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

CIVIL APPEAL NO. ABU 27 OF 2015
CIVIL APPEAL NO. ABU 31 OF 2015
(High Court No. HBJ 9 of2015)

BETWEEN	:	**ONE HUNDRED SANDS LIMITED**
		Appellant
AND	:	**ATTORNEY GENERAL OF FIJI & THE MINISTER FOR JUSTICE**
		Respondent
Counsel	:	**Mr. D. Sharma for the Appellant** **Mr. S. Sharma and Ms. T. Baravilala for the Respondent**
BETWEEN	:	**ATTORNEY GENERAL OF FIJI & THE MINISTER FOR JUSTICE**
		Appellant
AND	:	**ONE HUNDRED SANDS LIMITED**
		Respondent
Coram	:	**Chandra JA** **Lecamwasam JA** **Almeida Guneratne JA**
Counsel	:	**Mr. S. Sharma and Ms. T. Baravilala for the Appellant** **Mr. D. Sharma for the Respondent**
Date of Hearing	:	**2 February 2017**
Date of Ruling	:	**23 February 2017**

JUDGMENT

Chandra JA

[1] One Hundred Sands Ltd (hereinafter referred to as "the Appellant" being the Appellant in Civil Appeal No.027 of 2015 and the Respondent in Civil Appeal No.031 of 2015) on 26 March 2015 made an application for leave to apply for Judicial Review in terms of Order 53 of the High Court Rules of the decision of the Attorney General (hereinafter referred to as "the Respondent" being the Respondent in Civil Appeal No.027 of 2015 and the Appellant in Civil Appeal No.031 of 2015) made on the 9th of February 2015 to revoke a Casino Gaming Licence that had been granted to the Appellant on 15 March 2012.

[2] The Appellant sought the following reliefs from the High Court in its application:

(a) AN ORDER OF CERTIFORARI to remove the decision of the Respondent made on 9th February 2015 to revoke the Applicant's Casino Gaming Licence into this Honourable Court and the same be quashed and/or set aside;

(b) A DECLARATION (in any event) that the Respondent has acted unfairly and/or against the Rules of Natural Justice and/or arbitrarily and/or unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or made errors of law or exceeded his jurisdiction in purporting to revoke the Applicant's Gaming Licence without complying with the requirements of section 38 and 39 of the Gaming Decree 2009 as well as clauses 8,11, 16 and 19 of the Licence.

(c) Damages.

(d) Further Declarations or other relief as to this Honourable Court deem just; and

(e) Costs of this action on an indemnity basis.

[3] The Respondent filed a notice of opposition on 31 March 2015 to the Appellant's application in which the jurisdiction of the High Court was challenged among other grounds of opposition.

[4] After hearing both parties the learned High Court Judge on 24 April 2015 delivered his judgment refusing the application for leave and held that:

> *"(a) The wording of section 173(4)(d) of the Constitution, only precludes the Court from hearing and granting relief with regard to decisions made during the period. Since the decision was made on 9 February 2015, it is clearly outside the ambit of section 173(4) (d) having been made after the end of the period on the 6th of October 2014.*
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> *(b) The decision was not illegal because the Respondent correctly understood the law and applied it. He was entitled under section 39(1) of the Decree to revoke the licence for breach of condition and he did so. The breaches of conditions and clauses were cited in the decision.*
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> *(c) The decision was a rational one and justified in the circumstances because the Respondent had cited chapter and verse of all the failures of the Applicant to comply with the terms of the licence.*
>
> *(d) There was no procedural impropriety because no clause in the licence can override a provision of an applicable law."*

[5] The Appellant filed a notice of appeal on 15 May 2015 to partially set aside the judgment regarding paragraphs 28, 31 and 32 setting out the following grounds:

> *"1. That the learned Judge erred in fact and in law at paragraph 28(i) of the Judgment where he held that the decision of the Respondent to revoke the Licence for breach of condition was not illegal when in fact it was the procedure that was used to terminate the Licence that the Appellant had claimed was illegal. The Appellant's submission was that even if the Respondent had reasonable grounds to believe that the conditions of the Licence had been materially breached he was still bound in good faith to follow the dispute resolution procedures set out in clause 8 of the Licence prior to revocation.*

2. *That the Learned Judge erred in fact and in law at paragraph 28(ii) of the Judgment where he held that the decision of the Respondent was a rational one because the Respondent had cited chapter and verse of all the failures of the Appellant to comply with the terms of the Licence when in fact the Appellant submits that the decision was irrational and lacked good faith, such irrationality and lack of good faith arising from the Respondent's failure to follow the dispute resolution procedures set out under the Licence even when such procedure was invoked by the Appellant.*

3. *That the Learned Judge erred in fact and in law at paragraph 28(iii) of the Judgment where he held that the decision of the Respondent did not suffer from any procedural impropriety on the basis that no clause in the Licence could override a provision of an applicable law. It is submitted that a provision of law should not have been used by the Respondent in such a manner so as to allow the Respondent to ignore dispute resolution procedures that he had imposed into the Licence thereby shutting the Appellant out and denying the Appellant a right of hearing and a right to invoke the dispute resolution procedures.*

4. *On deciding the issue of leave on the papers filed the Learned Judge erred in fact and in law in not allowing the Appellant to address the Court on questions of illegality, the questions of irrationality, the question of procedural impropriety such as lack of good faith, legitimate expectations, the right to be heard and to litigate the issue whether there was in fact reasonable grounds to hold that there was a material breach of the Licence.*

5. *The learned Judge erred in fact ad in law in his interpretation of section 38 and39 of the Gaming Decree 2009 without first invoking the suspension provision under the said provisions thereby giving the Appellant a right of a fair hearing.*

6. *That the Learned Judge erred in law and in fact in not granting leave or refusing leave merely on the documents filed by the Appellant when in fact the Judicial Review application was not a frivolous application and the Appellant had met the threshold requirements under Order 53 Rule 3 of the High Court Rules 1998 to be granted leave.*

[6] The Respondent filed a Respondent's Notice on 1 June 2015 to partially set aside paragraphs 20 to 23 of the judgment setting out the following grounds:

"1. *That the learned Judge erred in law in holding that the clear unambiguous wording of section 173(4)(d) of the Constitution, only precludes the Court from hearing and granting relief with regard to decisions made during 5 December 2006 to 6 October 2014;*

2. *That the Learned Judge erred in law in holding that in paragraph (d) of section 173(4), the comma after "....laws" was disjunctive and therefore the first mention of the period could not refer to the Decree but was intended to refer to the decision;*

3. *That the Learned Judge erred in law and in fact in holding that since the decision was made on the 9th of February 2015, it was clearly outside the ambit of section 173(4)(d) having been made after the end of the period on the 6th of October 2014; and*

4. *That the Learned Judge erred in law in holding that the Learned Judged had jurisdiction to hear the Applicant's/Appellant's application for judicial review, which was made within time by a party who was interested."*

[7] Since the appeal filed by the Respondent (No.031 of 2015) is regarding the jurisdiction of the High Court to hear and determine the application of the Appellant, that appeal will be dealt with in the first instance.

Background Facts

[8] The Fijian Government on 15 March 2012 awarded the Appellant a Casino Gaming Licence. As per Clause 19.1(i) of the Licence the Appellant was to complete and have ready by 1 October 2013 the following:

(a) 100 Hotel Rooms;

(b) 1500 seat state- of-the-art convention centre; and

(c) A Casino on Denarau Island at the N1 site.

[9] The Appellant made requests from time to time commencing from 3 June 2013 for extensions for completion and was granted. After the extensions were granted, the Casino, the Convention Centre was to be completed and operational within 15 months of 15 January 2014.

[10] As at 9 February 2015 the construction of the Casino Project had not commenced, the land site for the Casino had not been secured and outstanding pecuniary penalty had not been paid.

