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

CIVIL APPEAL NO. ABU0016 OF 2004S
(High Court Civil Action No. 320 of 2001S)

BETWEEN:

AIR FIJI LIMITED

Appellant

AND:

FLORA SEU FONG HOUNG-LEE

Respondent

Coram: Barker, JA
Tompkins, JA
Scott, JA

Hearing: Thursday, 25 November 2004, Suva

Counsel: *N. Gedye and G. Phillips* for the Appellant
Hon A. J. Rogers, QC and S. Sorby for the Respondents

Date of Judgment: ~~January~~ February 9 2005

JUDGMENT OF TOMPKINS JA

Introduction

[1] The background to these proceedings and the preliminary issues for the Court to determine are conveniently set out in the judgment of the majority. There is no need for me to repeat them.

[2] In my opinion, the essential issue for the determination of question (a) is whether the Carriage by Air (Fiji Currency Equivalent Order) 1969 made by the then Governor of Fiji ("the CEO") was valid. I have decided, contrary to the conclusion reached by the majority, that the CEO was outside the scope of the power conferred

on the Governor by s 4 (4) of Schedule 1, Part 1 of the Carriage by Air Acts (Overseas Territories) Order 1967 ("the 1967 Order"), and was therefore *ultra vires* and invalid. Alternatively the CEO is irrelevant and has no effect in assessing the maximum amount the respondent can recover in these proceedings.

[3] This issue was not dealt with in the judgment of Singh J. He held that the CEO was properly passed and gazetted but did not give any reasons for this conclusion.

[4] In all other respects I am in full agreement with the reasons and conclusion expressed in the judgment of the majority.

The doctrine of *ultra vires*

[5] The doctrine of *ultra vires* as it relates to the validity of subordinate legislation is well established. In Bennion *Statutory Interpretation* 3rd ed at 183 the author describes the doctrine in these terms:

> "Any provision of an instrument constituting delegated legislation is ineffective if the provision goes beyond the totality of the legislative power which (expressly or by implication) is conferred on the delegate by the enabling Act. The provision is said to be ultra vires (beyond the power.)"

[6] In Wade and Forthsyth *Administrative Law* 8th ed at 845 the authors comment that the court has to look for the true intent of the empowering act in the usual way. They refer to the comment by Laws J in *R v Secretary of State for Social Security ex parte Sutherland* [1997] COD 222:

> "I do not consider there to be much room for purposive constructions of subordinate legislation; where the executive has been allowed by the legislative to make law, it must abide strictly by the terms of its authority."

[7] Burrows *Statute Law in New Zealand* 3rd ed at 11 notes that if a rule or regulation is ultra virus, namely outside the scope of the power conferred by the Act in question, it is invalid.

[8] The essential issue, therefore is whether the CEO is within or without the strict terms of the scope of the legislative power given to the Governor by s 4 (4).

The scope of the power in s 4 (4)

[9] Section 4 (4) is in these terms:

> "The Governor of an Overseas Territory may, in such manner as he may think fit, from time to time specify the respective amounts which for the purpose of the said Article 22, and in particular of paragraph (5) of that Article are to be taken as equivalent to the sums expressed in francs which are mentioned in that Article."

[10] Reduced to its essentials, the subsection empowers the Governor from time to time to specify the amounts which are to be taken as equivalent to the sums expressed in the Article. Equivalent, in this context, must mean equal in value. The power conferred is precise. The Governor may specify amounts which are equal in value to the sums mentioned in the Article 22. He has no power to specify any other amounts, that is any amounts that are not equal in value to the sums mentioned in the Article.

[11] For present purposes, the relevant parts of Article 22 are paragraphs (1) and (5):

> (1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of eight hundred and seventy-five thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed eight hundred and seventy-five thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> (5) The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

[12] The liability of the carrier is limited to 875,000 francs, referred to as Poincare francs. The paragraph 5 sets out what is a Poincare franc, ie a unit of currency consisting of 65.5 milligrams of gold of millesimal finesses nine hundred. Thus to ascertain the value of a Poincare franc, it is necessary to apply a gold value at the relevant date. The paragraph goes on to authorise the conversion of the sums represented by Poincare francs into national currencies and specifically requires that the gold value to be applied when making the conversion is to be, in the case of judicial proceedings, the gold value at the date of judgment.

