

IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Civil Appeal No: AAU0038/06

BETWEEN:

KALIVATI TURAGACA BAKANI

Appellant

And:

CARPENTERS FIJI LIMITED

Respondent

Coram: Byrne JA
Shameem JA
Scutt JA

Hearing: 13th February 2008

Counsel: Mr. A R Matabalavu for appellant
Mr. H Lateef for respondent

Date of Judgment: 1st April 2008

JUDGMENT OF THE COURT

1. **INTRODUCTION**

At trial, Kalivati Turagaca Bakani (Mr Bakani), the Plaintiff and Appellant herein, sought damages for breach and unlawful repudiation of his contract as Deputy Managing Director with Carpenters Fiji Limited (Carpenters). The High Court held that on the evidence Carpenters Fiji Limited was not in breach of its obligations under the contract between it and Mr Bakani. His Lordship said there was no breach of contract on the part of Carpenters, and that Mr Bakani was 'treated fairly and reasonably'.

2. Mr Bakani was not, it was held, simply 'made redundant or dismissed without any new offer, but was offered employment as director in Shipbuilding (Fiji) Ltd but ...

declined'. Further, Carpenters 'was very considerate towards [Mr Bakani] as they were losing someone who has served the Company for so long'. Upon this basis it was held that no question of payment of damages arose for consideration. Mr Bakani's claims were dismissed with costs of \$450.

3. Having considered all the matters addressed in the appeal, including written and oral submissions and authorities provided by Counsel, this Court agrees with the determination of the High Court. Mr Bakani was, in our opinion, treated fairly and reasonably: insofar as it was possible in ending Mr Bakani's employment with them as Deputy Managing Director, Carpenters acted considerately in recognition of Mr Bakani's contribution and role as a valued employee. The appeal fails.

4. **GROUND OF APPEAL**

1. That the learned Judge was wrong in law and in fact in finding that Mr Bakani's case was one of unfair dismissal, whereas the learned Judge ought to have found that the claim was based on wrongful repudiation by Carpenters through redundancy of Mr Bakani.
2. That the learned Judge was wrong in law in purporting to apply legal principles pertaining to termination of an employment contract per se to Mr Bakani's claim when instead principles concerning repudiation of the contract by means of unilateral declaration of redundancy should apply.
3. That the learned Judge's finding that the letter [signed by Mr Bakani on] 5 September 1994 contained entire terms and conditions of Mr Bakani's contract of employment is inconsistent with the evidence that Mr Bakani was groomed by Carpenters to be its Managing Director which is in turn consistent with evidence of Mr Bakani to the same effect as well as evidence of Mr Bakani's understanding of oral and written communication between him and officers of MBf Holdings Berhad. In the circumstances the learned Judge's conclusion that Mr Bakani signed the letter of 5 September 1994 unconditionally is erroneous in fact whereupon the learned Judge also erred in law.
4. That considering that Mr Bakani was made redundant, not dismissed, acceptance by the learned Judge of the letter [signed by Mr Bakani on] 5 September 1994 as conclusive of the terms and conditions of the contract between the parties was erroneous in fact and in law.
5. That the learned Judge's finding that Mr Bakani's eventually becoming Managing Director of Carpenters was not in the contemplation of the parties is against the weight of the evidence that he was identified to be Carpenters' Managing Director, particularly direct evidence in an application for extension of Mr Bakani's work permit by Carpenter's Chief Executive Officer, this evidence being consistent with

evidence in oral and written communications between Mr Bakani and Officers of MBf Holdings Berhad.

6. There was no sufficient evidence upon which the learned Judge could accept that Mr Bakani's redundancy was fair. Alternatively the learned Judge's conclusion that Mr Bakani's redundancy was fair is erroneous in fact and in law and further, in all the circumstances, compensation granted to Mr Bakani is wholly unreasonable: Court Record, pp.1-2.

5. In written submissions Counsel summarized these grounds as follows.

6. Grounds 1 and 2 were a claim by Mr Bakani of breach of employment by repudiation, being a unilateral determination of his employment as Deputy Managing Director, and unreasonable notice of termination. Counsel said the evidence pointed to 'a unilateral declaration of redundancy' and 'invocation of the notice provision in the written contract' between Mr Bakani and Carpenters 'was clearly inappropriate' as:

- the position of Deputy Managing Director was the second highest executive position at Carpenters; and
- the parties' understanding was that Mr Bakani eventually was to become Managing Director.

