THE CIVIL AVIATION AUTHORITY OF FIJI

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v.

MOTIBHAI & COMPANY LIMITED

[COURT OF APPEAL, 1995 (Quilliam, Thompson, Dillon JJA) 1 March]

Civil Jurisdiction

B

Contract-Nadi Airport Duty Free Concession-nature of exclusive rights-power of Civil Aviation Authority to grant-whether subject to Fair Trading Decree 1992.

The High Court granted several declarations in favour of the Respondent's exclusive right to a concession at Nadi Airport. HELD: Declarations affirmed subject to leave being granted to the Appellant to seek the High Court's determination on the
C effect of the Fair Trading Decree 1992 on the contract.

Cases cited:

Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Company Limited [1913] AC 781

D

Appeal against declarations granted by the High Court.

S.S. Inoke for the Appellant
G.P. Lala and G.P. Shankar for the Respondent

JUDGMENT OF THE COURT

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The appeal in these proceedings is against an order made by Sadal J on 3 December 1993 by which he made the following declarations which had been sought by the Respondent:

> "(1) that the exclusive rights granted by the Defendant Authority (or its predecessors to the Plaintiff Company under the principal
> F Agreement dated 27th November, 1978 and subsequently varied on 3rd December, 1985 and again on 1st January, 1991 respectively has not changed in its character and legal effect and is still binding and in force against the Defendant Authority.
>
> (2) that the said exclusive rights "to the premises" contained in
> G the three versions of the Agreement do not allow or permit the Defendant Authority to allow, permit or encourage any other concessionaire to obtain and (sic.) additional concession within the transit lounge and departure area of Nadi International Airport Terminal Building.

(3) that the exclusive rights applied to the whole area comprising the transit lounge and the departure area at Nadi International Airport Building and is not confined to the specific floor space or area actually occupied by the Plaintiff Company.

(4) that any action taken by the Defendant Authority wh ich will adversely effect the interest of the Plaintiff Company in respect of its exclusive rights will amount to a contravention or breach of a fundamental term of the principal Agreement and two subsequent variations to the Agreement."

The appellant's amended grounds of appeal are as follows:

(1) The learned Judge erred in law in failing to consider the preliminary issue of whether the principal Agreement of 27 November 1978 and the subsequent variations of 3 December 1985 and 19 January 1991 were binding on the Appellant/Defendant in so far as they purported to give the Respondent/Plaintiff exclusive rights to operate a duty free shop.

Having regard to the following circumstances namely:

that the Appellant/Defendant is a public authority created by and charged with public duties and obligations pursuant to statute namely, the Civil Aviation Authority of Fiji Act, Cap 174A,

and the learned Judge's finding that "the intention of the parties under the principal Agreement was for (the) Plaintiff Company to enjoy the sole and exclusive rights to the exclusion of others",

the learned Judge ought to have addressed or considered this preliminary issue, and he ought to have held that these agreements were unenforceable against the Appellant/Defendant in so far as they purported to give the Respond ent/Plaintiff exclusive rights as aforesaid on the grounds that:

(a)these agreements were void as a monopoly or otherwise as being in restraint of trade at common law, and further or in the alternative,

(b)the Appellant/Defendant had neither express nor implied powers to enter into agreements such as the principal Agreement of 27 November 1978 and the subsequent variations of 3 December 1985 and 19 January 1991 which gave the Respondent/Plaintiff exclusive rights to operate a duty free shop.

(c)the Appellant/Defendant did not have power to preclude itself from performing its duties under section 16(d) of the Civil Aviation Authority of Fiji Act to provide "such services and facilities as are in the opinion of the Authority necessary or desirable" for the operation of Nadi International Airport.

(2)The learned Judge erred in fact and in law in holding or accepting that the principal Agreement of 27 November 1978 and the subsequent variations of 3 December 1985 and 19 (sic) January 1991 gave the Respondent/Plaintiff exclusive rights to operate a duty free shop on the grounds stated in paragraphs l(a) and 1 (b) above.

(3)The learned Judge erred in law in holding that the variation agreements of 3 December 1985 and 19 January 1991 did not change the character of the principal Agreement in that:

(a)the learned Judge failed to give due weight to the ordinary and natural meaning of the words used in the variation agreements of 3 December 1985 and 19 January 1991 despite having found that the wording, at least of the 1991 variation agreement, was "unambiguous".

(b)the learned Judge ought to have found that the variation agreements expressly varied the principal Agreement without expressly or impliedly reviving the provisions in the principal Agreement relating to the "sole and exclusive" shopping rights to sell Duty Free Goods (clause 2 thereof), and he ought therefore to have held that those provisions were not imported in to the amended agreements to give the Respondent/Plaintiff exclusive rights to operate a duty free shop.