[11] On 9 February 2015 the Respondent in the exercise of his powers under section 39(1) of the Gaming Decree 2009, revoked the 15 March 2012 Gaming Licence granted to the Appellant.

Consideration of the Appeal filed by the Respondent on the decision of the learned High Court Judge regarding jurisdiction of the High Court to hear and determine the application of the Appellant seeking leave to apply for judicial review

[12] The Respondent in the notice of opposition filed in the High Court took up the position that the High Court did not have jurisdiction to hear and determine the application of the Appellant seeking leave to apply for judicial review. The said objection was based on section 173(4)(d) of the Constitution.

[13] Section 173(4)(d) of the Constitution lays down:

> *"(4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question –*
>
> ... ...
>
> *(d) any decision made or authorized, or any action taken, or any decision which may be made or authorized, or any*

action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorized by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution."

[14] The position taken up by the Respondent based on the prohibition in section 173(4)(d) was that it prohibited the Court from hearing and determining any application regarding the impugned decision of 9 February 2015 as it was issued under the provisions of the Gaming Decree of 2009.

[15] The learned Judge in his judgment at paragraphs 19 to 23 decided that the High Court had jurisdiction to hear and determine the application of the Appellant and stated as follows:

"19. I feel that it would be proper to phrase the issue before me as follows:

Does the prohibition to hear any proceedings or to grant any relief refer to the Decrees made during the period or to decisions made during the period.

20. The solution is at hand when one reads section 173(4)(d) with reasonable intelligence and reasonable care as Lord Fraser enjoins. If I look at paragraphs (a), (b) and (c) of subsection (4) I observe a common thread running through them. This is the reference to any Decree made during the period. There is only one mention of the Decree and only one mention of the period, in each paragraph.

21. But, in paragraph (d) there are TWO mentions of the Decree, TWO mentions of the period and NOW also a mention of any decision. Therefore to my mind the two mentions of the period cannot refer only to the Decree because it was not necessary to make two mentions of the Decree in paragraphs (a), (b) and (c). Thus, the only reasonable inference has to be that the two mentions of the period must necessarily refer to TWO DIFFERENT

THINGS. Put another way, it must mean one mention of the period refers to the decision and the other mention of the period refers to the Decree. Proceeding along this line, I think it is reasonable, proper and correct to conclude that the first mention of the period refers to the decision and the second mention of the period refers to the Decree. So if I paraphrase and summarise paragraph (d) and read it with subsection (4), the wording would be (using my own wordings) no court shall hear or grant any relief or remedy in any proceedings which challenge or question any decision made during the period except as provided for under any Decree made during the period. The comma after "... laws)" in paragraph (d) is, I consider, disjunctive and therefore the first mention of the period cannot refer to the Decree but is intended to refer to the decision.

22. *Since the learned draftsmen of the Constitution, were not engaged in any tautology, it can only mean they were clear in the intention they desired to convey which is that any decision made (under any Decree) during the period could not be questioned 'except as may be provided in or authorized by' such Decree made during the period.*

23. *I therefore find and I so hold that the clear unambiguous wording of section 173(4)(d) of the Constitution, ONLY precludes the Court from hearing and granting relief with regard to decision made DURING the period. Since the decision was made on the 9th February 2015, it is clearly OUTSIDE the ambit of section 173(4)(d) having been made after the end of the period on the 6th October 2014. I therefore disallow the preliminary objection and hold I have jurisdiction to hear the Applicant's Application for judicial review, which is made within time by a party who is interested."*

[16] The learned Judge having quoted Lord Fraser sought to interpret the relevant sections on the basis of the plain ordinary meaning of words. This approach is referred to as the Literal Interpretation as opposed to other cannons of interpretation. The literal approach is adopted where the words used in a statute are plain enough to convey the intended meaning.

