



## The Chronology

- [2] Mr Cooper was appointed the Chief Executive Officer of PTCL and given a contract of employment for 3 years from 1 January 1999. The PTCL was a Government Commercial Enterprise under the Public Enterprise Act (Chap.35 of 1996). Its shareholders were the Permanent Secretaries of Public Enterprises and Finance. They were trustees for the Government. Under s.58 of that Act on the Public Enterprise Minister gave the PTCL a written direction to go into voluntary liquidation and cease business. A resolution was passed by PTCL to go into voluntary liquidation and a Mr Gaukrodger of Peat Marwick was appointed liquidator on [15 May 2000]. Pursuant to s.284 of the Companies Act (Chap 247 of 1985) he delivered to the Registrar of Companies his account and return on 4 December 2000. Pursuant to that section, PTCL was deemed to be dissolved 3 months later on 4 March 2002. None of this was in contention before us. It follows from s.339 of the Companies Act that, if anyone such as Mr Cooper wished to challenge that liquidation and dissolution, he must have done so by 4 March 2004. No such challenge has been made.
- [3] Following the change in government policy towards PTCL, the following is a chronological statement of events relevant to the present appeal:
- (i) 24 June 1999. The Permanent Secretary for Public Enterprises (the Permanent Secretary) requested Mr Cooper to provide him with a copy of his contract of employment. This was sent as requested the next day.
  - (ii) 20 August 1999. The Prime Minister, who was also the Minister of Public Enterprises wrote to the Board of PTCL directing it to resolve to go into voluntary liquidation.
  - (iii) 1 September 1999. Ms Fenton, the Interim Chairman of PTCL wrote to the Prime Minister raising concerns about various matters including the liability

to Mr Cooper under his contract of employment. She said this would have to be resolved before the directors could sign a declaration of solvency (Form 27).

- (iv) 23 September 1999. Ms Fenton again raised her concerns with the Permanent Secretary.
- (v) 14 October 1999. The Permanent Secretary wrote to Ms Fenton saying "this is to confirm that the government will undertake to pay all the debts of PTCL in this liquidation exercise." He asked Ms Fenton to complete Form 27 immediately and confirm that it had been done.
- (vi) 20 October 1999 Ms Fenton wrote to the Permanent Secretary enclosing a copy of Form 27 saying she could not complete it as it showed that company was insolvent. It showed liability under "contractual arrangement, \$333,466" which included the assessed liability to Mr Cooper, and an overall estimated deficit of \$376,218.
- (vii) 27 October 1999. A letter was written on behalf of the Permanent Secretary saying only amounts "fully justified" would be met and asked for details of the \$333,466.
- (viii) 29 October 1999. A letter on behalf of the Permanent Secretary was written to Ms Fenton with a copy to Mr Cooper directing him to report on 1 November 1999 to the Permanent Secretary for his "future work arrangements" and said the Government had rejected his claim as being "too excessive."
- (ix) 4 November 1999. An extraordinary general meeting of PTCL was held and passed a special resolution that all employee contracts be terminated.

- (x) 15 December 1999 Mr Gaukrodger wrote to Mr Cooper enclosing his calculation of PTCL's finances showing a liability to Mr Cooper for three months' severance pay, bonus leave and travel expenses.
- (xi) 24 December 1999. The Board of PTCL met and the minutes state:

**"Appointment of Liquidator**

***The Board agreed to the appointment of Mr John Gaukrodger of KPMG as liquidator of Public Trustee Corporation Limited on the assumption that the Form 27 of the Companies Act will be executed after establishing that the Company was technically solvent (assets exceed liabilities) and therefore in a position to go into voluntarily liquidation."***

Thereafter, Mr Gaukrodger acted as liquidator although it appears from Form 28 filed by him in the Companies Office that he was appointed by a resolution dated 15 May 2000.

- (xii) 28 December 1999. The Permanent Secretary wrote to Mr Cooper informing him his employment by PTCL was terminated with effect from 31 December 1999 and that he would be paid all that was due to him to that date plus three months' severance pay.
- (xiii) 4 January 2000. Mr Cooper's solicitors wrote to the Permanent Secretary repeating the claim based on the terminated employment contract and sent a copy to the liquidator with a note to him saying:

***"May we put you on notice (In your capacity as the liquidator) that our clients do not agree with the three months severance pay interpreted and applied by the Government on our clients employment contracts. It is our view that our clients' are entitled to more than three (3) weeks.***