[13] Thus "the sums . . . mentioned in that Article" ie, Article 22, are Poincare francs having, in the case of judicial proceedings, the value of the amount of gold set out in the Article at the date of judgment. No other sums are mentioned in the Article.

The CEO

[14] The CEO, that was gazetted on 8 August 1969, is in these terms:

> "In the exercise of the powers conferred upon him by sub-paragraph (4) of paragraph 4 of Schedule 1 to the Carriage by Air Acts (Overseas Territories) Order 1967 and sub-paragraph (4) of paragraph 4 of Part 1 of Schedule 1 to the Carriage by Air acts (Application of Provisions) (Overseas Territories) Order 1967, the Governor has made the following Order:-
>
> | Amount of francs | Equivalent in Fiji Currency | |
> |---|---|---|
> | | $ | c |
> | 250 | 13 | 82.375 |
> | 5,000 | 276 | 40 |
> | 125,000 | 6,909 | 90 |
> | 250,000 | 13,819 | 80 |
> | 875,000 | 48,369 | 28" |

[15] It is reasonable to assume, at least for present purposes, that when the order was gazetted, F$48,369.28 represented in Fijian currency the value of 875,000 Poincare francs.

Conclusion

[16] The problem with the CEO is, to put it shortly and simply, that it did not specify amounts that were equivalent to the sums expressed in francs mentioned in the Article because the sums expressed in francs in the Article were Poincare francs having, in the case of judicial proceedings, the value of the amount of gold set out in the Article *at the date of judgment*. What the CEO specified was the sums in Fijian currency having the equivalent gold value of the francs mentioned in the Article *at the date of the making of the order*. That can be, indeed after the passage of time will almost certainly be, a different sum in Fijian currency from what would be represented by the equivalent gold value at the date of any relevant judgment. Thus the CEO did not specify amounts in Fijian currency equivalent to "the sums . . . mentioned in that Article" ie, Article 22, as required by s 4 (4).

[17] This conclusion accords with that reached by Mr W.K.Hastings in his helpful article, *Living with an Archaic Treaty: Solving the Problem of the Warsaw Convention's Gold Clause* (1996) 26 VULR 143. At page 146 he comments that the Convention anticipates that the value of gold could fluctuate, otherwise there would be no need to specify the date of judgment as the date at which the conversion into national currencies is to be made. After referring to other possible methods of conversion, he states:

> "But the Convention is clear and mandatory. It is the value of gold at the date of judgment that must be used to determine the damages awarded when the Article 22 (2) limit applies."

[18] Later, at page 155, he discusses the New Zealand CEO. He says:

> ". . . as s 10 (4) [the New Zealand equivalent of s 4 (4)] makes explicit reference to Article 22 (5), it is possible to argue that the 1984 notice [the New Zealand CEO] is not a notice which meets the requirements of Article 22 (5). In other words, the 1984 notice has nothing to do with the Article 22 (5) an article having force of law in New Zealand, because the notice can never be a "conversion according to the gold value of such currencies at the date of judgment.""

[19] I am in full agreement with these observations.

[20] If the CEO is held to be valid and effective in regard to the litigation between the respondent and the appellant to fix the value in Fiji currency of the sums referred to in Article 22 (5), the result would amount to a variation of the clear words of the Article. Instead of the value of the currency being the equivalent gold value at the date of the judgment, the limitation would be assessed by taking the equivalent gold value at the date of the gazetting of the CEO. I do not consider that s 4 (4) was intended to authorise such a significant variation of the Article. If the value of gold at the date of judgment is more than the value at the date of the gazetting of the CEO, as is now the case, the effect is that a limit is set lower than the limit fixed by the Convention. This is directly contrary to Article 23 of the Convention which states:

> "(1) Any provision tending to relieve the carrier from liability or to fix a lower limit than that which is laid down in this Convention shall be null and void . . ."