[17] The learned Judge in considering section 173(4) of the Constitution has taken up the position that the prohibition therein relates to Decrees made during the period 5

December 2006 to the 6th of October 2014 (being the first day of sitting of Parliament). However he concluded that though the Decree was exempted, a decision made after 6 October 2014 was not exempted and that the High Court had jurisdiction to hear and determine the application in respect of the decision of 9 February 2016.

[18] The learned Judge has compared the positions set out in sub-sections (a), (b) and (c) and arrived at the conclusion that they refer to any Decree made during the period (5 December 2006 to 6 October 2014 – hereinafter referred to as "the said period") and that there is only one mention of the Decree and only one mention of the period in each paragraph, whereas in sub paragraph (d) there are two mentions of the period and also a mention of any decision. The learned Judge therefore concludes that sub-section (d) must mean something different from sub-sections (a), (b) and (c).

[19] The four sub-sections (a), (b), (c) and (d) cover different aspects of Decrees etc made during the said period. Sub-section (a) refers to the **validity or legality**, subsection (b) refers to **the constitutionality**, sub-section (c) refers to **the Decrees being inconsistent with the Constitution**. The prohibition applies to these aspects of the Decrees. Sub-section (d) refers to **decisions taken or made** under such Decrees. In interpreting these sub-sections, the same meaning has to be attributed to them and the period specified in the different sections would refer to the Decrees made during the said period so that decisions taken or made under such decrees should get the same exemptions as otherwise it would open up an area where such decisions taken or made under such decrees become the subject of challenge which would in turn make it possible to question the Decrees themselves, which is what is prohibited under these provisions in section 173(4)(d) of the Constitution.

[20] In such a situation the adoption of the literal rule would not assist to get at the true import of the Legislature and a different interpretation should be utilized. What was intended to be avoided by section 173(4)(d) was the canvassing of the Decrees referred to therein and it would be meaningless if actions taken under such Decrees were not given the same coverage. The use of the mischief rule would assist in giving

the true meaning of the section by giving it a meaning which would convey the true import of the section which is to cover the Decrees referred to therein giving a total coverage including decisions taken or made under such Decrees.

[21] It is no doubt desirable to adhere to the words of a Statute or a Constitution. But, that is only a presumption, not to depart where the language admits no other meaning.

[22] That is not the case here,. It is an elementary rule of construction that, merely because the language under consideration is susceptible of another meaning, the ordinary meaning should not be departed. However, one exception to that rule is when adequate grounds are found either in the history or cause of the enactment or in the context or in the consequences which would result from a literal interpretation, for concluding that that interpretation does not give the real intention of the legislature. (Vide Maxwell, The Interpretation of Statutes – 11th Edition, p.3).

[23] Thus, having regard to the history and cause of the enactment of s.173(4)(d) of the Constitution and the basis of learned Solicitor General's arguments in referring to the context and the consequences which would result should the interpretation given to the section by the learned High Court Judge is allowed to stand, I am inclined to accept the construction placed on the said section by the learned Solicitor General.

[24] Learned Counsel for the Appellant submitted that the Gaming Decree had no provision for review of any decision or action taken under the provisions of the Decree and therefore the coverage given by s.174(3)(d) does not apply to decisions taken under the Gaming Decree after 6 October 2014. He cited the Casino (Operators) Decree of 2012 and stated that there was provision under that Decree to oust the jurisdiction of the Courts and therefore in the absence of such provisions in the Gaming Decree that it should be possible to canvas the decisions made in terms of the Decree. If that argument is to be accepted it is difficult to comprehend how S.174(3)(d) would apply as it would give rise to a situation where decisions prior to 6

October 2014 cannot be challenged but those after 6 October 2014 could be the subject of challenge, which as shown above is not what s.173(4)(d) intended.

[25] It was argued by the learned Solicitor General for the Respondent that, sub-section 173(4)(d) has a provision which relates to the dealing of decisions made under such Decrees, if there is provision in such Decrees themselves. They could be dealt with only in that manner and not where there is no such provision. He cited as an example the Citizenship of Fiji Decree, 2009 which provides for such a mechanism.