*The writer would like to have a meeting with you shortly (and Public Enterprise Department, if deemed appropriate). Would it be possible if so please let is know."*

- (xix) 14 January 2000. The Permanent Secretary replied saying Mr Cooper had been paid more than he was entitled to and that he had been offered but had refused alternative employment within the Government.
- (xx) 21 January 2000. The liquidator replied saying the matter was being handled by the Permanent Secretary's Department
- (xxi) 1 March 2000. Mr Cooper commenced these proceedings in the High Court.
- (xxii) 15 May 2000. Mr Gaukrodger was appointed liquidator of PTCL.
- (xxiii) 4 December 2001. The liquidator filed his final return with the Registrar of Companies. The attached accounts made no reference to Mr Cooper's outstanding claim in these proceedings.
- (xxiv) 4 March 2002. Pursuant to section 284(4) of the Companies Act, PTCL was deemed to be dissolved and so it has remained.

### The Employment Contract and Award

- [4] Mr Cooper's contract of employment dated 21 January 1999 stated his employment to be for 3 years from 1 January 1999, unless terminated earlier under the terms of the contract. Termination was provided for in clause 9:

#### "9. Termination

*This contract may be terminated by he Board of Directors of PTCL in the event that in their view, there is an irreconcilable breakdown in the*

*relationship or incompatibility between the Employee and the Board. Prior to such termination of contract, there shall be a discussion with the Employee with the intention of resolving such differences. In the event that the Employee is given notice of termination such notice will specify the date on which it is to take effect, and the Employee shall be paid a sum equivalent to three months remuneration in addition to any holiday or other pay due on that specified date.*

*PTCL may terminate this contract at the end of a period equivalent to the Employee's cumulative entitlement to sick leave, annual leave and any other paid leave plus 90 days where the Employee has been physically or mentally incapacitated to the extent that the Employee is incapable of performing the services required of the Employee.*

*PTCL may terminate this contract without notice, if the Employee.*

- *Has materially breached any of the terms and conditions of this contract or*
- *Is guilty of any neglect of duty or serious misconduct which justified summary dismissal or*
- *Is convicted of any criminal offence punishable by imprisonment or*
- *Is formally dismissed for continued low performance and/or subsequent misconduct where there has been a previous formal final written warning."*

Clause 16 provided:

**"16. Complete Agreement**

*This contract contains all the enforceable conditions of employment. This contract shall not be changed or modified except by written agreement of the parties."*

- [5] Pathik J held that the contract was for a fixed term of 3 years and there was no provision, express or implied, for termination on reasonable notice or on the grounds of a change of government policy. He then assessed Mr Cooper's loss on termination, deducted what he had been paid, and entered judgment for Mr Cooper for \$95,500 plus interest at 5% and costs. The judgment was entered against all three named defendants who are the present three appellants.

### The Grounds of Appeal

[6] In submissions counsel claimed

- (i) There was no breach of contract entitling Mr Cooper to damages
- (ii) The contract was not a fixed-term contract and there was an implied term that it could be terminated on reasonable notice.
- (iii) The action was an abuse of process because PRCL had ceased to exist.
- (iv) The action was improperly instituted as no leave was sought to continue under s.229 of the Companies Act.
- (v) The Permanent Secretary and the Attorney-General are not liable for the financial obligations of PTCL.
- (vi) The damages awarded were excessive and the Government's offer was reasonable.

### The Claim Against PTCL

[7] With respect we disagree with Pathik J when he allowed the claim against PTCL to proceed after 4 March 2002 (being the date referred to in para. 3 (xxiv) above). Thereafter it ceased to exist and could not be revived. Accordingly the award against the defunct company must be set aside. By the same token, a non-existent entity could not bring an appeal so that we must regard the Permanent Secretary and the Attorney-General as the only appellants.

