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IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Civil Ap
(On Appeal from a judgment of the
High Court, Suva in Civil Action No. 92
of 2004)

BETWEEN : KABARA DEVELOPMENT CORPORATION LIMITED
APPELLANT

AND : 1. THE ATTORNEY GENERAL
FIRST RESPONDENT

: 2. THE MINISTER FOR TRANSPORT AND CIVIL AVIATION
SECOND RESPONDENT

Coram : Byrne, JA
Pathik, JA
Goundar, JA

Counsel : R. Matebalavu for the Appellant
: Ms S. Levaci and Ms K. Vuibau for the Respondents

Date of Hearing : 17th September 2009

Date of Judgment : 16th October 2009 at 9.15 am.

JUDGMENT OF BYRNE, J.A. and
GOUNDAR, J.A

INTRODUCTION –THE OUTER ISLANDS OF FIJI

- [1.0] Because of their geographical position, communities in the outer islands of Fiji depend mainly on sea transport for provision of the ordinary necessities of life. Comparatively few of these islands have airstrips and those which do are available generally to only light aircraft of a limited carrying capacity. This appeal highlights the problems facing these communities because of their dependence on sea transport. Because of their small populations any form of sea transport is not viable commercially without some form of government subsidy.
- [2.0] Because of its recognition of their comparative isolation and size of the communities, in 1994 the government decided to introduce a Shipping Franchising Scheme to eight designated areas including Northern Lau Group and upper Southern Lau Group and lower Southern Lau Group. It asked for bidders to provide Shipping services.
- [3.0] The appellant was incorporated in 1991. Its purpose was to buy a vessel from the Lau Provincial Council which was selling a vessel called **"TAI-KABARA"**. Actually, according to the evidence before Singh, J in the High Court from whose judgment of the 12 of December 2006, this appeal is made, the Appellant, did not pay anything but simply took over a debt of about \$265,000.00 owed by the Provincial Council to the National Bank of Fiji.
- [4.0] The appellant borrowed money from the bank by way of debenture. The vessel needed repair and when this was done, the appellant began to provide services to islands in Southern Lau from 1991 to 1996.
- [5.0] It incurred losses. It realized that operating in Lau waters was not viable and Government shipping services to Lau were poor.

THE APPELLANT'S REQUEST TO THE GOVERNMENT

- [6.0] In 1995 the appellant approached the government for assistance which came in the form of the shipping franchise scheme mentioned earlier. As the Learned Judge remarked at page 2 of the judgment "this franchise scheme may have come as a welcome relief to the appellant".
- [7.0] The appellant was successful in its bid and it entered into a contract with the government on 29th August 1997. The contract was between the Controller of Government Supplies and the Appellant. It was for a period of three years. The Government agreed to pay the appellant a sum of \$30,000 per month in return for the appellant operating regular scheduled services to the Lau Group.
- [8.0] The appellant alleged that its franchise agreement was extended for a further period of ten years and that the contract for this extended period was unlawfully terminated.
- [9.0] On the other hand the respondent denied that the Appellant was ever granted a ten year extension and, in the event that the Court found that it was granted the contract, then the contract was lawfully terminated.

THE HEARING BEFORE THE HIGH COURT

- [10] Singh, J heard evidence from the parties on the 12th and 13th September and 18th October 2006. He first dealt with the 1997 agreement. He found on page 2 of his judgment (page 6 of the record), and in our view correctly, that the agreement comprised three documents which were to be read together. The first of these was the CALL FOR TENDERS which was a letter dated 28th of April 1997 from the Director of Marine to the Manager of TAI KABARA SHIPPING. The second was the BID, reference to which is made in a letter dated 1st of August 1997 from the Government Supplies Department to the Manager Operations, KABARA DEVELOPMENT CORPORATION. This letter informed the appellant that it had been granted the contract to provide Shipping services in the Southern Lau Franchise area by the vessel "TAI-KABARA" at a cost of \$30,000 per month for a period of 3

years and under which performance would be reviewed after every 12 months. This letter was signed by one AZED MOHAMMED for the Controller of Government Supplies.