7. Further, if redundancy was intended as a possibility, then it was 'just as easy' to include this as a term of the written contract. However, Counsel said, on the evidence there was a 'mutual intention' that Mr Bakani should have a long period of employment.

8. As to grounds 3 and 4, Counsel said Mr Bakani challenged 'as wrong' the High Court finding that Carpenters' letter of 2 September 1994 (signed by Mr Bakani on 5 September 1994) was 'conclusive of terms and conditions of employment' and further said that the parties 'intended' Mr Bakani to 'be groomed as Managing Director'. Further, Counsel said that one month's notice, 'even if standrd' for Carpenters' senior executive employees' was 'in all the circumstances inappropriate and unreasonable'. Mr Bakani, it was said, was entitled to reasonable notice. In this, Counsel relied upon ***Yashni Kant v. Central Manufacturing Company Limited***, Civil Appeal No. ABU 0001 of 2001S.

9. Further on grounds 3 and 4, Counsel said that no fairness was shown to Mr Bakani, for he was 'led to believe that he was [being] groomed as Managing Director'. Further, if the notice provision in the letter of 2 September 1994 'could be invoked, then one month's notice [was] clearly inadequate'. Further, the manner in which Mr Bakani's employment was determined 'clearly caused distress and loss of reputation'. Here, Counsel relied upon

section 33 of the Constitution; *Stuart v. Armourguard Security Ltd* [1996] 1 NZLR 484; and *Whelan v. Waitaki Meats Ltd* [1991] 2 NZLR 74.

10. As to grounds 5 and 6, Counsel said the High Court 'purported to link the issue of redundancy with fairness', and submitted:

- strictly speaking, fairness deals first with appropriateness of notice, and secondly with whether in the entire circumstance there was fair treatment (here, for Mr Bakani);
- redundancy is a separate issue, and was the real reason for determination of Mr Bakani's employment;
- further, redundancy related to the post of Deputy Managing Director, however Carpenters 'clearly intended' that Mr Bakani eventually become Managing Director;
- additionally, redundancy was neither an express nor implied term of the contract of employment, because:
 - as well, correspondence between Mr Bakani and Carpenters supported long-term employment;
 - redundancy related to the position of Deputy Managing Director;
 - there was clear evidence that Mr Bakani was identified as the future Manager Director.

11. Additionally regarding grounds 5 and 6, 'assuming that redundancy was open to Carpenters, then a redundancy package of up to two years would be fair and reasonable. Further, 'in any event loss and injury suffered by [Mr Bakani] during [his] period of unemployment pending employment by [the] Native Land Trust Board [his subsequent employer] is directly attributable to [Carpenters'] conduct of wrongful termination hence such period ought to be the basis of [an] award of damages.

12. TERMS OF APPOINTMENT AND TERMINATION

Taking into account the grounds of appeal and the High Court's determination, this Court considers that the proper approach in the appeal is to employ a three-stem process. First, upon what terms was Mr Bakani's employment with Carpenters terminated. Secondly, what were the terms of Mr Bakani's employment with Carpenters from the outset. Thirdly, is there any thing between the date of Mr Bakani's employment and its termination which founds a proposition that:

- the terms of his employment were anything other than those stated in his letter of employment; and/or
- the terms on which his employment was terminated failed to accord with his terms of employment;
- in light of his terms of employment, the terms upon which his employment was terminated were or were not fair and reasonable.

13. In our view, the principal items of evidence upon which the appeal is to be determined by reference to this three-step process are:

- the letter of 10 July 1998 from the Managing Director of Carpenters to Mr Bakani confirming oral advice as to the need for reducing overhead expenses of the company in Fiji and Papua New Guinea and that the position of Deputy Managing Director in Fiji 'is to be abolished' with the result that Mr Bakani's position was thereby redundant;
- a follow up letter of 16 July 1998 with attached documents relating to Mr Bakani's forthcoming departure';
- the letter of 2 September 1994 setting out terms of Mr Bakani's employment, and its precursor a letter of 11 July 1994 confirming that Carpenters would make Mr Bakani an offer of employment with reference to its terms; and
- an application for a work permit vis-à-vis Mr Bakani and evidence from an officer of the Department of Immigration in respect to it.