[26] If the relevant Decree has no mechanism provided therein to canvass any decisions made under it, such decisions are exempt from challenge in terms of section 173(4)(d) and are exempt. Since there is no such mechanism provided under the Gaming Decree, decisions made under it whether before or after 6 October 2014 would come within the exemption provided for in section 173(4)(d).

[27] Learned Solicitor General relied on the decisions of the High Court in **Steven Pradeep Singh and Fiji Labour Party v. Electoral Commission and Others** (Civil Action No.HBC 245 of 2014) and **Makereta Waqavonvono v. Chairperson of Electoral Commission and Others** (Civil Action HBM 92 of 2014) where the High Court held that section 173 excluded from the jurisdiction of the Courts any decision under any laws made between 5 December 2006 until 6 October 2014. Since these cases dealt with decisions made before 6 October 2014 they do not come strictly within the position in the present case where the decision in question was after the 6 October 2014. However, they affirm the position that the exemption to s.173(4)(d) would be where such mechanisms of challenge are provided in such Promulgation or Decree itself.

[28] In view of this position the decision of the learned High Court Judge in holding that the High Court had jurisdiction to hear and determine the application of the Appellant is erroneous and has to be set aside. Section 173 provides for the exclusion of

jurisdiction in the widest possible terms when it states that "Notwithstanding anything contained in this Constitution no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any way entertain or to grant any order, relief or remedy in any proceeding of any nature whatsoever". This section therefore clearly excludes the jurisdiction of the High Court in accepting, hearing and determining the application of the Appellant seeking leave for judicial review.

Consideration of the appeal of the Appellant

[29] The learned Judge went on to refuse leave to the Appellant to proceed to judicial review and has appealed against that decision.

[30] Since it has been concluded that the appeal of the Respondent succeeds and has the effect that the High Court has no jurisdiction to hear and determine the application of the Applicant seeking leave to apply for judicial review, it may not be necessary to consider the position as to whether the Appellant had made out a case to obtain leave, which is the appeal of the Appellant. Since the matter was argued before us, we wish to consider the appeal of the Appellant as well.

[31] Counsel for the Appellant submitted that the cancellation of the license for breach of conditions was illegal. He submitted that the Licence granted to the Appellant provided a dispute settlement procedure in Clause 8 for breach of conditions and that the Licensor had not resorted to that procedure. This is the basis of the first ground of appeal and is to a certain extent continued in ground 5 and therefore would be dealt with together.

[32] In making this submission it is clear that there was no dispute as to the fact that there was a breach of the conditions in the licence by the Appellant. The question then

arises as to whether the Licensor acted legally in invoking the provisions of the Gaming Decree to cancel the licence.

[33] It was argued that the licence should have been suspended in terms of s.38 of the Gaming Decree. According to s.38 the Licensing Authority may suspend the licence and investigate into the breaches. S.38 is only discretionary and even if applied affords an investigation into the breach of the conditions of the license. In the present case, it was quite evident from the correspondence of the Appellant that the breach of the conditions were admitted and the need for any investigation hardly ever arose.

[34] The cancellation of the licence had been in terms of Section 39 of the Gaming Decree 2009 which provides for the revocation of a Licence in the event of a material breach. The Licensee had sought several extensions and even variation of the conditions of the licence during the tenure of the licence. The correspondence annexed to the affidavit of the Appellant clearly brings out the position that the Licencee had hardly done anything to comply with the obligations undertaken in the licence and appeared to be a non-starter from the beginning. The initial completion date was 1 October 2013 but even as at February 2015 the site for the Casino which had to be operational by 1 October 2013 had not been secure and construction had not commenced. The documents presented by the Appellant clearly showed that there was a material breach of the conditions of the licence.

[35] In such a situation where there was a material breach of the conditions, the Licensor was in law entitled to act in terms of S.39(1) to revoke the licence. The learned Judge's decision that the revocation of the licence was not illegal was correct in terms of s.39(1) of the decree.

