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

CIVIL APPEAL NO. ABU 142 OF 2017
(High Court Civil Action No: HBC 153 of 2015 (Suva)]

BETWEEN : **OFFICE OF THE ATTORNEY-GENERAL**
1st Appellant

: **INFORMATION TECHNOLOGY & COMPUTING SERVICES**
2nd Appellant

: **MINISTRY OF FINANCE**
3rd Appellant

AND : **DIGICEL FIJI LIMITED**
Respondent

Coram : Lecamwasam JA
Almeida Guneratne JA
Jameel JA

Counsel : Ms S Ali for the 1st & 2nd Appellants
Mr A Prakash for the 3rd Appellant
Mr P Katia for the Respondent

Date of Hearing: 20 February 2019

Date of Judgment: 8 March 2019

JUDGMENT

Lecamwasam, JA

[1] This is an appeal filed by the Appellant against the judgment of the Learned High Court Judge at Suva dated 8 November 2017. As the learned High Court Judge has laid out the factual matrix comprehensively, I can do no better than to produce the relevant paragraphs in the High Court judgment. Hence I reproduce the facts as narrated by the learned High Court Judge as follows:

> *'1. The plaintiff filed this action claiming $200,011.36 for the telecommunication services provided to the 1st defendant.*
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> *2. The plaintiff's case is that it entered into an agreement on private network service with the first defendant on 7th February 2011 and as per the said agreement it was initially required to provide telecommunication services for Suva, Nausori and Savusavu. This service had been offered on trial basis where the plaintiff did not charge any fee during the period of first fifteen days (trial period). After the trial period the 1st defendant did not take steps to cancel the agreement and the plaintiff continue to provide services as per the agreement. In or around November 2011 the first defendant requested the plaintiff to terminate the agreement but however, they later agreed to suspend the services for the month of December, 2011. On 3rd January 2012, the first defendant paid FS66,691.31 being the amount due on the invoices dated March 2011 to November 2011. The 1st Defendant continue to utilize the services and the amount due for the period of twenty five months ending 7th February 2014 was FS200,011.30.*
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> *3. The position of the defendant is that the first defendant did not issue notice of cancellation because the plaintiff was yet to work on Rotuma site. IT was also averted that the plaintiff was not entitled to issue invoices when it had not successfully provided the trial services to the 1st defendant and that the payments have been made by an error. The first defendant by way of a counter claim, claimed the amount paid to the plaintiff on the basis that the said payment had been made erroneously.*
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> *4. A the pre-trial conference the parties admitted the following facts:-*
>
> *1. The plaintiff is a telecommunications company offering mobile, internet and other telecommunications services in Fiji.*
> *2. The 1st department is the a department under the Ministry of Finance tasked to develop, promote and coordinate and support strategies that*

foster service excellence through the utilization of e-Government Application tools.

3. *The 3rd defendant (this should be the defendant) is a Ministry that supports the government in the service of the overall strategic objectives of government and in providing essential legal expertise and support.*
4. *The plaintiff and the 1st defendant are parties to the Computing Services Contractual Agreement on Private Network Services dated 7th February 2011 (Agreement).*
5. *Initially this telecommunication service was offered on a 'trial' basis where the 1st defendant would not be charged for use of the services during the 'trial period'.*
6. *The agreement also provided that if the "trial services" was deemed to be successful, then the on-going costs as outlined in the agreement will apply for the full period since activation for the term of the agreement.*
7. *In or around November 2011, the 1st defendant requested that the plaintiff terminated the agreement.*
8. *On 3rd January 2012 payment of F$66,691.39 was made to the plaintiff by the 1st defendant to settle the invoices dated March, 2011 to November 2011."*

[2] Aggrieved by the judgment of the High Court, the Appellant filed the instant appeal on the following grounds of appeal:

Contract void ab initio

*"1. **THAT** the Learned Judge erred in law in holding that the contract of 7 February 2011 ('**Contract**') was not vitiated despite agreeing that: the Manager did not have the authority to enter into the Contract; and, that the Manager acted contrary to the Procurement Regulations 2010 ('**Regulations**').*