14. The letter of 11 July 1994 from Carpenters to Mr Bakani confirms a discussion with him making of an offer of employment ' on the following basis'. It then sets out in numbered paragraphs (1) base salary; (2) annual bonus; and (3) 'compensatio', the latter stating:

Deputy Managing Director of the Carpenters Group of Companies Reporting to the Managing Director, currently Mr Ross McDonald. Your exact duties will be worked out between you and I and Mr McDonald but will certainly entail such matters as overseeing government an official relations, relations with unions, special major Carpenters and MBf projects in Fiji, including property and hotel development projects and in general acting as Senior Deputy to Mr McDonald: Exhibit P3-4, Court Record, p.311.

15. A further unnumbered paragraph states:

All the other details of your employment and other benefits with be in line with those accorded to other senior personnel in the Carpenters Group: Exhibit P3-4, Court Record, p.311.

16. The letter of 2 September 1994 upon which Carpenter's relied as providing full terms of Mr Bakani's employment contract consists of three (3) pages, commencing with an opening paragraph which states:

We refer to our various discussions, and to the MBf Asia Capital Corporation Holdings Limited, Hong Kong letter of 11 July 1994 addressed direct to yourself and have pleasure in confirming your appointment as Deputy Managing Director of this company on the following terms and conditions: -: Exhibit P3-6, Court Record, pp.313-15.

17. That letter then goes on to list the terms under various headings, including 'Title' – Deputy Managing Director, 'Duties' (here various items are listed generally consistent with the matters set out in the 11 July 1994 letter), 'Reporting To' – The Managing Director; 'Commencing Date' – 5 September 1994; 'Salary' (identical with that in the earlier letter and to be reviewed annually); 'Superannuation'; 'Annual Leave'; 'Car' (for business and private use); 'Medical'; 'Life Insurance'; 'Club Fees'; 'Telephone'; and 'Termination'.

18. The remainder of page 2 and part of page 3 'expand on' the duties listed earlier. Prior to a paragraph welcoming Mr Bakani to the Carpenter Group and extending to him 'our best wishes for a long and successful career with the Group', the letter states:

Your duties will change and you will be involved in many ways across all activities of the company where you can make a positive contributions as your knowledge of our operations grows. You will also be able to relieve the writer [Managing Director RG McDonald] of a substantial portion of the workload he carries.

You will sit on the company's senior management committee where your experience and background will enable you to participate in decision making that influences and directs the operations of the Group; Exhibit P3-6, Court Record, p.315.

19. Earlier, on page 2 of the letter, under the heading 'Termination', the following appears:

This contract is terminated by not less than one month's notice in writing on either side, or by payment of one month's salary in lieu of notice'.

20. This was a particular focus of the trial, the High Court's determination, and matters raised on the appeal. As was noted by the High Court and in this Court, Mr Bakani signed the letter (on 5 September 1994), confirming: 'I hereby accept this appointment on the terms and conditions stated above'.

21. That clause appeared in all contracts or letters setting out terms of appointment of other senior personnel, so that Mr Bakani was in no different position from any other member of senior management. Carpenters said that this confirmed that there was no obligation on Carpenters to provide Mr Bakani with longer term or ongoing or permanent employment, or that contradicted Carpenters right to end his employment on the terms upon which it was ended. Further, it was said that Mr Bakani's contention that he was being 'groomed' for the post of Managing Director and held a permanent position was not substantiated by the terms of employment set out in the letter of 2 September 1994.

22. Once having signed the letter on 5 September 1994, it was said, and hence accepting employment with Carpenters on the basis of one month's notice of termination, Mr Bakani was precluded from a contention that his employment was wrongly terminated or should have been terminated on terms different from those ultimately extended to him. Mr Bakani, however, said in evidence that his understanding was that he would remain

with Carpenters until he reached 65 years of age, unless his contract was terminated for misconduct: that is, his employment for life was subject only to satisfactory performance.

23. The High Court held that the letter of 2 September 1994, signed by Mr Bakani on 5 September, was the contract between Mr Bakani and Carpenters, and that the terms and conditions of Mr Bakani's employment were fully contained in it. His Lordship observed that there was 'no mention anywhere that [Mr Bakani] will eventually be appointed Managing Director as alleged' and said:

I do not find in the evidence that this was in contemplation of [Mr Bakani]. There is nothing in the evidence to create in the mind of the plaintiff that he would be promoted to the position of Managing Director except to the effect that [Carpenters] was looking forward to a long association and greater responsibilities will be given to him: Court Record, p.11.

24. We note that the letter of 2 September 1994 does contain the aforementioned reference by the Managing Director (its signatory) that Mr Bakani '...will also be able to relieve the writer [Managing Director RG McDonald] of a substantial portion of the workload he carries'. However, it would be drawing a longbow to say that this confirms Mr Bakani's contention that that post was to fall to him in the future and he was being 'groomed' for it. Further, the work permit and immigration evidence is not persuasive of that view.

25. In the High Court, His Lordship made the following findings on this aspect:

On the evidence before me I find as fact that after verbal discussion and correspondence between the parties, they entered into a contract of service by [Mr Bakani's] signing it unconditionally on 5 September 1994.

All the terms and conditions of employment are contained therein and [Mr Bakani's] employment is governed by the contract and he accepted them by signing it.

I find that the termination clause 'of one month's notice] is very clear and all that is required is a month's notice: Court Record, p.12.

26. Taking into account all the material, including oral evidence in the trial, we cannot but agree with his Lordship. His finding was consistent with both the facts and the law. In this regard, we refer to the authorities cited by His Lordship and referred to later herein.

27. Mr Bakani says that the terms of his termination were unfair and unreasonable. In light of this, we set out in full the contents of the letter of 10 July 1998 [Exhibit D], Court Record, pp.228-39) terminating Mr Bakani's employment with Carpenters:

As verbally advised to you last week, at the time of my visit to Malaysia in February of this year the directors issued instructions that overhead expenses of the company in Fiji and Papua New Guinea were to be addressed and reduced. As a result of this

a number of senior positions in Papua New Guinea have been abolished or merged and this process is continuing.

In Fiji the directors have decided that in addition to other expense savings the position and office of Deputy Managing Director is to be abolished. As a result of this your position has become redundant.

It is with sincere regret that I have to notify you of the company's decision. Our personal relationship has always been of the highest order and your integrity and loyalty to the company have been outstanding.

At your request I have spoken again to the Malaysian directors concerning the redundancy proposals that were verbally put to you. The following arrangements will now apply:-

1. You will receive one month's notice of termination.
2. You will receive five months redundancy pay.
3. The date from which your period of notice begins is Wednesday, 22 July but in accordance with MBf Group policy it will be necessary for you to leave the company on that date.
4. You are granted the right to use your company motor vehicle up to and including 31 December 1998 at which date it is to be returned to the company in good condition. From the date of your leaving the company's employment until the return of the vehicle the company will maintain registration, third party and comprehensive insurance on the car. Fuel and maintenance are your responsibility apart from the warranty attaching to this relatively new vehicle.
5. At any time up to 31 December 1998 you have the option of purchasing this vehicle at its written-down book value plus VAT. At 31 December 1998 the written-down value of this vehicle will be \$47,560. Alternatively at any time up to and including 31 December you may purchase the vehicle currently driven by Max Danker at its written-down value plus VAT. At 31 December 1998 Max's vehicle will have a written-down value of \$31,582. Vehicle purchase must be for cash or through an external finance company.
6. You will be paid all accumulated holiday pay and any other benefits due on 22 July next.

You will be asked to resign from the Board of WR Carpenter (South Pacific) Ltd and its subsidiary and associated companies. The company would be very pleased however if you would continue as a director of Shipbuilding (Fiji) Ltd and accept an appointment as a director of MCI Carpenters Ltd. The annual fees for which are \$4,000 and \$2,000 respectively.

You are a well-known and well-respected person in the business company and I have no doubt that you will move on to bigger and better things. Whatever your future employment or vocation may be, I wish you well. Please feel free to make contact with me at any time.

With best wishes.

Yours sincerely.

Kenneth Clemens
MANAGING DIRECTOR

28. A paragraph under Mr Clemens' signature provides:

Redundancy is accepted on the above terms and conditions. I confirm that I have no further claim on the company: Exhibit DI, Court Record, pp.338-339.

29. This is followed by Mr Bakani's signature, affixed on 24 August 1998.

30. The follow-up letter of 16 July 1998 (Exhibit A2, Court Record, p.340) also requires quoting in full:

Further to my letter of 10 July I attach the following documents in relation to your forthcoming departure from the company now that the position of Deputy Managing Director has been made redundant.

1. Details of final pay. Please note that full benefit has been given in the tax calculation in relation to the redundancy component.
2. The P4-1 tax slip in duplicate.
3. Letters of resignation addressed to WR Carpenter (South Pacific) Ltd, Morris Hedstrom Samoa Ltd, Morris Hedstrom Tong Ltd, BHP Steel Building Products South Pacific Ltd and NMBf Insurance Company (Fiji) Ltd respectively.

You will advise in due course as to whether you wish to continue your directorship of shipbuilding (Fiji) Ltd and take up the directorship offered in MCI Carpenters Ltd.

The final pay as per attached will be deposited into your bank account on the morning of Friday, July 17. If you prefer an alternative arrangement please advise now.

31. On redundancy and 'fair and reasonable' dismissal, the High Court said, by reference to *Native Land Trust Board Employees Association v. Native Land Trust Board* [1998] FCA 28; *Diners Club (NZ) Limited v. Prem Narayan* CA No. ABU00A96/S; and *Yashni Kant v. Central Manufacturing Company Limited*, Civil Appeal No. ABU 0001 of 2001S that the employer 'has the right to dismiss without cause and extends to the manner in which a dismissal is to be carried out and that it is to be fair and not in a manner that is humiliating and distressing'. His Lordship referred to the contact of employment between Mr Bakan and Carpenters, as to the provision for termination previously referred to, namely:

32. This contract is terminable by not less than one month's notice in writing on either side, or by payment of one month's salary in lieu of notice: Court Record, at p.14.

33. His Lordship said that this clause 'shows that both sides (the employer and the employee) can terminate the contract by giving one month's notice or salary in lieu of notice. Termination can be with cause and without cause as shown by the above authorities': Court Record, at pp.14-15.

34. His Lordship held that even it were the case, as advocated by Mr Bakani, that his contract was 'for life' – that is, until he reached 65 years, the age of retirement and hence was 'permanent', 'the employment can still be terminated by reasonable notice: *Chitty on Specific Contracts*, Vol.2, p.780; *McClelland v. Northern Ireland General Health Services Board* [1957] 1 WLR 594, at 601.

35. He concluded that Carpenters had 'though the period of [Mr Bakani's] employment dealt properly with [him] in conformity with the principles stated in the authorities ... cited'. Further, Mr Bakani was 'quite fairly dealt with by [Carpenters] before termination. The treatment [he] received at the hands of [Carpenters] was reasonable'. This conclusion was based on a number of factors:

- That Mr Bakani was verbally informed by the Managing Director of the situation and the proposal by Carpenters as to the need for 'downsizing' or contracting operations in Papua New Guinea and Fiji, as discussed at a meeting in Malaysia;
- This verbal informing occurred before the Managing Director wrote to Mr Bakani putting these matters in writing and notifying him of the redundancy of the position of Deputy Managing Director;
- Mr Bakani was informed of the reasons for redundancy, and that he would receive one month's notice of termination along with other conditions of redundancy.

36. Looking carefully at the terms of redundancy or termination offered to and provided to Mr Bakani, we find it impossible to agree with Mr Bakani's contention that these were unfair and unreasonable, or that his termination of employment was unfair and unreasonable. On the contrary, the approach taken by Carpenters appears to be extremely fair and reasonable. In addition to the one month's termination, Mr Bakani was offered the use of his company car for just under six months, with registration, comprehensive insurance and other expenses (apart from petrol and running costs) continuing to be paid by Carpenters; he was offered two directorships at a total of \$6000 per year – a far smaller sum than his annual income of course this is true, but nonetheless in all the circumstances an offer which went beyond anything required by Mr Bakani's contract; he was offered the option of buying at written-down value his company vehicle or one at a lesser cost; he received five months redundancy pay; a requirement for immediate clearance and deduction of company accounts (Carpenters Finance, etc) was waived 'on the understanding the [Mr Bakani] would meet these accounts as they fall due': Exhibit D1, A2, Court Record, pp.338-340.