- [11] The third document was **THE ACTUAL AGREEMENT** which is of one page and is dated the 29th of August 1997 and is between the Major Tenders Board (Marine Department) and Kabara Development Corporation Limited. The agreement stated that the documents to which we have previously referred, the Call for Tenders, the Bid, and the Letter of Acceptance were to be deemed to form and be read and construed as part of the agreement.

THE SALIENT FEATURES OF THE CONTRACT

- [12] The salient features as expressed in the call for tenders were that the award of the contract did not give the appellant a monopoly of shipping rights to the southern Lau Group. The appellant was only entitled to a government subsidy. Other operators were free to provide services to areas covered by the franchising scheme. The call for tenders specified the timetable which set out the regularity of calls to be made to designated areas.
- [13] In the case of Southern Lau it provided that "*the successful tender will be required to provide a sailing every two weeks from Suva to the islands of Southern Lau Franchise areas. Every sailing should depart on the same day of the week, providing an interval between departures of precisely two weeks*".

The level of servicing required to each of the islands in the group was then specified.

- [14] As we have said the contract was for three years with no provisions for extension. It further required that the vessel "***must be maintained in a seaworthy condition and continue to have all required safety certification and to carry all necessary safety and navigational equipment***". Failure to comply with these provisions would be a cause for termination of the contract.

CONTINGENCY ARRANGEMENTS

- [15] The call for tenders stipulated that the tenderer had to clearly indicate the arrangement if any that it intended to make in order to ensure continuity of service to the franchise area in periods during which the nominated vessel was out of service due to slipping, scheduled maintenance or breakdown. The agreement also provided for circumstances in which the contract might be cancelled. The relevant circumstance in this case was the failure of the contractor to provide services on two consecutive occasions.

WAS THE CONTRACT EXTENDED FOR A FURTHER PERIOD OF TEN YEARS?

- [16] In the High Court the appellant gave evidence that before the expiry of the term of the 3 year contract it approached the government to extend the franchise period. It wrote to the Director of Marine on 12th January 1999 and referred to a meeting held with the Minister for Communications, Works and Energy seeking an extension of contract for nine years from 31st August 2000 and to expire on 31st August 2009.
- [17] The appellant additionally relied on a Memorandum from the Controller of Government Supplies to the Permanent Secretary for Communications, Works and Energy dated 19th of March 1999. It says that the Major Tenders Board in its meeting held on 17th March 1999 approved the extension of the appellant's contract for ten years from 17th March 1999. It is desirable to quote this letter in full, omitting formal parts. It reads:

"Attention : Mr. V. Vakacegu.

Refer to your Memo 25/730/9 dated 15/3/99.

This is to advise that the Major Tenders Board in its Meeting No. 5/99 held on 17/3/99 approved the extension of the above mentioned contract to Kabara Development Corporation Ltd and Kadavu Shipping Co. Ltd for a further ten years (10) from 17.3.99. This contract expires on 17/03/2009.

The Board also directed that the performance of the Contractors be reviewed annually for the service provided.

The Major Tenders Board has further approved that the Fresh Tender, CTN 23/99 Shipping Services to Kadavu-Babaceva, Eastern Gau, Nairai, Batiki, Yasayasa Moala, Yasawa Group and Northern Lau Group should also be for a period of 10 years.

For your information and necessary action.

(Signed)
[V. Fung]
 For CONTROLLER OF GOVERNMENT SUPPLIES

cc: The Director of Marine - Fax # 303251".

- [18] It also relied on a letter written on 24th March 1999 on the Ministry of Communication, Works and Energy letterhead by one S. Umu for Permanent Secretary for Communication, Works and Energy. The letter is addressed to the Appellant. The relevant portion reads:

"We are pleased to advise that at its meeting 5/99 held on Wednesday 17th March 1999 the Major Tenders Board approved the extension of your current contract for a further ten years from 17/03/99. The contract expires on the 17th day of March 2009".

- [19] The evidence on this aspect for the respondent was given by Waisale Salu who was the Assistant Director of Maritime Security. He stated that there was a process to be followed in granting a franchise agreement. This involved three stages – first, pre-qualification, second, tender and third, agreement. The pre-qualification stage determined whether an applicant was an established shipping operator as opposed to a potential shipping operator. An established operator was one who is in the shipping business and owned a vessel. Those who qualified as established operators then qualified to enter the tender stage and were given a tender specification and then a final agreement.

