learned Trial Judge erred in law and in fact in holding that the Common Law of Fiji is not the same as the Common Law of New Zealand.

7. The Learned Trail Judge erred in law and in fact in holding that the Learned Arbitrator erred in law in approaching the reference before him from the point of view of the concept of unjustifiability.

8. The Learned Trial Judge erred in law and in fact in holding that there was a breach of the Collective Agreement which made the dismissals for redundancy unfair and unjustified.

9. The Learned Trial Judge erred in law and in fact in not holding that the First Respondent had clearly not complied with clause 29.1 of the Collective Agreement and the Judicial Review application should therefore be dismissed.

10. The Learned Trial Judge erred in law and in fact in holding that the Appellant had frustrated the redundancy process.

11. The Learned Trial Judge erred in law and in fact in holding that clause 29.1 did not require the First Respondent to hold discussions on selection.

12. The Learned Trial Judge just went completely wrong in law in setting aside the award and thereby unnecessarily frustrated and delayed the resolution of the industrial dispute."

The Company filed Notice of Further Grounds upon which the Company contends the Judgment of the High Court should be upheld:

"(i) Error of Law by Tribunal underlies application for review: The Tribunal failed to direct itself correctly as to the applicable law, including as to the content of the common law principles of substantive justification and procedural fairness, and as to the correct construction of the obligations cast by the collective agreement on employer and on employees.

(ii) Substantive Justification (1): The Tribunal's findings of fact were such that as a matter of law, the redundancies must have been substantively justified. The relevant findings of fact (which were not contested) were such that the decision to disestablish each of the 12 positions must as a matter of law be substantively justified, given that it involved genuine business decisions to reorganise, the positions were genuinely disestablished, and the positions were not subsequently re-established.

(iii) Substantive Justification (2): The Tribunal misunderstood and misapplied the decision of the New Zealand Court of Appeal in Aoraki Corporation Limited v McGavin [1998] ERNZ 601 – and thereby imported the alien (and erroneous) concept that substantive justification requires the making of 'just choice'" between individuals.

(iv). Substantive Justification (3): The Tribunal misconstrued clause 29.1 of the Agreement in concluding that the provisions qualified the employer's prerogative to disestablish positions.

(v) Substantive Justification (4): The Tribunal's conclusion that a prerequisite to substantive justification was the exhaustion of good faith discussions is unwarranted by either the common law generally or the Agreement particularly.

(vi) Procedural Fairness (1): The Tribunal erred in law in that it misconstrued clause 29.1 so far as it concerns selection procedures, and applied it to the redundancy of distinct positions. Correctly construed, such procedures apply only where there is selection between members of a common class holding the same positions – only some of which positions are to be made redundant.

(vii) Procedural Fairness (2): The Tribunal misconstrued clause 29.1, so far as it concerns notification to enable discussions, extending the obligation to notify to an obligation to hold discussions of a certain nature, and to provide certain information, and despite the failure of the Union to meet."

The appeal raises two important issues of law: (1) the nature and the scope of a judicial review under O 53 (2) the proper principles of law applicable on redundancy in Fiji.

The principles governing a judicial review are well settled. In Fiji, this question has been determined in respect of a judicial review of a decision of the Arbitration Tribunal under the ***Trade Dispute Act***. This Court in ***Re Air Pacific Limited*** 34 FLR 6 at page 13 stated:

> *"As a reviewing Court it is not concerned with the merits of the decision of the Tribunal but with the question whether the Tribunal acted lawfully in arriving at its decision, i.e. whether it did so within the jurisdiction conferred on it by virtue of the appointment made under the Trade Dispute Act."*

The circumstances under which judicial review may be available include: where the decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.

In the present case, it is alleged that the Tribunal made errors of law and findings of fact no reasonable tribunal of fact could have made.

Errors of Law

The High Court held that the:

> *"....Arbitrator erred in law in approaching the reference before him from the point of view of the concept of unjustifiability, a concept which is a purely statutory construct and which does not exist in Fiji's common law".*

Before the Tribunal, counsel for the Company submitted that it should apply the legal principles that are set out in New Zealand in the 3 leading cases: ***G N Hale & Sons Limited v Wellington Caretakers IUOW*** (1991) 1 NZLR 151; ***Brighouse Ltd v Bilderbeck*** [1994] 2 ERNZ 243; ***Aoraki Corporation v McGavin*** [1998] 1 ERNZ 601.

The applicable source of law in Fiji on issues of employment are to be found in the common law of England as at 2nd January 1875 in accordance with s 22 of the ***High Court Act*** (Cap 13). Any revision of these principles by statute in England is not applicable in Fiji, unless the same statute in England is adopted or equivalent statute is passed by the Parliament in Fiji.

The principle of "substantial justification" in New Zealand is introduced by statute and the ***Employment Act*** (Cap 92) does not have the equivalent provision on redundancy. We agree with the trial judge when he stated:

> ***"... the questions raised by the 3 cited New Zealand cases were essentially questions of statutory construction. This statute has no equivalent in Fiji."***

In the circumstances, it is not appropriate to apply the New Zealand authorities in Fiji.

Having come to the right decision on the applicability of the New Zealand authorities, the High Court further found that the Tribunal erred in applying the New Zealand authorities in the present case. The High Court held that the issues in the present case should be determined in accordance with clause 29.1 of the Agreement.

The Tribunal fully set out the submissions made by the parties before it and at page 53 of the record (Vol 1) made reference to 2 Awards: ***Award No.***

27/1999 (Housing Employees Association v Housing Authority) and *Award No. 35/1999 (BP (SS) Co Ltd v WR Carpenters (Fiji) Ltd* and stated:

> *"In the 2 earlier redundancy Awards, the Tribunal also emphasized the distinction between 'general principles' and the requirements of the collective agreements. General principles are implied by the common law, but are subject to any agreed term in the collective agreement. To the extent that a general principle is contradicted or modified by an agreed term, it is the agreed term that must prevail. Mr Kos was therefore correct insofar as he conceded that clause 29.1 of the agreement is to be given primacy over the general principles in determining the respective rights and obligations of the parties."*

The Tribunal relied particularly on the ***Housing Authority Award*** (supra). At page 54 of the record (Vol 1), it set out the following passage from that Award:

> *"But the Tribunal must again emphasise that these general principles may be modified when there are relevant provisions in a collective agreement.*
>
> *Usually, such provisions will set out the basic procedures that the employer must follow to assure procedural fairness, but they may also record an agreement by the employer that effectively limits its substantive freedom to make management decisions involving redundancies. Such provisions must be followed even if they go beyond what the general principles would require, because the employer has contracted to observe them."*

After setting out the principles applied in the 2 previous Awards, at page 55 of the record (Vol 1) the Tribunal stated:

> *"The Tribunal acknowledges that some of those findings were based on the specific terms of the relevant clause of the Housing Authority's collective agreement. In this dispute, the main issue for determination is as to what exactly was required of the parties under the relevant Air Pacific – FAWA collective agreement."* (underlining ours).

The passages we have referred to indicate that the Tribunal did not apply the principles of law set out in the New Zealand authorities. The Tribunal treated the provisions of the Agreement on redundancy as determinative of the issues before it. The Tribunal made this clear when considering the application of clause 29.1. It stated on page 59 of the record (Vol 1):

> *"Various New Zealand cases were cited to suggest that consultation with employees was an aspect of procedural fairness, but that it was not necessary in every dispute, and that the failure to consult, if relevant, was to be remedied by damages. The Tribunal must make clear that it considers that it is important to distinguish between consultation with Association required under a collective agreement and with employees as a general common law principle. The cases cited were largely concerned with the latter."* (underlining ours)

In our view, the Tribunal was correct in concluding that consultation under the Agreement is to be distinguished from the principles and procedures referred to in New Zealand cases. It correctly set out the proper issues for determination on page 58 of the record (Vol 1):

> *"The Association's actual claim as set out in the Terms of Reference was that Company did not show that it had followed the 'requisite selection procedure' under clause 29.1. The clause required*

'attributes such as skill, experience, abilities, performance, length of service to be considered, in any event of redundancy, and where these are equal to discharge on the basis of last-in-first out."

We conclude that the Tribunal applied the relevant clauses of the Agreement.

Clause 25 of the Agreement provides:

"25.0 INDUSTRIAL RELATIONS CODE OF PRACTICE

The Company and the Association shall act in accordance with provisions of the Industrial Relations Code of Practice dated June 1973 or as revised from time to time."

The relevant provisions of the *Industrial Relations Code of Practice* (Code) are:

"44. Responsibility for deciding the size of the work force rests with management. Before taking the final decision to make any substantial reduction, management should consult employees or their representatives, unless exceptional circumstances make this impossible.

45. A policy for dealing with reductions in the work force, if they become necessary, should be worked out in advance so far as is practicable and should form part of the undertaking's employment policies. As far as is consistent with operational efficiency and the success of the undertaking, management should, in consultation with employee representatives, seek to avoid redundancies by such means as-

(i) *restrictions on recruitment,*

(ii) *retirement of employees who are beyond the normal retiring age,*

(iii) *reductions in overtime,*

(iv) *re-training or transfer to other work.*

46. If redundancy becomes necessary, management in consultation, as appropriate, with employees or their representatives, should –

(i) *give as much warning as practicable to the employees concerned,*

(ii) *consider introducing schemes for voluntary redundancy, retirement, transfer to other establishments within the undertaking, and phased run down of employment,*

(iii) *establish which employees are to be made redundant and the order of discharge should be based on 'last in' 'first out' all other conditions being equal,*

(iv) *offer help to employees in finding other work in co-operation, where appropriate, with the Ministry of Labour, and allow them reasonable time off for this purpose,*

> *(v) decide who and when to make the facts public, ensuring that no announcement is made before the employees and their representatives and trade unions have been informed."*

The Code itself does not have any force of law. These are principles drawn up by the Department of Labour and Industrial Relations as a guide. They have been incorporated and should be read as part of the Agreement.

We also consider that the Code sets out "fair labour practices" and they should be taken into account in accordance with the ***Constitution,*** s 33 (3).

On page 61 of the record (Vol 1), the Tribunal set out the relevant provisions of the ***International Labour Organization Termination of Employment Convention 1992*** (Convention) referred to in the judgment of Thomas J. in the Aoraki case, and stated:

> ***"The Tribunal considers itself bound to pay regard to international law standards. As it said in Award No 46 /99 (NUHCE v Plantation Island Resort), this is an aspect of its duty to apply 'fair labour practices' under section 33 of the Constitution."***

The reference to the "international law standards" (Convention) was an attempt to take into account relevant "fair labour practice" in the Convention in accordance with s 33 of the ***Constitution***. The Trial Judge agreed with this and

we affirm this view. The relevant provisions of the Convention referred to by the Tribunal are not inconsistent with the relevant provisions of the Code.

However, the Trial Judge went further and concluded that the Tribunal incorporated the law of redundancy in other countries in Fiji by virtue of s 33 of the ***Constitution***. We agree with counsel for the Association that the trial judge misunderstood the Tribunal's reference to the Convention and the ***Constitution***. The Tribunal did no more than simply take into account international standards which, as we have indicated, are not inconsistent with the Code. We do not find any error by the Tribunal in this regard.

When dealing with the Company's right to re-organize its structure, the Tribunal concluded on page 57 of the record (Vol.1):

> ***"Thus, so far as the decision to re-organize and consider the possibility of redundancies was concerned, it was one that the Company's management was entitled to take, even if it was operating profitably at the time."***

This conclusion is consistent with clause 44 of the Code. Clauses 44, 45 and 46 of the Code set out the steps the Company is required to take when considering redundancy under the Agreement. Before any step is taken to introduce redundancy, the Company should consult the Association (clause 44), seek to avoid redundancy (clause 45) or in the event that redundancy becomes necessary, as in the present case, to take the steps, amongst others, to establish

which employees are to be redundant (clause 46). This is concerned with the latter.

These clauses are to be read together with clause 29.1 which provides:

> ***"In the event of redundancy, attributes such as skill, experience, abilities, performance, length of service, shall be considered by the Company whether revised manpower levels are being determined. Where these attributes are equal, employees shall be discharged on the basis of last in, first out. The Company shall advise the Association at least two months prior to implementation of redundancy to allow for time for discussion."***

Counsel for the Company submits that the act of selection under clause 29.1 can only apply where there is a "common class of position from which only some positions are being made redundant."

We accept that this clause may apply to circumstances where there is a common class of position from which only some positions are being made redundant. However, we do not accept that this clause is restricted to such circumstances. We cannot find any words in clause 29.1 capable of such limitation. Where the positions, the subject of redundancy are different, such as in the present case, there is no reason why the Company cannot consider all or some of the attributes set out in clause 29.1 in considering redundancy. We consider that the first sentence in clause 29.1 is capable of this meaning. The "tie-breaker" is relevant where the attributes are equal.

The "tie-breaker" in this clause is somewhat similar to clause 46 (iii) of the Code which provides that employees who are made redundant should be discharged "based on 'last in' 'first out' all other conditions being equal". Like clause 29.1, this clause is drafted to apply generally with a "tie-breaker' in the event that the relevant conditions are equal.

We find that the Tribunal did not make any error in applying clause 29.1 to the present case.

In applying clause 29.1, the Tribunal held at page 57 of the record:

> ***"As the Tribunal indicated in the Housing Authority dispute, redundancy situations involve both the decision on positions and the selection of individuals."***

It elaborated on this on page 58 of the record (Vol 1):

> ***"...the Company had the right both to identify positions and individuals, but it was required to show that it had fairly identified the positions and once it had identified positions, it had applied the criteria set out in clause 29.1."***

The criteria relate to the attributes set out under clause 29.1 of the Agreement and other relevant matters set out under clause 46 of the Code. These attributes and considerations would be the basis of discussion with the Association under clause 29.1. We do not find any error in this conclusion.

We note that in applying clause 29.1 of the Agreement, the Tribunal constantly made reference to the principle of "substantive justification". As we have indicated earlier, this principle is introduced by statute in New Zealand but it is not applicable in Fiji for the reasons we have set out earlier.

We have considered whether the reference to "substantive justification" is in fact adoption of principles of law applicable in the New Zealand authorities. We have concluded that this is not necessarily so. Where the Tribunal has used this terminology, it has been stated within the context of non-compliance with clause 29.1 of the Agreement. For instance, when stating its final conclusion, the Tribunal stated:

> ***"For the forgoing reasons, the Tribunal finds that the termination of the employment of 12 grievors was in breach of clause 29.1 of the collective agreement and substantively unjustified and procedurally unfair."***

In essence, the reference to "substantial justification" is a reference to non compliance with the requirements of clause 29.1. It would be advisable not to use this terminology to avoid any confusion.

Counsel for the Company further submits that the Company may terminate the employment of employees for redundancy under clause 4.6 of the Agreement which provides:

> ***"The employment of senior staff covered by the Agreement may be terminated by either the***

> ***Company or employee by giving in writing one month's notice of termination or the payment or forfeiture of one month's salary. In the event of termination by the Company, written reasons shall be given to the employee."***

He submits that the Company has complied with this and the employees have no remedy.

This clause deals with termination of employment by the Company or by employees. A claim under an equivalent provision was considered in ***Yashni Kant v Central Manufacturing Company Limited*** (Civil Appeal N0. ABU0001 of 2001S dated 30th August 2002). Clause 4.6 does not deal with redundancies. It is clear from the evidence that the Company treated this matter as a redundancy issue under clause 29.1. The reference to the Tribunal was made on this basis. We are satisfied that this was not a matter arising under clause 4.6 of the Agreement. We do not see the relevance of clause 4.6 of the Agreement in the present case.

Errors of Fact

The High Court reversed the decision of the Tribunal on the cause of the breakdown of the discussions. As we have set out earlier in the judgment, a judicial review proceeding under O 53 is concerned with the process of decision-making and not with the decision itself. However, courts may interfere with findings of fact in a very limited class of case. In ***Associated Provincial***

Picture Houses Ltd v. Wednesbury Corporation [1947] 2 All E R 680, in dealing with the question of courts reviewing discretionary power granted by Parliament to local authorities, Lord Greene stated at page 682:

> *"When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law."*

Lord Greene went on and discussed the concept of unreasonableness and at pages 682-683 stated the proposition:

> *"It is frequently used as general description of the things that must 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 exclude from his consideration matters which are irrelevant to the 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."*

He summarized the conclusions at page 685:

> *"The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account, or, neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to*

consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, I think the Court can interfere"

The principle of unreasonableness was further amplified in ***R v Hillingdon London Borough Council*** [1986] AC 484 at 518:

"The ground upon which the courts will review the exercise of an administrative discretion is abuse of power – e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity (for example, breach of natural justice), or unreasonableness in the Wednesbury sense – unreasonableness verging on absurdity...Where the exercise or non-existence of a fact is left to the judgment and discretion of a public body and the fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

The Tribunal heard extensive evidence in relation to the discussions between the parties and it carefully set out the facts and reached a conclusion on the cause of the breakdown of the discussions. These are matters for which the Tribunal is empowered to deal under the ***Trade Dispute Act*** and the Court should leave such findings to the Tribunal, unless the Tribunal's findings are so absurd or it was acting perversely. We do not consider the findings of the Tribunal fall into this category in the present case. We consider that the trial judge fell into error in reversing the findings of fact by the Tribunal. We would allow this ground of appeal.

We have not found it easy to determine the consequential orders we should make in this case. The events giving rise to the industrial dispute occurred over 4 years ago, and the Company has moved on . We are not sure what has become of the 12 members of the Association.

Moreover, the Tribunal was part-heard and the second question referred to it is still pending. We understand that the composition of the Tribunal has changed. We were mindful of these matters when we suggested to the parties at the commencement of the hearing of the appeal to consider settling the outstanding matters. Unfortunately, this was not possible.

Counsel for the Company invited the Court to dismiss the balance of the reference before the Tribunal, there being no purpose to be served by remitting the matter to the Tribunal. We consider that the question of whether the twelve employees may be reinstituted is yet to be determined and is not a matter properly before us. We consider that the appropriate order is to remit the matter to the Tribunal so that it may, if it considers it appropriate, continue with the hearing.

In the result, we allow the appeal, quash the decision of the High Court, restore the decision of the Tribunal and remit the matter back to the Tribunal to deal with the outstanding issue according to law. The respondents should pay the Association's costs of the appeal and the proceedings in the High Court. If the parties are not agreed on the amount, they should be taxed by the Registrar.

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Reddy, P

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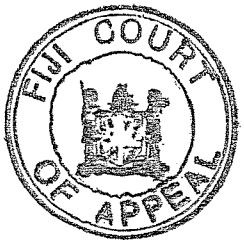
Kapi, JA



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Sheppard, JA

Solicitors:

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