The claims against the Permanent Secretary and the Attorney General

- [8] These two parties represent the Government interests in this matter as shareholders of PTCL, the Minister of Public Enterprises and his department.
- [9] In Mr Cooper's statement of claim he alleges that the Permanent Secretary as a shareholder together with the other Government shareholder passed the resolution on 4 November 1999 terminating Mr Cooper's employment, that the Permanent Secretary gave the undertaking to pay PTCL's debts, cancelled the contract of employment by letter of 28 December 1999 and that that was in breach of the contract. He claims the Public Enterprise Act "articulated compensation for loss of employment." He referred to s.34(8). He claims the Permanent Secretary wrongly assessed the compensation payable and refused to revise it when asked. He alleges the Permanent Secretary's actions were "improper."
- [10] We suggested to Mr Muaror that he had not pleaded a cause of action against the Permanent Secretary or the Attorney General and asked him what the cause of action was. He was unable to suggest one and it does not appear that argument was addressed to the High Court on that important matter.
- [11] Rule 2 of the High Court Rules require a plaintiff in a Statement of Claim to state concisely the nature of his claim and the relief or remedy required.
- [12] Taking the claims against the Permanent Secretary and the Attorney General as a claim against the Government of Fiji, it is plain the Government undertook to the Board of PTCL that it would pay all the debts of PTCL (Letter of 14 October 1999 above). Naturally, that would mean debts properly established. If such an undertaking had not been given by in effect the two shareholders of PTCL it would had to have become involved in a creditors' winding-up or a Court winding-up which the Government plainly did not contemplate. However, the undertaking was to the Board of PTCL and not to Mr Cooper.



[13] It seems to us that Mr Cooper could have pleaded that the Permanent Secretary (and the Government) knowingly and intentionally procured a breach of Mr Cooper's contract. This has long been established as a tort when the procurement is without reasonable justification or excuse: Lumley v Gye (1853) 2 E & B 216 and Clerk and Lindsell on Torts 16<sup>th</sup> ed para. 15.02. Acting in the public interest under s.58 of the Public Enterprise Act would be reasonable justification, but only if proper compensation was offered. Counsel did not advance argument before us on this basis. It is nevertheless plain that the proper compensation has always been in issue between the parties and the liquidator failed to resolve the dispute as he should have.

### Compensation

- [14] In our view the respondent was obliged to articulate his cause of action more precisely. On the other hand we consider the appellants should have sought better particulars. In the result the matter was not properly argued before Pathik J or us.
- [15] This Court's powers on appeal are set out in Rule 22 of the Court of Appeal Rules. Rule 22(4) provides:

*"(4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."*

- [16] In our view it would be unjust to dispose of this matter finally on appeal without submissions on the suggested cause of action. To do so would risk doing an injustice. Accordingly we will remit the case to the High Court for rehearing. We would suggest that the parties agree to formulate the question for argument and

proceed on the basis of the material already before that Court. The Judge will be able to insist on appropriate procedural steps bearing in mind that the facts are already well canvassed.

- [17] To assist the parties and without setting out our reasons we can say that, on the material before us, we would have agreed with the Judge's finding that the contract of employment was for a fixed term of three years with no express or implied term than it could be terminated on reasonable notice or on the grounds of a change in government policy. Further, we would have upheld his assessment of loss.
- [18] Before disposing of the appeal we refer to two matters that have given us cause for concern.

#### The Liquidation of PTCL

- [19] It appears from the information on the file and submissions made to us that no Declaration of Solvency was completed. The liquidator was not appointed until after he had commenced to act. The liquidator failed to resolve Mr Cooper's claim of which he was fully aware. He appeared to leave it uncritically to the Permanent Secretary. As a result his account filed in December 2001 was incorrect and the company should not have been wound up on the basis that it had paid its debts. If what we say is correct, it reflects very badly indeed on the liquidator and the Permanent Secretary.

#### A further submission by the Appellants

- [20] In Mr Green's submissions he claims that counsel for Mr Cooper agreed at a pre-trial conference as follows:

***"On or about 14<sup>th</sup> October 1999 the second Defendant formally confirmed the Government's undertaking to pay all the debts of the company as a result of the liquidation process on the company, which has been duly complied with" [emphasis added].***

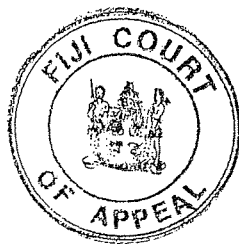
We have read the minutes of the pre-trial conference of 10 May 2002 and item 5 is in the above words but without the words underlined. Further the minutes made it plain that the plaintiff took issue with that very matter. We would not like to think that counsel attempted to mislead us on such an important matter. It is plain that the trial Judge did not proceed on the basis of the suggested agreement.

Result

- [17] [1] Judgment entered against PTCL is set aside so that appeal is allowed.
- [2] Judgment against the Permanent Secretary and Attorney General is set aside and the case against them is referred back for determination in the High Court.
- [3] There will be no award of costs in this Court.

*R. S. Barker*

Barker, JA



*A. J. Ellis*

Ellis, JA

*J. Scott*

Scott, JA

Solicitors:

Office of the Attorney General Chambers, Suva for the Appellants  
Muaror and Company, Suva for the Respondent.