- [20] The Major Tenders Board decides to whom to award the contracts. It then informs the Director of Marine and draws up contracts. The Controller of Government Supplies signed the contract on behalf of the Government. This was the procedure followed when issuing the 1997 Contracts.
- [21] According to this witness he was the Director of Marine on the 12th of January 1999 when the appellant sought an extension of contract for nine years. The letter was copied to Mr. V. Cavubati who was the Assistant Minister for Communications, Works and Energy at the time. He stated that on receipt of this letter he sought advice from the Solicitor General and he received a Memorandum from the Solicitor General dated 4th February 1999.
- [22] The Solicitor General advised the Director of Marine to act fairly and also to be seen to act fairly which was the reason for the tender process. He stated that the Government could grant an extension of the contract but would open itself up to "justifiable criticism of acting unfairly and possibly of corruption" if this were done. The Solicitor General recommended that before extensions were granted, the normal tender process should be undertaken so as not to defeat the competitive tendering process.
- [23] As the Learned Judge correctly observed on page 5 of his Judgment :
- "In other words before the Permanent Secretary for Communication, Works and Energy wrote the letter to the Plaintiff on 24th March 1999 saying it had been given this extension, the Director of Marine had the Solicitor General's letter advising him against extensions without calling for tender - see Defence Exhibit (DE-6)".*
- [24] Additionally he had also received a written Memorandum from the Controller of Government Supplies dated 26th February 1999 advising him that the Major Tenders Board in its meeting 4/99 held on 25th February 1999 had decided: "not to approve the extension of the existing contract for additional ten (10) years as requested by the Honourable Assistant Minister for Communications, Works and Energy".

- [25] The Learned Judge stated, and we agree, that although the Circular Memorandum does not refer to the appellant by name, given the earlier letter of 12th January 1999 it is obviously a reference to the appellant's application. The opening paragraph of this letter shows a meeting at which the appellant's representative, the Director of Marine, and the Minister and Assistant Minister were all present.
- [26] The Director found the contradictory decisions between the Permanent Secretary and Controller of Government Supplies rather unusual. As far as he was concerned, he did not enter into any contract for a ten-year extension. Also, there were no advertisements published.
- [27] There was evidence before the High Court that the Director had also received a complaint from the Minister for Tourism and Transport by a letter dated 1st July 1999 of unsatisfactory services being provided by TAI-KABARA and of it having to be towed after developing an engine problem. He was also aware of the advice of the Solicitor General to the Permanent Secretary for Tourism and Transport in a Memorandum dated 21st July 2000 that proper tender process had to be followed before shipping franchises were given. The Memorandum said the contracts could not be awarded without tenders being called.
- [28] On 29th August 2000, the Director wrote to the Appellant saying that "the contract entered into three years ago was formally closed" and that they were processing fresh tenders through the Major Tenders Board.

LEGISLATIVE PROVISIONS – FINANCE REGULATIONS

- [29] Numerous regulations have been made under the Finance Act Cap. 69, the title of which is:
- "An Act to Make Provision for the Administration and Control of the Public Finances and for Other Matters Connected Therewith.

- [30] The Learned Judge stated correctly at page 7 of his judgment that the starting point for the resolution of this case is Regulation 19 of the Finance (Supplies and Services) General Regulations made under Section 70 of the Act. Regulation 19 states that only the Controller that is, the person in charge of the Government Supplies Department or some other person authorized by him, can execute any contract for the supply of goods and services. Consistent with this provision the agreement dated 29th August 1997 was signed by the Controller.
- [31] The Learned Trial Judge noted on page 7 of his judgment that the claimed extension of agreement dated 24th March 1999 to the Appellant was signed by "S. UMU" for Permanent Secretary for Communication, Works and Energy. He said it was not signed by the Controller nor was there any evidence that he was authorized by the Controller to sign this letter, accordingly, the Judge said, the Contract was not executed in accordance with the requirements of Regulation 19. We agree.
- [32] The Learned Judge then said that under Regulation 12(8) it was the Major Tenders Board which considers and may authorize the acceptance of any tender called for by the Controller. It is the Board which decides whether to accept or reject a tender. Even though the Controller is a member of the Board, he does not accept or reject tenders himself. That task is left for the whole Board or at least when there is a quorum. Regulations 12(4) states that the quorum for a meeting of a Major Tenders Board shall be three members. Normally, the Controller would relay the outcome of a meeting to the Tenderer.