[36] The second ground of appeal adduced by the Appellant was that the learned Judge had erred in fact and law when he held that the decision of the Respondent was a rational

one because the Respondent had cited chapter and verse of all the failures of the Applicant to comply with the terms of the Licence.

[37] Learned Counsel for the Appellant based his argument on this ground regarding failure of the Licensor to follow the dispute resolution mechanism and the imposition of penalties for defaults of the terms of the licence. Further that the failure to invoke the dispute resolution mechanism related to the issue of the breach of natural justice as the Licensee had been denied an opportunity to respond to the allegations of breach of the licence conditions.

[38] The position relating to breach of material conditions was in no doubt at all as seen from the correspondence initiated by the Appellant when requesting for extensions of time and variation of the terms of the licence. The Appellant had been given sufficient opportunities to remedy the breaches, had been given an opportunity to be heard via a teleconference and had been put on notice regarding cancellation of the licence.

[39] Therefore the argument that the decision of the learned Judge not being rational has no basis and is devoid of any merit.

[40] The Third ground of appeal of the Appeal is on the basis that the learned Judge had decided that there was no procedural impropriety in the cancellation of the licence.

[41] The Licensor had decided to cancel the licence in the exercise of the authority given under the Gaming Decree 2009. As stated earlier, the Licensor had authority under the Decree to cancel a licence where there was a material breach of the conditions of a licence. Even though the terms of the licence set out a dispute resolution mechanism, the breach on the part of the Appellant was so material in that the obligations undertaken under the licence during the extended time frame, that the licensor was entitled to invoke the authority under the Decree to cancel the licence. In such a situation I see no impropriety in the action taken to cancel the licence.

[42] The fourth ground of appeal is on the basis that the learned Judge had failed to give an opportunity to the Appellant to address on questions of illegality, irrationality, procedural impropriety, to be heard and to litigate the issue as to whether there was a material breach of the licence.

[43] In an application seeking leave for judicial review, what is necessary for the Court to consider is whether there was an arguable case presented by an Applicant seeking leave. The Appellant had presented its facts by way of an affidavit and annexures which were comprehensive and which detailed the correspondence exchanged. A consideration of the material presented by the Appellant made it abundantly clear that there was a material breach of the conditions of the licence and the learned Judge having considered such material concluded that there was no arguable matter presented by the Appellant to grant leave.

[44] As stated above the material presented by the Appellant to the High Court by way of its documents clearly displayed the manner in which the Appellant had acted regarding the conditions of the licence. It was clear and apparent from the material before Court that there was virtually no compliance of the conditions of the licence and the learned Judge was correct in refusing leave for judicial review.

[45] The sixth ground of appeal is more or less a repetition of ground five couched in a different way to the effect that the learned Judge had failed to see that the Appellant had presented an arguable case for the granting of leave.

[46] In the case of granting of leave in an application seeking leave for judicial review, the Judge is granted a discretion in considering the matter. The learned Judge has considered the material presented before him and exercised his discretion correctly in refusing leave as he was not satisfied with such material to grant leave. Although the notion of absolute or unfettered discretion has been rejected (*vide* Denning M. R. in **Breen v. Amalgamated Engineering Union** [1971] 2 QB 175 at 190), if the exercise of discretion is to be interfered with then it must be shown that it has been wrongly or unreasonably exercised.

[47] In the above circumstances the appeal of the Appellant has no merit and is dismissed.

[48] In the High Court the learned High Court ordered the parties to bear their own costs in all the circumstances of the case and this Court would take a similar view and order the parties to bear their own costs.

Lecamwasam JA

[49] I agree with the judgment and proposed orders of Chandra JA.

Almeida Guneratne JA

[50] I agree with the judgment and reasoning of Chandra JA.

Orders of Court

(1) The appeal of the Respondent (No.031 of 2015) is allowed and the decision of the learned Judge regarding jurisdiction of the High Court is set aside.

(2) The appeal of the Appellant (No.027 of 2015) is dismissed.

Hon. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL