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

CIVIL APPEAL NO. ABU0008 OF 2001S
(High Court Civil Action No. HBJ 13 of 1998S)

BETWEEN:

JABBAR MOHAMMED
JABBAR MOHAMMED as Executor and
Trustee of the Estate of ATTA MOHAMMED

Appellants

AND:

DIRECTOR OF LANDS AND SURVEYOR GENERAL

1st Respondent

AND:

RAJENDRA PRASAD (SUVA) LTD
T/as "Food For Less Supermarket"

2nd Respondent

Coram: Reddy, P
Kapi, JA
Sheppard, JA

Hearing: Friday, 21st February 2003, Suva

Counsel: Mr. H. Nagin for the Appellant
Ms. N. Basawaiya for the First Respondent
Mr. D. Sharma for the Second Respondent

Date of Judgment: Friday, 11th April 2003

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (Shameem J) delivered on 25th June 2000. The judgment dismissed an application for judicial review brought by the appellants. The decision which it was sought to have reviewed was a

decision of the Director of Lands made on 2nd June 1998 to terminate the appellant's tenancy at will over taxi bases on lot 75 plan DP 5086 at Kalabo Industrial Subdivision. The grounds on which judicial review was sought were breach of natural justice or lack of procedural fairness, failure to take into account relevant considerations, the taking into account of irrelevant considerations, making a decision which was wholly unreasonable, and acting contrary to the appellant's legitimate expectations. The respondents to the applications were the two respondents to this appeal hereafter referred to as the "Director of Lands" and " the Supermarket".

The facts of the matter, which are largely taken from the judgment of Shameem J. are as follow. The Appellant, Jabbar Mohammed, is the executor and trustee of the estate of Atta Mohammed. The appellant and Atta Mohammed were operating a taxi business in partnership under the name of "Nasinu Central Taxis".

On 4th January the Permanent Secretary for Works and Transport wrote a letter to Atta Mohammed approving a request to operate a taxi base from the land on the condition the land could be taken by the Government if required for road improvements. On 31st January 1991 the appellant and Atta Mohammed requested a lease of the taxi base site. On 14th October 1991 the tenancy was granted. It was in the form of a letter to the appellant and Atta Mohammed. The letter was as follows:

'I am directed to inform you that you are hereby authorized to occupy the described land as a tenant-at-will on the following terms and conditions:-

Land: ***Lot 75 on Plan DP 586 Kalabo Industrial Subdivision.***

Area: ***516m2.***

Rent: ***$1.50 per day payable at the end of each month or $547.50 p.m. with effect from January 1991.***

Tikina: ***Naitasiri.***

Ownership: ***Crown Freehold Land***

Purpose: ***Taxi base.***

TAW Conditions

1. The right to occupy and to use the land is not transferable.

2. The land described may be used solely as a taxi base and no building whatsoever may be erected thereon after the date hereof, except for a shelter which may be erected on the site with the approval of the Suva Rural Local Authority after prior approval in writing for erection of the shelter is first obtained from the Director of Lands.

3. In the event of failure on your part to pay the rental as aforesaid punctually this authority may be cancelled without further notice and you will be required immediately to vacate the land.

4. This letter shall not operate to create a tenancy in respect of the said land.

5. The hours of operation is restricted from 6 am to 11 p.m. daily (Monday to Sunday).

6. The lease (sic) shall erect to the satisfaction of the lessor and the Suva Rural Local Authority a wooden post fence around the site with an entrance on to Daniva Road.

7. The site is to be opened for use by other taxi owners who are to negotiate charges directly with the tenant, and such charges shall require the prior approval of the lessor.

8. This tenancy may be terminated on receipt of a month's notice from the landlord.

9. No compensation will be payable for improvements on the demised land on termination of this tenancy.

10. Any breach of any of the conditions as stated herein will render the tenancy subject to automatic cancellation."

The abbreviation TAW is an abbreviation for tenancy at will. Atta Mohammed and the appellant accepted the tenancy and signed the letter of acceptance on 14th October 1991. Atta Mohammed subsequently died but the appellant is executor of his estate. There was no express joinder of his estate: But no point was raised about this. All parties assumed that the proceedings were properly constituted. We make the same assumption.

On 19th October 1994 the two again requested a lease but this was never granted. Thereafter the supermarket opened on the adjacent land. On 29th August 1995 the appellant and Atta Mohammed wrote to the Director of Lands expressing concern that the supermarket had applied for permission to develop the land. There was no reply. Nor was there any reply to two subsequent letters. On 10th October 1996 the Director of Town and Country Planning approved six further taxi bases to operate from the site.

On 18th July 1997, the Divisional Surveyor Central/Eastern refused a lease over the site. His letter stated that the land in question was zoned "Planting Reserves". It was therefore a public amenity which could not be leased out on a long-term basis to an individual or a company. The letter also said that the Department of Town and Country Planning was not "keen" to re-zone the subject land to commercial. This was said to be based on "sound town planning principles." The letter concluded by saying that the tenancy at will for the taxi base that was issued on 1st January 1991 was presently being reviewed with a view to reassessing rental to reflect "the present use of the site".

In May 1998 the appellant heard that the tenancy was to be revoked and that a new tenancy was to be issued to the supermarket on the instructions of the then Minister for Lands. Solicitors were instructed to write to the Minister. The solicitors' letter of 29 May 1998 made a number of representations to the Minister. These were summarized in part in the judgment appealed from as follows:

"1. The Applicant had used considerable resources to upgrade the area.
2. The total number of bases had been increased to 11.
3. The proprietors would face great hardship if the tenancy were to be revoked.
4. The Food for Less Supermarket had its own car-park which it had let out to market vendors.

5. The Nasinu Central Taxis provided good service, and employment to the people of the area including customers of the Food for Less Supermarket."

On 2nd June 1998, the Director of Lands terminated the tenancy "on grounds that the subject area was required for redevelopment in conjunction with further development to be carried out on adjoining commercial property (ie the Super market) and also because the development of the site was being pursued to ease traffic in front of the supermarket. The appellant was advised that, on completion of the development, he could apply direct to the supermarket for taxi bases at a rental to be approved by the Director of Lands. The taxi service was given 30 days to vacate the premises.

The judgment then contains an account of correspondence which passed between the supermarket and the Minister of Lands. On 30th September 1997 the supermarket had written to the Director of Lands saying that the appellant could continue to operate his taxis from the land even after a tenancy was granted to the supermarket. On 1st September 1998. The Director of Lands issued a tenancy at will over the land to the supermarket. The terms of the tenancy were similar to those of the tenancy previously granted to the appellant and Atta Mohammed.

The learned Judge first dealt with the question of natural justice. She said that the appellant contended that the tenancy at will had been terminated without a

hearing. She referred to S.11 of the Crown Land Act (Cap.132) which conferred power on the Director of Lands to lease crown land. She also referred to the fact that it was not in dispute that in terminating the tenancy, the Director had given the appellant 30 days notice as he was required to do by virtue of clause 8 of the tenancy agreement. But the judge said that it was trite law that whenever any public body made a decision which affected any individual adversely, it was obliged to give to that individual a right to be heard. She noted that the Minister did not formally inform the appellant of his intention to terminate the tenancy. But she said, "However, the applicant (the appellant) heard about the possibility and made submissions on 29th August, 3rd October and 6th November 1995. She said that the submissions which were made were plainly considered by the Minister. And she referred to a minute to the Permanent Secretary for Lands by the Minister which she said showed that he considered the letter from the appellant's solicitors . We are not sure to which letter the learned judge was referring but, for reasons later to be given, it cannot have been the letter of 29th May 1998.

Her Ladyship pointed out that a right to be heard was not necessarily a right to an oral hearing. We agree, of course, with that statement. She said that the representations made by and on behalf of the appellant were "correct full and clearly expressed." They were considered by the Minister "and indeed by several Government Ministers, all of whom appeared to have been involved in the controversy." Her Ladyship concluded that in all the circumstances the Minister had not been unfair in

the procedures adopted before the tenancy was terminated.

She then dealt with the other grounds which were relied upon by the appellants and considered that he had not made out a case for relief under any of those. In relation to legitimate expectations she said that she could find no evidence that had been given to establish that any assurance had been given that certain procedures for a hearing would be followed" by the Director of Lands.

The learned Judge said that the correspondence on the file showed that the respondent was very conscious of all relevant considerations. She said that it was clear from an affidavit filed on behalf of the supermarket that the appellant and Atta Mohammed would be able to continue with its operations but that the rent for the tenancy at will would be paid to the new tenant, i.e. the supermarket, instead of the Director. Her Ladyship stated that, whilst courts can rule on what relevant considerations are, they would not interfere with the balancing of those considerations and she referred to the Judgment of Lord Scarman in United Kingdom Association of Professional Engineers v. Advisory Conciliation and Arbitration Services [1981] A.C. 242. We also agree with what the judge has said about this matter.

After referring to some further matters the learned Judge concluded that there were no grounds for holding that the respondent had taken into account irrelevant considerations or failed to consider relevant ones. She added, and we agree with this,

that the fact that the Director's officers might have come to a different conclusion (for instance issuing a licence to both the supermarket and the appellant) was irrelevant.

After dealing with some further matters the learned judge concluded that all grounds of review should be dismissed.

A large number of grounds were argued on the appeal. On reflection, however, it seems to us that the two most relevant grounds are the alleged failure of the Director to afford the appellant natural justice or procedural fairness; and failure to meet the appellant's legitimate expectations, not only to a hearing but also that the tenancy would not be determined except if the land were required for the purposes of road improvements That being what the appellant and Atta Mohammed were told when they were first permitted to occupy the land. Other submissions included a submission that the decision reached was so unreasonable as not to be capable of being reached by any reasonable person, failure to take into account relevant considerations and the omission from account of relevant considerations and some other matters to which we do not find it necessary to refer.

Amongst the documents produced by the Director of Lands on discovery were two file notes dated 20th May 1998. The first referred to a meeting with the Minister on 15th May 1998. It appears to be either from the Minister or the Director. It said that a notice of termination was to be issued immediately on the ground that the area

was required for redevelopment in conjunction with further development to be carried out on the adjourning commercial property. The appellant was also to be advised that the redevelopment of the site was being pursued to ease traffic congestion in front of the supermarket. It was said that on completion of the development, the appellant could apply directly to the supermarket for taxi bases at rentals to be approved by the Director. This memorandum was followed by a further memorandum also dated 20th May 1998 implementing the decision referred to in the first memorandum. The two memoranda plainly show that the letter written on behalf of the appellant on 29th May 1998 could not have been considered by the Director or the Minister before the decision to terminate the tenancy was made. Although the letter purporting to cancel the tenancy was dated 2nd June 1998, it is clear from the terms of the two memoranda of 20th May 1998 that the decision conveyed in the Director's letter of 2nd June 1998 was made without consideration having been given to the appellant's solicitor's letter of 29th May 1998. That letter, as earlier mentioned was referred to by the leaned judge. It was summarized in part in her judgment. The letter in its entirety is as follows:

> ***"It has come to our clients 'attention that our clients 'tenancy of the above land is going to be cancelled and a new tenancy of the same land is to be issued to FOOD FOR LESS SUPERMARKET.***

Our clients humbly request that their tenancy be continued upon the following grounds:-

1. This tenancy to our clients was approved in 1986. At that time the land was swampy. Subsequently our clients filled the area and graded it so that a taxi

base could be made. These works were carried out at considerable expense to our clients. Our clients have further continued to upgrade the area.

2. Our clients originally established 5 taxi bases after approval was granted by Department of Road Transport. This was done well before the Food For Less Supermarket was established.

3. Our clients continued their business and upgraded their services to the public by purchasing new taxis and creating 6 more bases. The total number of bases are therefore 11.

4. In doing the above clients had to purchase new taxis and in the process had to borrow substantially from various financing institutions. Our clients therefore have heavy repayments at present and if our clients are displaced at this time they will have considerable suffering and will not be able to meet their commitments.

5. On the other hand Food For Less Supermarket has its own car-park which it has let out to Market Vendors.

   This clearly shows that Food For Less Supermarket has more than sufficient space and there is no need to take away our clients' land and give it to Food For Less Supermarket.

   Our clients are very concerned that some other taxi operators have come to them and boasted that our area was going to Food For Less Supermarket who would then sublet the area to them.

6. Our clients already provide good service to the customers of Food For Less Supermarket, Health Centre and the School children.

7. Our clients presently employ 15 people for the taxi services that they provide. If our clients are displaced from the land all these people will lose their jobs."

A reading of the learned judge's judgment discloses that the matter was not decided adversely to the appellant because the judge thought that in the circumstances of this case, the appellant was not entitled to procedural fairness. Rather she formed

the view that, on the basis of the material before her he had been dealt with fairly. Essentially that was because the appellant's case had been put by him more than once in letters written by him or on his behalf over a number of years. She does not deal with the matter but the tenor of her judgment was to dismiss the letter of 29th May 1998 from account because in substance it relied on the same matters as were relied upon in earlier correspondence.

Before us - it is not clear that the matter was relied upon before the primary judge – the appellant claimed that he had a legitimate expectation that the tenancy would not be terminated unless the land were required for road improvements. That seemed to have been an assurance given at the time the appellant and Atta Mohammed took possession of the site. The effect of the submission, if it were adopted, would be to confer on the appellant the right to occupy the land indefinitely unless it were required for road widening purposes. This submission opens up the question of what relief might be granted to an applicant whose legitimate expectation was disappointed.

This question is discussed in Judicial Review of Administrative Action; de Smith, Wolf and Jowell, 5th ed (1995) at 421-6 where the authors deal with the scope of the legitimate expectation. Under the heading, "Expectation of What?", it is said at 421):

> ***"The terms of the representation by the decision-maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things:***

(1) *that a hearing or other appropriate procedures will be afforded before the decision is made; or*

(2) *that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied.*

In the first case, fairness dictates that the expectation of a hearing be fulfilled. The expectation may extend to the opportunity to make representation or to any other component part of a fair hearing, for example, the duty to give reasons. In the second case, fairness dictates that the expectation of the benefit should not be summarily disappointed and that the recipient of the benefit should at least be permitted to argue for its fulfillment.

In either of the above cases the substantive benefit or advantage may not in the end be granted. All that is required at this stage is that the opportunity be given to participate in the decision about whether or not it should be granted (or not withdrawn or varied). However, in the second case (relating to the expectation of a benefit), the law may sometimes go further and require the expectation to be fulfilled by the actual grant of what was promised."

See also the discussion of Professor Wade in Administrative Law, Wade, 8th ed (2000) at 498-500.

If the appellant is entitled to continue in occupation of the site unless it is required for road widening purposes the entitlement must arise because the case falls into a rather special category. The effect of giving the appellant this relief would be specifically to enforce that expectation upon which the appellant relies. In other words the court would, in practical term, be granting specific performance of what was never intended to be more than a tenancy at will determinable on a month's notice.

We do not think that this case falls into that special category. The matter must be looked at sensibly and practically. An indication by a government officer at the time a right of occupancy such as a tenancy at will is agreed to would be unlikely to have any effect except as an indication given in good faith of what the government's then intentions were. The statement runs directly counter to the notion of a tenancy at will determinable on a month's notice. It could not operate to override the clear terms of the tenancy agreement. The submission made to the contrary by counsel for the appellant is rejected.

This takes us back to procedural fairness. For our part we are of the view that the appellant was entitled to procedural fairness because we think that the appellant had a legitimate expectation that he would be dealt with fairly. That expectation stems in our opinion from the whole of the circumstances of the case including the statement made to the appellant that he would continue in occupation of the land unless it were required for road widening.

The question to be determined then is whether in all the circumstances the appellant was accorded procedural fairness. The learned judge thought that he had been; the appellant contends that he was not.

The tenancy at will had been in force for approximately 7 years when it was terminated in 1998. During this period the appellant had carried on a successful

business. He employed a number of people and he himself and his family were dependent upon the business for their livelihood. It is true that there had been a continuing series of negotiations between the appellant and the Director particularly in relation to whether he could be granted a lease and thus have a more secure tenure. Plainly there was a chance that eventually the Director would prefer to grant the tenancy at will over the land to the supermarket which would then be in occupation of the whole area rather than having it broken up as it was. This would be likely to lead to an improved situation environmentally or at least that is what the Minister and the Director thought. But, although this matter remained in the background for a long time, nothing came about as a result of it. The first minute of 20th May 1998 shows that on that day a peremptory decision was made to terminate the appellant's tenancy and a tenancy to the supermarket. No thought was given to informing the appellant that it was proposed to take this course and asking him whether he had anything further to put as to why the decision which was being contemplated should not be implemented.

It is true as the learned judge says in her judgment, that the appellant had made numerous submissions over a period about his requirements and about matters associated with the desirability of his being granted the lease. But the earlier letters had been written in 1995. There is a question whether, before the decision was reached on 15th May 1998, any decision which was being contemplated should have

been made without giving the appellant an opportunity to put his case as it was then, not as it was in 1995.

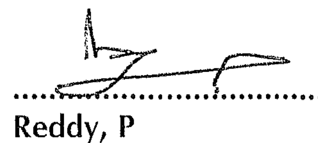
In our opinion, when matters began to come to a head in 1998, it was incumbent on the Director or the Minister to give the appellant an opportunity of making submissions. Unbeknown to the appellant the Director's proposals had become much more specific than they had been up to then. What had emerged was a consolidated proposal integrating the supermarket, its parking area, the road and the appellant's taxi bases. The downside for the appellant was that he would be a subtenant of the supermarket and thus in his mind at its mercy in the future. This is something to which he has strong objections.

Another factor that needs to be taken into account is the fact already mentioned that the appellant had been told when the tenancy was first being discussed in 1991 that the only reason that he might lose his rights would be because of the need for the land to be used for road widening purposes. He acted on that assurance. The fact that it had been made may not have involved the government being bound by any promise enforceable at law. But it did give the appellant an expectation that he would have reasonable security of tenure unless the government itself wanted to use the land. As events turn out it was not the government that wanted to use it but the supermarket and the government decided that it should be preferred.

In those circumstances there was clearly a legitimate expectation on the part of the appellant that he was entitled to be heard in order that he might put his case as to why the government after all should leave his tenancy in place. There can be no question but that in these circumstances the government was obliged to give him that opportunity and that in failing to do so denied him procedural fairness.

We have given weight to all the letters relied upon by the learned judge in her Judgment but we conclude that the fact that the decision was made without any opportunity being given to the appellant to make submissions in relation to the decision reached on 15 May 1998 demonstrates a clear denial of procedural fairness to which he was entitled. This is especially so when one takes account of the substantial lapse of time between the last of the earlier letters and the decision made over two years later.

In the result we allow the appeal. The order made by the High Court is set aside as is the notice of termination given the appellant on 2nd June 1998. The matter is remitted to the Director of Lands and Surveyor General to be heard and determined again according to law. The law in question is as indicated in these reasons for judgment. The first respondent should pay the appellant's costs of the appeal and proceedings in the Court below which we assess in the sum of $2,000.00. We make no order as to the costs of the second respondent either in respect of the appeal or proceedings below.



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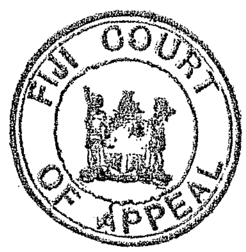

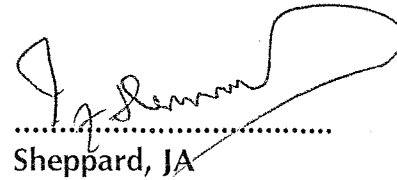

Sheppard, JA

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