WHAT IS THE EFFECT OF NON-COMPLIANCE WITH THE REGULATIONS?

- [33] The Respondent submits that the letter upon which the appellant relies to assert that it had a 10-year contract was not issued in accordance with the procedures and requirements of the Finance (Supplies and Services) General Regulations Cap. 69. The First Respondent argues that these regulations spell out the procedure to be followed in the supply of goods and services to the Government in a government commercial activity. The overriding regulation is Regulation 3 which is expressed in mandatory terms and reads:

“No tender for the supply of goods or services, or for the purchase of public stores, shall be called for, considered or accepted otherwise than in accordance with these Regulations”.

- [34] Regulation 4 states that it is the duty of the Controller to ensure that the provisions of Regulation 3 are complied with.
- [35] The regulations established a number of tender boards, each operating within its specially fixed sphere of operation. The Major Tenders Board is one of these and the Controller is one of its members. Under Regulation 12 (8) its task is to consider and authorize the acceptance of tenders of the supply of goods and services where the price exceeds \$25,000. It cannot accept tenders but only authorize the acceptance of a tender. The final say is with the Controller or someone authorized by him under Regulation 19. He can refuse to sign a contract for a good reason. It is important to realize that merely because the Major Tenders Board may have authorized acceptance of a tender, this does not mean that a Contract has come into existence. In short, the scheme of the Act and Regulations is to provide a system of checks and balances, the overriding purpose of which is to ensure that Government funds are spent as wisely as possible. The regulations are also designed to prevent collusive contracts and allegations of favouritism.
- [36] At Page 10 of his Judgment, Singh, J quoted from the book ***“Government Contracts”*** Nicholas Seddon 3rd edition at page 257 where paragraph 7.2 states:
- “the body seeking tenders is under a public responsibility to use public money in the best possible way. The responsibility involves not only securing the best deal through open and effective competition but also the protection of the public purse from collusion, fraud and extravagance. It is also important that the integrity of the whole process is maintained so that potential contractors are not put off, with consequential lessening of competition”.**
- [37] The Learned Judge stated, and we agree, that the appellant was aware of the system which had to be followed, namely: the advertisement of the franchise scheme, a call for tenders, tender reply and agreement before the 1997 contract was finalized. It knew that the Controller had signed the contract.

- [38] The Appellant chose not to follow this procedure in seeking the extension. Instead, according to Mr Taniela Tabu, the Chairman of the Appellant's Board: ***"The company thought of seeking assistance from Ministerial level. We made direct approach to the Minister for assistance because the Ministers had prerogative over and above the process which is there"***.

This reveals the understanding or rather lack of it of the appellant of the Finance Regulations.

- [39] The documents relied on by the appellant to support its application were two letters dated 19th and 24th of March 1999. The first is an internal Memorandum. Neither is signed by the Controller. There were no advertisements, no tenders called and no contracts signed by the Controller. The appellant submitted no tender for a 10-year extension. The Controller signed no contract. The regulations were not complied with. In our view these failures were fatal to any application for extension.

- [40] The calling of tenders is required by law. The Regulations do not specify what is the effect of failure to call tenders on contracts but, they are framed in mandatory language. Regulation 3 requires strict compliance with the Regulations. Non-compliance with them or with the tender process defeats the entire purpose of the regulations. Seddon on "Government Contracts" (Supra) page 357 expresses the view that ***"if legislation is directed at preserving the integrity of the competition for government business (that is usually a tendering procedure) the non-observance renders the process invalid"***.

- [41] In ***Wade v. Gold Coast City Council -26 LGRA 349*** a cartage contractor had entered into a contract to cart gravel for a local authority after his tender had been accepted. The contractor alleged he had secured an extension of contract with the local authority's engineer on the same terms as was set out in the tender. It was held by Hoare, J that the renewed contract was not made in accordance with the Queensland Local Government Act (1936-1971). At page 351 the Judge said, : "I can see nothing in the Local Government Act whereby an Engineer has any particular status in relation to the making of contracts".

- [42] Although *Wade* dealt with a different statutory context we consider the reasoning is equally relevant here. In the final analysis only the Controller can sign the contract and no one else.
- [43] The regulation gave the Controller that final say and not the Minister. A 10-year extension would commit the State to an expenditure of \$3.6 Million. We think it most unlikely that the Controller would commit the State to such a level of financial liability without calling for tenders in face of the earlier calling of tenders for a far shorter period and for a lesser amount.
- [44] We have no doubt that the intervention of the Assistant Minister for Communication, Works and Energy after consultation with the Appellant opened the approach of the Appellant to being regarded as a collusive contract or to quote again from the Solicitor General's letter: "Can it possibly be for the public good for a Minister of the State to intervene and give directions to an official, whose duty and power it is to grant or decline licences, to act in a particular way in respect of a particular case. Such conduct, if permitted would mean that individuals who have the ear of the Minister have an advantage over one who has not". - *Korovulavula v. Public Service Commission Civil Appeal No. ABU 0006 of 1994 - Judgment of this Court 20th August 1994.*
- [45] A Minister must use statutory powers entrusted to him for the general purpose of the empowering statute and for the public good. To do otherwise would open the door to corruption in official conduct and would destroy public confidence in the integrity of the system of awarding contracts under relevant legislation, in this case the Finance (Supplies and Services) General Regulations.
- [46] We are in no doubt that the appellant had no contract for 10 years because the tender process under the regulation was not followed and because the Controller had not signed the contract. The appellant was no stranger to the procedure and in our view could not rely on any ostensible authority which might have appeared to be given to S. Umu, the Permanent Secretary for Communication, Works and Energy to sign on behalf of the Controller.

WAS THE CONTRACT VALIDLY TERMINATED?

- [47] To answer this question we must consider the purpose of the scheme on which, we have previously touched. The draft final report on the Franchise Scheme (Plaintiff's Exhibit 71) at Section 4.1 states: **"The service franchising system is intended as a solution to a problem: the lack of access of some Fijians to the full range of social and economic opportunities.....In the absence of such a scheme, islanders would be significantly disadvantaged by the absence of an acceptable commercial shipping service"**.
- [48] The Appellant argues that it continued to provide services to the franchise area under what it claims was a 10-year extension. The Respondent's position is that the appellant continued to provide services under a series of extensions for short terms until a fresh tender process was to be finalized. In our judgment either the appellant misunderstood the law or if it did not, it hoped that it would continue to have the government's approval to the service it was providing. In either event there could be no extension of contract.
- [49] The Respondent had terminated the appellant's services by its letter dated 20th December 2004. The basis for termination was that TAI-KABARA failed to provide services on two consecutive occasions between the 8th of October and 3rd of December 2004.
- [50] The Respondent relies on the provision "Cancellation of the Contract" on page 9 of the Call for Tenders. The relevant clause reads: "The Principal may cancel the contract if the Contractor:
- fails for reasons other than weather conditions or *force majeure* on two(2) consecutive occasions to operate a service nominated in the service schedule.

The appellant submitted to the Trial Judge and to this Court that *force majeure* excludes termination. It submits that the compulsory dry docking in late October 2004 was an act of *force majeure* so that this condition applies.

THE MEANING OF 'FORCE MAJEURE'

- [51] It is not a term of art in our law though the effect of those words in a contract has often had to be considered. The words are taken from the Code Napoleon, and are well known in continental legal systems, for example that of France - CODE.CIV.Para.14-148.
- [52] In a Contract it means that a party is not liable for failure to perform any of his obligations in so far as he proves :
1. *that the failure was due to an impediment beyond his control; and*
 2. *that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract, and*
 3. *that he could not reasonably have avoided or overcome it or at least its effects.*
- [53] There are numerous examples in the cases. Thus in *Matsoukis v. Priestman and Co. (1915) 1K.B. 681* Bailhache, J held that the words would cover dislocation of business due to a universal fuel strike or to a breakdown of machinery. Bad weather will normally not constitute *force majeure* but war, strikes, abnormal storm or tempest have been held to constitute *force majeure*.
- [54] The Oxford dictionary defines the term as: "*unexpected circumstances, such as war, that can be used as an excuse when they prevent one party from doing something that is written in a contract*".
- [55] The Learned Trial Judge held that the compulsory dry docking in October was not a force majeure, and we agree.

- [56] The facts are that on 28th October 2004 the vessel was loaded with passengers and cargo. The owners had reported malfunction of the Generator and had asked for a special engine survey. One of the officers assigned to inspect the Generator was John Vincent Tunidau. He went to check the generator and in the process noted that the crew were continuously pumping out water. After checking the generator he inspected the cargo hull and noted water seeping in. He reported this to the Hull Surveyor. One Misaele Vakararawa then went to look at the leak. He took the vessel out into the Harbour and made a report of his findings and defects. He considered the vessel unsafe so it had to be slipped.
- [57] The Appellant's witness, Taniela Tabu considered that there was nothing wrong with the boat and if water was coming in it could be pumped out. In the past they had been allowed to go on voyages. Further he stated that the vessel was to be dry-docked in December in any event. The Learned Trial Judge described Mr Tabu's attitude as staggering. He was prepared to take people on a voyage when the vessel's generator was not working. The boat was leaking just before embarking on a rather lengthy journey to Lau.
- [58] The Appellant's Exhibit 21 is a four-page page report. The Judge described it as an impressive list of repairs requiring all rotten planks to be replaced, all cement patches which had been used to plug leaks to be removed, a new generator to be installed and operational, just to name a few.
- [59] Given the extent of the defects the Marine Department officials had to consider the safety of the crew, passengers and cargo on board. Quite properly they refused to let the ship leave port.
- [60] The call for tenders document contained a contingency arrangement clause which required the tenderer to clearly indicate arrangements it intended to make in order to ensure continuity of service for period during which : **"the nominated vessel is out of service due to slipping, scheduled maintenance or breakdown"**.
- [61] Singh, J held that the onus was clearly upon the appellant to ensure a back-up service in such events. In fact, there is a built-in grace period of one trip in case of

break down. If there were no servicing for one trip then the only consequence would be that the appellant would be earning less but the contract would not be terminated.

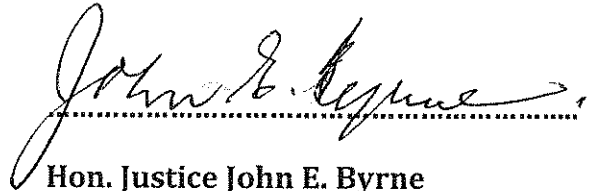
The appellant sought to excuse itself by saying that Khan's Shipping let it down but this does not exonerate the appellant from the consequences. It was for the appellant to ensure that it dealt with reliable and responsible shipping companies.

- [62] In our judgment the failure to service such a route for such a length of time struck out the whole objective of the franchise system and in our judgment the Controller or the Department of Marine was correct in not condoning what was clearly an avoidable breach of contract.
- [63] In our judgment it was entitled to terminate the contract. The law as to this is clear. In *Investors Compensation Scheme Ltd v. West Bromwich Building Society and ORS (1998) 1 ALLER 98*, the House of Lords held that the matrix of fact against which a contractual document was to be construed included anything which would have affected the way in which the language of the document would have been understood by a reasonable man. A contract has to be read in its entirety and, having done so like the Trial Judge, we are satisfied that termination of this contract was warranted and legal.
- [64] Counsel for the Appellant argued that the termination was too drastic in the circumstances but we do not agree. To do so would require this Court to substitute its discretion for that of the relevant authority and no court will do that unless there are compelling reasons for doing so. We find none.

CONCLUSION

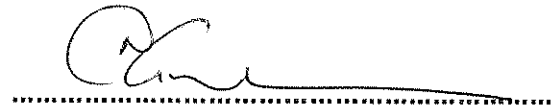
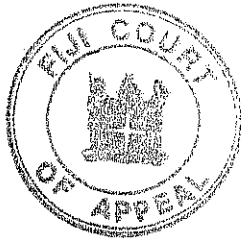
[65] For the reasons we have given, this appeal must be dismissed. We order the appellant to pay the respondent's costs which we fix at \$5,000.

Dated at Suva this 16th day of October 2009.



Hon. Justice John E. Byrne

Judge of Appeal



Hon. Justice Daniel Goundar

Judge of Appeal