RATU MOSESE BANUVE TUISAWAU

v A

1. SUVA CITY COUNCIL
2. THE ATTORNEY-GENERAL

[HIGH COURT, 1995 (Scott J) 13 March]

Civil Jurisdiction B

Practice (Civil) - whether relator actions are part of the law of Fiji

The Plaintiff sought the abatement of an alleged public nuisance. he second defendant moved to have the action dismissed on the ground that it should have been brought in the name of the Attorney-General, not against him.
HELD: The relator action has no place in Fiji's legal system. C

Cases cited:

Attorney-General Ex Rel McWhirter v. IBA [1973] QB 629; [1973] 2 WLR 444; [1973] 1 All ER 689
Attorney-General and Spalding Rural Council v. Garner [1907] 2 KB 480 D
Davey v. Spelthorne [1984] AC 262
Gouriet v. Union of Post Office Workers [1978] AC 435
Inland Revenue Commissioners v. National Federation of Self Employed [1982] AC 617
London County Council v. The Attorney-General [19902] AC 165
Nava v. Native Lands Commission and Native Land Trust Board (FCA 55/93) E
O'Reilly v. Mackman [1983] 2 AC 237; [1982] 3 All ER 1124
Roy v. Kensington and Chelsea FPC [1992] 2 WLR 229
Wilson v. I.B.A. [1979] SLT 279

Ruling on applications to strike out.

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Plaintiff in person
R. Gopal for the 1st Defendant
M.L. Ahmadu for the 2nd Defendant

Scott J:

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By a Writ issued on 9 June 1994 and by Notice of Motion filed on 23 August 1994 the Plaintiff seeks a number of Orders and Declarations the combined effect of which would be to close the Lami rubbish dump on the grounds that continued dumping at the site is a health hazard and a public nuisance.

There are now two Applications before the Court to strike out the Plaintiff's Action. The first, by the First Defendant, is ostensibly made pursuant to RHC Order 18 Rule 18 but no affidavit was filed in support and neither did Mr. Gopal address any argument in support of striking out on those grounds save that the Action was an abuse of the process of the Court for the same reasons advanced by Mr. Ahmadu. The First Plaintiff's Application does not therefore need to be separately considered.

The Second Defendant's Application (supported, it may be noted, by a most curious affidavit the maker of which had clearly never come across RHC O 41 r 5) is for the Action to be dismissed on the ground that this being an Action where a private person is seeking the abatement of a public nuisance or is seeking to compel the performance of a public duty the Action should have been brought in the name of the Attorney-General, and not against him. In other words, the Action should be a Relator Action and should have complied with RHC O 15 r 13 which it did not. (See also the White Book 1991, paragraphs 15/11/1 et seq).

In the course of his submissions in support of his Application Mr. Ahmadu referred to the leading English authorities citing Attorney General Ex Rel McWhirter v. I.B.A. [1973] QB 629; [1973] 2 WLR 444; [1973] 1 All ER 689 and Gouriet v. Union of Post Office Workers [1978] AC 435 to which might be added London County Council v. The Attorney-General [1902] AC 165.

Suggesting that a principal purpose of Relator Actions was to prevent the Courts from being overwhelmed with hopeless and unmeritorious Actions, Mr. Ahmadu submitted that the rules not having being followed the Plaintiff's case should be struck out.

Mr. Gopal supported Mr. Ahmadu and further submitted that on the facts the Plaintiff's Action did not fall into those three special categories of Action which did not require the Attorney-General's consent. (See Halsbury's Laws of England - 4th Edition - Volume 37 - paragraph 231).

In answer to these arguments the Plaintiff in an eloquent and thoughtful submission stressed the nature and the .importance of the subject matter of the Action. He was not, he told me, interested "in legal gymnastics". His concern was to get something done about the rubbish dump which, on the affidavit evidence, he submitted was clearly a public health risk. In the face of continuing inaction by the proper authorities he was left with no alternative but to come to Court. He also pointed out that by section 103 of the 1990 Constitution Fijian Customary Law had been incorporated into the Laws of Fiji. He was, as appeared from the Statement of Claim, a paramount chief of Rewa within which province the rubbish dump lay and he was bringing the Action on behalf

of his people and out of concern for their health and well being.

The Defendants' Applications and the response thereto by the Plaintiff r aise important questions central to the development of administrative law in Fiji. The first question to be answered is whether the Relator Action is part of the Law of Fiji at all.

As has been seen, Mr. Ahmadu's submissions were predicated on the assumption that since Relator Actions are part of the law of England and Wales they must therefore be part of the Law of Fiji. In my view the position is rather less straightforward.

So far as I am aware no Relator Action has ever been brought in Fiji and certainly none has been brought since 1987. That it has however at least been envisaged that there might be such Actions is clear from the existence of RHC 0 15 r 13 and also from section 18 (3) (a) of the Crown Proceedings Act (Cap.24) (presumably now to be known as the State Proceedings Act) - see Fiji Interim Military Government Decree No.3). Neither of these provisions however has the effect of introducing the Relator Action into Fiji Law.

Section 22 (1) of the High Court Act (Cap.13) should also be noted. Under that section "The Common Law (which was) in force in England .... on the 2nd day of January 1875 shall be in force within Fiji". This provision is however subject to the important qualification imposed by section 24 which provides that section 22 (1) shall only apply "so far as the circumstances of Fiji and its' inhabitants permit and subject to any existing or further Acts of the Parliament of Fiji." The relevance of these sections lies in the origins of the role of the Attorney-General in Relator Actions.

The most detailed account which I have been able to find is in Attorney-General and Spalding Rural Council v. Garner [1907] 2 KB 480 where Channel J described the position as follows (page 485):-

> "The Attorney-General takes proceedings as the representative of the public, for he represents the Crown and the Crown represents the public. I quote from a book which I understand is recognised as an authority in the Chancery Division namely Calvert on Parties (2nd Edition at page 26) and the matter is there stated as follows: "The Attorney General is by law the representative of public interests. The reason for that he is the officer of the Crown, and that, according to the principles of our law the interest of the public is vested in the Crown."
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> "The Attorney-General" said Lord Eldon in Attorney-General v. Brown" is an officer of the Crown and in that sense only the officer of the public". Whenever therefore the rights of

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> the Sovereign, as the guardian of the interest of the public are affected they must find their protection in the presence of the Attorney-General"

This analysis of the basis of the Attorney-General's role in Relator Actions is confirmed in Wade - Administrative Law - 6th Edition where at page 604 the author states:-

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> "The foundation of this procedure (relator actions) is the interest of the Crown, as parens patriae, in upholding the Law for the general public benefit. The Crown is concerned to see that public bodies, public trusts and charities should not exceed or abuse their powers or their funds; to abate public nuisances and to prevent the Law being flouted."

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How far, then, are these principles applicable in Fiji?

As Sir Mari Kapi recently pointed out in Nava v. Native Lands Commission and Native Land Trust Board (FCA 55/93) the fact that Fiji has its own written Constitution which England does not must be remembered when considering the relevance of English authorities to Fiji's situation. Furthermore there is now a crucial difference between the legal systems of Fiji and England brought about by the promulgation of the 1990 Constitution namely the fact that Fiji is now a Republic and that all references to the Crown are to be deleted from Fiji's Laws.

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Now, in many cases the deletion of the word "Crown" and its substitution by word "State" would make little practical difference to the application of the Law. But as has been seen a Relator Action and the role of the Attorney-General therein stems directly and exclusively from the Crown exercising its function as parens patriae. In my view it is senseless to think of the State acting as parens patriae - how could the State be the guardian of itself?

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It is also of interest to note in passing that even in a kingdom such as Scotland the Relator Action is unknown and there is no bar to individuals with very general interests suing on their own account in order to prevent breach by a public body of a duty owed by that body to the public (See Wilson v. I.B.A. [1979] SLT 279).

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There is a further and most important consideration. 1977 saw the introduction in England of a new Order 53 and a similar Order 53 was introduced into Fiji in 1981 (See LN 3/81). The purpose of this Order was to introduce a uniform, flexible and comprehensive code or procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior Courts, Tribunals, or other bodies or persons charged with the performance of public actions and duties. At the same time it was designed to

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eliminate procedural difficulties relating to the machinery of administrative law, mainly by removing procedural differences between the remedies which an applicant was formally required to select as most appropriate for his case. A

Gouriet's case, heavily relied upon by Mr. Ahmadu, was decided before the introduction of the new Order 53 and was followed and distinguished in 1982 by the House of Lords in Inland Revenue Commissioners v. National Federation of Self Employed etc. [1982] AC 617. The result was to marginalise Gouriet. B This was because on the new view of standing the Court held that it would be "a grave lacuna in our system of public law if a pressure group like a federation, or even a single public spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and to get the unlawful conduct stopped" (ibid page 644 E). C

As Wade puts it (page 705) "a ratepayer will now have the standing to challenge the legality of his local authority's actions without needing to enlist the aid of the Attorney-General providing only that he can show a good case". It is doubtless for these reasons that in 1988 the Justice - All Souls review recommended that Relator Actions be abolished. D

At this point some mention of section 103 of the Constitution may also be made. The sub-section reads as follows:-

> "Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the Laws of Fiji: provided that this sub-section shall not apply in respect of any customs, traditions, usage of values that is and to the E extent that it is inconsistent with a provision of this Constitution or a statute repugnant to the general principles of humanity".

The problem about provisions such as this (even when grammatically drafted), which exist in many Pacific Constitutions, is to determine what precisely the F customary law is. In the present case the only evidence and submissions were from the Plaintiff who is an intelligent and educated traditional high chief. What better person could there be to tell the Court that in Fijian customary law the role of the high chief was to protect his people, by all means possible, from dangers to their health and well being? G

For the Relator argument based objections to succeed would entail the curious and anomalous result that in the Republic of Fiji public nuisances cannot be restrained at the instance of a high chief acting under Fiji traditional law but only at the instance of the Attorney-General acting on behalf of a non existent parens patriae.

A From all the above it will be apparent that I can find no scope purpose or benefit to be derived from introducing the Relator Action at this stage into Fiji's legal system.

B Before finally leaving the question of the Attorney-General's role in this Action I observe that study of the Statement of Claim does not reveal that the Plaintiff is in fact seeking any actual relief against the Attorney-General. In these circumstances I can see no purpose in joining the Attorney-General as a Defendant. Under the provisions of Order 15 Rule 6 2(a) I therefore dismiss him from the suit.

C Unfortunately there remains a final complicating matter arising from the fact that the Plaintiff commenced his proceedings by Writ. The general rule is that where a person seeks to establish that a decision of a person or body infringes his rights which are entitled to protection under public law then that person must proceed by way of Judicial Review (see O'Reilly v. Mackman [1983] 2 AC 237; [1982] 3 All ER 1124) and there is as yet no power corresponding to RHC 0 53 r 9 (5) to allow proceedings commenced by Writ to continue by way of Judicial Review.

D There are however three considerations which I take to be particularly relevant. The first is that given the continuing nature of the nuisance complained of by the Applicant there is every likelihood that leave to seek Judicial Review would be granted were the present proceedings to be dismissed for technical reasons. Second, the reliefs sought by the Applicant, namely declarations and injunctions are both reliefs obtainable both in proceedings began by writ and in proceedings E brought by way of Judicial Review. Thirdly, the rule in O'Rielly v. Mackman, which of course is at most highly persuasive in Fiji, has been the subject of considerable criticism. In 1984 Lord Wilberforce said in Davey v. Spelthorne [1984] AC 262,278:-

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> "We have not yet reached the point at which mere characterization of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary Courts; to permit this would be to create a dual system of law with the rigidity and procedural. hardship for Plaintiffs which it was the purpose of the recent reforms to remove".

G With the greatest respect and taking advantage of that increased degree of latitude which Fiji's total legal independence affords its Courts I prefer to be guided in this case by another Decision of the House of Lords namely Roy v Kensington and Chelsea FPC [1992] 2 WLR 229 where Lord Lowry said:-

> "In conclusion ..... it seems to me that, unless the procedure adopted by the moving Party is ill-suited to dispose of the

> question at issue, there is much to be said in favour of the proposition that a Court having jurisdiction ought to let a case be heard rather then entertain a debate concerning the form of proceedings".

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For the above reasons I am of the view that there no technical or procedural objection to the Plaintiff's Writ as it now stands save that the Attorney-General was improperly joined and has accordingly been dismissed from the suit. The two Applications to strike out the Statement of Claim are dismissed.

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(Applications dismissed.)

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