37. We considered whether the liberality of the provisions extended to Mr Bakani to cover his employment termination could be taken as supporting his contention as to 'permanent employment' until reaching retirement age and being 'groomed' for the position of Managing Director. Did this imply that Carpenters had in fact held out to Mr Bakani employment 'for life' and the top management position? In our view, this was not the case. Rather, it was consistent with the comments made by the Managing Director, Mr. Clemens, in the letter of 10 July 1998, namely that Carpenters 'sincerely regretted' the need for the decision, that Mr Bakani's integrity and loyalty to the company [had] been outstanding', and that Carpenters and Mr Clemens wished him well as a 'well-known and well-respected person the business community [who would] move on to bigger and better things ...': Exhibit D1, Court Record, pp.338-339.

38. Counsel for Mr Bakani relied amongst other authorities upon *Yashni Kant v. Central Manufacturing Company Limited* Civil Appeal No. ABU0001 of 2001S (HCCA No. HBC 567 of 1996S) as to the 'unfairness' and 'unreasonableness' of Mr Bakani's termination, and also Mr Bakani's stated expectation of taking over the post of Managing Director. However, we consider that that case is very different from that of Mr Bakani.

39. First, in *Yashni Kant* the employee was treated summarily, being dismissed/terminated on the spot, in circumstances both humiliating and distressing, with a later letter which effectively sought to 'excuse' the summary dismissal by putting forward substantive reasons – effectively as an afterthought as it would appear an attempt to rectify the summary action taken it might be suggested in the heat of the moment. In the present case, the treatment of Mr Bakani was quite different as illustrated by reference to the two letters which dealt with his termination. In this regard, we consider also that section 33 of the Constitution is properly met: the circumstances were consistent with the requirement that every person 'has the right to fair labour practices, including humane treatment ...'. There was no inhumane treatment or unfairness in the way in which Mr Bakani was terminated, in the way in which the termination was conveyed to him and in the circumstances of his termination.

40. As to the question of taking over the Managing Director's position, in *Yashni Kant* there was independent evidence substantiating this. In the present appeal, the question whether there is independent evidence substantiating the proposition as to expectation must be answered, as it was in the High Court – 'no'. If there was any such evidence, the question is whether in all the circumstances that expectation was realistic and also whether it provides a platform from which Mr Bakani can argue, according to law, that his legitimate expectation was not met and hence he was entitled to damages. In all those respects, we are constrained again to answer 'no'.

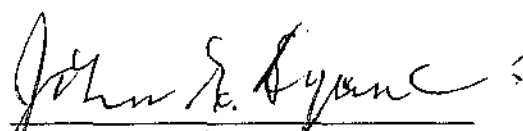
41. In our view, *Yashni Kant* serves simply to highlight in stark and conclusive terms that the High Court was right in holding that Mr Bakani had not made out his claim of being 'groomed' for his superior's job, and that Mr Bakani's treatment was, in fact, fair and reasonable. Again in this regard, in addition to being consistent with the law as set down by His Lordship in the High Court, there was no breach of section 33 of the Constitution.

42. CONCLUSION

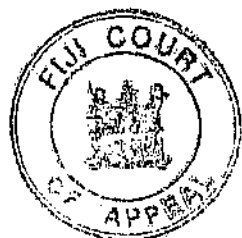
As observed at the outset, this Court considers that the finding of the High Court was correct in fact and in law. We are unable to accede to any of the grounds of appeal, clearly argued though they were. We agree with the High Court and hence must dismiss the appeal.

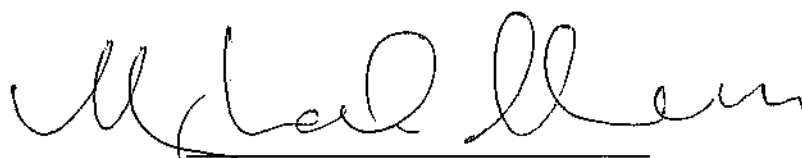
ORDERS

1. The appeal is dismissed.
2. There will be no order for costs.

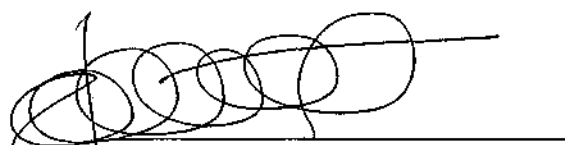


Hon. Justice John Byrne
Judge of Appeal





Hon. Justice Shameem
Judge of Appeal



Hon. Justice Scutt
Judge of Appeal

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