*2. **THAT** in the alternative the learned Judge erred in law in not holding that the Contract was void despite agreeing that it was in breach of the Regulations.*

Contract still at trial stage

*3. **THAT** the learned Judge erred in law and in fact in applying **Anderson Ltd v Daniel [1924] 1 KB 138** when the appellant's position was that the trial period had not concluded, and therefore the Contract could not be performed. Anderson is irrelevant as it was about a contract unlawfully valid (becoming illegal in performance).*

Rotuma

4. ***THAT*** *the Learned Judge erred in law and in fact in holding that the 'trial service' of the Contract had ended (before which no payment liability could accrue) despite the Contract under Schedule 2 clearly stating that* ***all 4 sites specified had to be activated before the 'trial service' came to an end.*** *Schedule 2 read in conjunction with clause 14.1.4 of the Contract has one clear meaning: that only after 15 days from installation of all the 4 sites does the 'trial service' come to an end.* ***As Rotuma was not installed the Contract was still at the 'trial service' stage.***

Nausori

5. ***THAT*** *even if Nausori was to be installed in lieu of Rotuma, the Learned Judge erred in law and in fact (in holding that the 'trial service' of the Contract had ended) as the respondent failed to install even at Nausori; furthermore the respondent was given authorization from ITC Services for installation at Nausori Airport and the Learned Judge erred in holding there was no authorization for the same.*

Ratification

6. ***THAT*** *the Learned Judge erred in law by holding that a void contract can be ratified by a principal for breach of the legislation (the Regulations in this matter) when the true position is that no ratification can save a contract unenforceable at law, and furthermore the Learned Judge erred in concluding that payment amounted to ratification.*

7. ***THAT*** *the Learned Judge erred in fact and in law in applying the principle of ratification based on* ***Wilson v Tumman (1843) 6 Manning and Granger 236, 242*** *because ratification is inapplicable where the contract is void ab initio.*

8. ***THAT*** *the Learned Judge erred in law in relying on* ***Keighly, Maxstead & Co. v Durant*** ***[1901] AC 240*** *when ratification cannot apply to a contract that is void in law.*

Payment under mistaken obligation

9. ***THAT*** *the Learned Judge erred in law and in fact in holding that the payment made to the respondent was irrecoverable. Payment made due to a mistake of law under a void contract is recoverable."*

I will now proceed to answer the grounds of appeal *in seriatim*.

[3] *Ground 1*

The appellant argued in their written submissions that the contract is void due to the absence of the signature of the Permanent Secretary. It is common ground that the authority to sign as the contracting party was vested with the Permanent Secretary and not the Manager.

[4] The validity of the agreement between Fiji International Telecommunication Limited and Information Technology and Computing Services (ITC) (at page 499 of the HCR) which was cited and filed by the Defendant (Appellant) is unassailable as it is signed by the Permanent Secretary for Finance, Mr Filimone Waqabaca, satisfying the legal requirements.

[5] However, as per the agreement produced before court (at page 313 of volume 2) it has been signed on behalf of Information Technology and Computing Services by one Eliki Salusalu who, it transpired, was the Manager. The difference between the two agreements is that the former is signed by the Permanent Secretary for Finance, and the agreement pertaining to the instant case is signed by Mr. Salusalu. *Prima facie* the signatory to the agreement before court is only a Manager and not the Permanent Secretary of the relevant ministry who is the authorized signatory. Therefore, one can assume that the agreement is void and cannot be enforced for the lack of authority of one party.

[6] The decision to enter into the contract in question was an institutional decision. It is to be noted that the present matter did not fall into the realm of public law but a matter of private law in contract. Nevertheless, I for one, could not find the reason to draw a distinction as matter of legal principle. The ITC avers in paragraph 2.6 of the agreement thus:-

> *"Confirmation by ITC*
>
> *ITC confirms that it has full power and lawful authority to execute and deliver this Agreement and to consummate and perform or cause to be performed its obligations under this Agreement and each transaction contemplated by this Agreement to be performed by the ITC".*

[7] This clause serves as sufficient 'representation on authority' of the ITC, which the ITC cannot deny. This clause is also an undertaking that the signatory to the agreement, be it the Permanent Secretary or the Manager authorized by the Permanent Secretary, has lawful authority to sign the agreement.

[8] A public authority such as a permanent secretary is naturally at liberty to employ agents in the execution of its powers. When powers are conferred or exercised by such public authorities who have the charge of large departments, convenience and necessity often demand that they work through committees, executive officers, and such other agencies. As Lord Denning once stated *"an administrative function can often be delegated"*. [**Barnard v. National Dock Labour Board** (1953) 2 QB 18 at page 40]

[9] Given the vagaries of administrative functions, it is not difficult to envisage the Permanent Secretary burdened with multiple administrative functions delegating or authorizing another official within the institutional set-up to lend his signature as the authorized person to sign the contract on behalf of the permanent secretary.

[10] In the seminal case of **Carltona Ltd v. Commissioner of Works** (1943) 2 AER 560 Lord Greene MR said *"it cannot be supposed that...in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the departments. Public business could not be carried on if that were not the case"*

[11] Adopting the above judicial thinking in the context of the instant case, it can be safely presumed that the signatory had derived authority from the Permanent Secretary to sign the agreement. Therefore, without any evidence to the contrary, it is abundantly clear that he has signed, not in his capacity as Manager but as the authorized delegate of the Permanent Secretary.

[12] In that conspectus of things, all the requisites of a valid contract had come into existence such as the initial offer, the acceptance of it, the subsequent communication of that acceptance the subject matter of the contract, and who could have been regarded as the parties to the contract feeding the concept of "Consensus ad idem". Thereafter the parties having acted on the basis of the existence of a "valid contract", the argument that the contract stood vitiated because the Permanent Secretary had not signed the contract in question is rendered obnoxious, to morality as well as to the law.

[13] It is pertinent to mention that it was not within the knowledge or the power of the respondent to ascertain who the person entitled to sign the agreement on behalf of the appellant is. As cited by the Respondent, in his submission, (which was cited by the Appellant in a different context) **Howell v Falmouth Boat Construction Co.Ltd** [1951] AC 837; Denning LJ had opined thus:-

> *"whenever government officers in their dealings with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having authority which they assume. He does not know and cannot be expected to know the limits of their authority, and he ought not to suffer if they exceed it."*

Hence, no responsibility fell on the respondent to ascertain the legal authority of the signatory official on behalf of the appellant.

[14] For the reasons articulated above, I hold that the "Authorized Person"(the Manager) had the authority to enter into the contract and he did not act contrary to the procurement regulations 2010. Hence, the 1st ground of appeal fails and the learned Judge had not erred in holding that the contract of 7 February 2011 was not vitiated.

Ground 2

[15] In view of the response to the first ground of appeal I hold that the Judge has not erred in not holding that the Contract was void.

Ground 3

[16] Although **Anderson Ltd v Daniel** [1924] 1 KB 138 is not on all fours, it had no impact on the outcome of the case and the learned Judge had arrived at the correct conclusion. Hence not erred. As I have already held that the contract is not void. The Appellant cannot deny that the trial period had concluded, especially on perusal of the undated letter sent by Manager ITC Services, again the same Mr. Salusalu (at page 315), to the Chief Executive Officer of Digicel. The correspondence 'admitted to the fact that the trial period has ended by stating *"As the test period ended, we continued utilizing your services for seven months, and had accumulated bills amounted to $50,848.99. ITC Services does not have or any available liquidated assets to pay for this bill. This $50,900.00 was not planned nor budgeted for this year's ITC's budget."* Without need for further proof to attest to the fact that the trial period had ended, it is abundantly clear that the Appellants have been continuosly utilizing the services of the Respondent for a period of 7 months subsequent to the trial period. Therefore, I hold that the learned judge had not erred. Hence this ground of Appeal too fails.

Ground 4

[17] As per the correspondence already dealt with above, it is indisputable that the appellants were aware of the duration of the trial period. This is borne out by these words in the above letter: *"Please be advised the reasons for terminating these links is because this always considered as trial as was never to be permanent and not to exceed the one month trial. It was an oversight on our end that we fail to cease your services as soon as the test period ends. As the test period ended we continued utilizing your services for seven months..."*. In accordance with the agreement, it was incumbent on the part of the appellants to give written notice for cancellation, which they have not done. By their own admission, the failure of the appellants to cease the services of the respondent beyond the trial period, for seven months, was the result of an oversight. Therefore, the Appellants cannot claim that the trial period continues because all four sites specified to be activated before the trial service came to an end were not activated as stipulated. The trial period is not to be construed as dependent upon activation of all four sites. Such a construction

leads to the aberration of a perennial trial period, in the event even one site remains un-activated.

[18] Further, the Appellants have either misconceived the content in Schedule 2 of the Agreement or may have attempted an alternative interpretation. According to the schedule, the trial period does not end "*Before the end of 15 calendar days from the date of service activation of the last site*". The words 'last site' are interpreted by the Appellants to mean the 4th site, which was the Rotuma site. I find that the Rotuma site has had to be abandoned due to the non-availability of vessels and the location of the site. Therefore, the appellants cannot avail themselves of the benefits of an ongoing trial period. For the preceding reasons, this ground of appeal fails.

Ground 5

[19] In view of my response to ground of appeal No.4 above, this ground needs no consideration.

Ground 6

[20] As correctly identified by the Appellants in their written submissions and supported by authorities, no subsequent ratification can save a contract unenforceable at law. However, the instant contract is not an **unenforceable** contract nor is it a void contract as it had been signed by the ***"authorized person"***, which aspect I have dealt with in a preceding section. Therefore, I hold that the ground raised by the appellant in this instance is redundant and must therefore fail.

Ground 7

[21] Ground 7 does not arise in view of the answer to ground 6.

Ground 8

[22] The facts of **Keighly, Maxstead & Co. v. Durant** [1901] AC 240. Can be distinguished on the facts of this case as I have not proceeded on the basis of subsequent ratification by a third party. As such a course was redundant. Therefore this ground too fails.

Ground 9

[23] Any payments made by the second appellant have been in view of the services utilized for over a period of seven months beyond the trial period. Hence they are not entitled to a refund and this ground of appeal, and the cross claim also fail.

[24] For the reasons given above, I dismiss the appeal of the appellants and order the second appellant to pay $5000.00 as costs to the respondent.

[25] This appeal had raised broad question of the circumstances and facts that feed a distinction to be drawn between *"contracts rendered void ab initio"* and *"voidable contracts."* Having read in draft his Lordship's Justice Lecamwasm's judgment where he has addressed his mind to the concept of an institutional decision, even though, not *'strictu sensu'* in the area of Public Law but in the realm of "a private law contract" there being no reason to draw a distinction in law in that regard, for the reasons stated by him with reference to precedents, I express my concurrence with His Lordship's reasons, conclusions and the proposed orders contained in His Lordship's judgment.

Guneratne JA

[26] I agree with the reasoning and conclusions of Lecamwasam JA.

Jameel JA

[27] I agree with the conclusions and proposed orders of Lecamwasam JA.

Orders of the Court are:

1. *Appeal dismissed.*
2. *Orders the 2nd Appellant to pay F$200,011.30 to the Respondent.*
3. *The Second Appellant to pay $5000.00 to the Respondent as costs in addition to the amount ordered by the learned High Court Judge.*

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida-Guneratne
JUSTICE OF APPEAL

Hon. Justice F Jameel
JUSTICE OF APPEAL