[21] The failure of the CEO to achieve the purpose of Article 22 (5) is vividly illustrated by the present case. According to the CEO, the equivalent value in Fiji currency is F$48,369.28. We were informed from the bar that today the equivalent value in Fiji currency would be about F$1.5 million. I am unable to accept that a CEO that produces such a bizarre result can be considered to be within the power given to the Governor by s 4 (4). It has clearly failed to achieve the purpose of the section.

[22] I accept that it may be difficult or impossible to frame a CEO that will have the effect of a conversion into a national currency at the date of judgment because it is not possible to anticipate in advance what will be the equivalent gold value at the date of judgment. But that difficulty or impossibility is no reason to uphold a CEO that does not specify sums equivalent to the sums mentioned in the Article and is therefore outside the power conferred on the Governor by s 4 (4).

[23] The problem with the construction adopted by the majority, that Article 22(5) authorises into a national currency a conversion for use at the date of any judgment and not at the date on which the CEO is made, is that it is contrary to the clear words of the Article. The last sentence expressly states the *time* at which the conversion

"shall . . . be made", not the *use* to which an earlier conversion may be put. If the conversion is required to be according to the gold value at the date of the judgment, it can only be made at or about that time.

[24] There are several reasons why I do not find the opinion of the majority in *Franklin Mint Corpn v Trans World Airlines Inc* [1984] 2 Lloyd's Rep. 432: (1984) 104 SC 1776 ("*Franklin Mint* ") to be persuasive in the present case.

[25] The principal reason is that in *Franklin Mint* the US Supreme Court was dealing with an article in the Convention that is significantly different to Article 22 (5). It was concerned with an article in the Convention dealing with international travel. The relevant article is Article 22 (4) which reads:

> "(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

[26] The significant difference is in the second sentence. Unlike Article 22 (5) with which we are concerned, the article in the Franklin Mint case contains no direction concerning the date of the gold value to be used in the conversion into national currencies. More specifically it does not require that gold value to be at the date of judgment. Nor does the article refer expressly to conversion for the purposes of judicial proceedings.

[27] The second reason concerns Article 23, which I have set out in paragraph 20 above. The opinion of the majority in *Franklin Mint* makes no reference to it. Stevens J in his dissenting opinion concluded that the article rendered the limit set in TWA's tariff to be void, a conclusion that I consider to be inescapable.

[28] The third the reason is that the majority in Franklin Mint concluded that the method of limiting liability chosen by the Convention would fail to effect any purpose of the Convention's framers in the light of the contemporary domestic and international monetary structure. They also considered that applying the gold standard when the value of gold fluctuated significantly would be impractical. I agree that the fluctuating price of gold would presents the sort of difficulties to

carriers and insurers referred to in the judgment of the majority in the present appeal. But I can not accept that these difficulties are a reason, in effect, to vary the express terms of the Convention. I am in full agreement with the observation of Stevens J when he said at page 443:

> "Of course, if the premise of the Court is correct, and the liability limitation is unworkable in today's world, there is but one remedy: amendment of the Convention by the parties."

[29] This is exactly what some of the parties to the Convention sought to achieve by the Montreal Convention. If applying Article 22 (5) in accordance with its terms, disregarding the CEO, is likely to cause significant problems to carriers and indemnifiers, I have no doubt that they will exert pressure on some or all of the parties who have not yet adopted the Montreal Convention to do so.

[30] There is an alternative approach that has the same effect as finding the CEO to be *ultra vires*. The Article specifies that, in the case of judicial proceedings, the sums under the Article shall be converted into national currencies according to the gold value of the currency at the date of judgment. The CEO does not do that because it converts into Fijian currency at a different date. It is therefore simply irrelevant and can have no application to the judicial proceedings between these parties. If the respondent obtains judgment, the only limitation to the amount of that judgment is the amount assessed according to the Article, applying the equivalent gold value at the date the judgment is obtained.

[31] In either case, the result is the same as the conclusion reached by Rogers CJ Comm D in *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* (1988), 22 NSWLR 734, namely that the equivalent gold value is to be arrived at by applying the market price of gold at the date of judgment. That gold value is to be converted into Fijian currency to arrive at the maximum amount the respondent can recover in these proceedings.

Result

[32] I would allow the cross-appeal. The answer to issue (a) is "No". The answer to issue (b) is "Yes".

Tompkins JA