(4)The learned Judge erred in law in concluding that the principal Agreement of 1978 was "no doubt a 'Lease Agreement' (for a fixed term .. later extended for five years from 19 January 1991) and not a 'Concession Agreement' " in that:

(a)the learned Judge's conclusion is not supported by and inconsistent with the words used in the agreement when read as a whole, and further or in the alternative.

(b)the learned Judge misdirected himself as to the relevant principles of law applicable to such a consideration.

(5)The learned Judge's conclusion that the principal Agreement

of 1978 was "no doubt" a 'Lease Agreement' .. for a fixed term .. later extended for five years from 19 January 1991 .. and not a 'Concession Agreement' is inconsistent with his findings that: A

(a) "The language used (in clause 2 of the principal Agreement) is quite clear and explicit. The words used simply mean to close or shut out others from enjoying the right to sell duty free goods."

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(b)the "principal Agreement read in its entirety makes it clear that the rights for which the Defendant Authority had given the Plaintiff Company exclusivity related to the actual concession regardless of the floor space granted to the Plaintiff Company within the total area of the transit lounge and the departure area of the Terminal Building". C

(c)"In order to carry on with the business of sale of duty free goods the Defendant Authority gave the Plaintiff Company under Clause 5 of the principal Agreement the 'sole and exclusive use of part of the transit lounge and the departure area' " .

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(d)"The intention of the parties under the principal Agreement was for (the) Plaintiff Company to enjoy the sole and exclusive rights (to sell duty free goods) to the exclusion of others".

(6)The learned Judge's finding that the "principal Agreement E read in its entirety makes it clear that the rights for which the Defendant Authority had given the Plaintiff Company exclusivity related to the actual concession regardless of the floor space granted to the Plaintiff Company within the total area of the transit lounge and the departure a rea of the Terminal Building" is not supported by and inconsistent with the words used in that F agreement.

(7)As evident from the grounds referred to in paragraphs 4, 5 and 6 above, the learned Judge had misdirected himself as to and had misconceived the true meaning and effect of the parties agreements.

(8)The learned judge should have held that the provision for G exclusive rights to sell duty free products were unenforceable by reason of sections 27, 29, 31 and 46 of the Fair Trading Decree 1992.

(9)The learned judge should have refused to make the declarations sought, on the grounds:

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(a)that the application does not dispose of the whole of the dispute between the parties; or in the alternative

(b)there are disputed questions of fact and law between the parties that are not appropriate to be determined on an originating summons; or in the alternative

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(c)the judge's determination may raise an estoppel or raise *res judicata* against the Appellant/Defendant in respect of matters not litigated in the matter.

(10)In the alternative, the learned judge ought to have limited the declaration so as to determine only the matter of construction of documents

C before the Court, and ought not to have determined the substantive rights (if any) of the parties arising under those agreements.

(11) The Court should receive further evidence on the questions of fact arising in these proceedings."

D Grounds 3 to 7 relate to the interpretation of three agreements made by the parties with one another; they can conveniently be dealt with together. The remaining grounds raise issues of *ultra vires*, of unenforceabiiity at common law and of unenforceability by reason of the Fair Trading Decree 1992. We shall deal first with the grounds relating to the interpretation of the agreements.

The appellant is a body corporate which was established in 1979 by the Civil

E Aviation Authority of Fiji Act (Cap 174A) ("the Act"). One of its functions is to provide at airports in Fiji such services and facilities as are in its opinion necessary or desirable for their operation (S.16(d)). In 1978 Nadi International Airport was administered by Nadi International Airport Property Company Limited. From the time when the appellant was established all the rights, obligations and liabilities which had been vested in or imposed upon that company immediately

F before were deemed to be the rights, obligations and liabilities of the appellant (S.14(2) and Schedule Para 3).

One of the sources of those rights, obligations and liabilities was, subject to its legality, the first of the agreements with which we are concerned in this appeal; it had been made between Nadi International Airport Property Company Limited

G and the Respondent on 27 November 1978. It is apparent from the Recital in the agreement that, before it was made, the company had invited "tenders for a concession", at the airport "being the exclusive shopping right to provide and sell (a) duty and tax free goods of all descriptions and types including Duty Free liquor, cigarettes, cigars and tobacco" in the transit area of the terminal building and "(b) Duty and tax paid goods including publications" in the departure area of that

building. It was expressly stated in the Recital that those exclusive shopping rights to provide and sell duty and tax free goods were to be referred to thereafter in the agreement as "the duty free shop concession". A

The operative part of the agreement contained 49 clauses. Those which it is necessary to consider for the purposes of this appeal were as follows:

> "(2)The Grantee shall have the sole and exclusive shopping rights to sell Duty Free Goods including Liquor and Tobacco B to international airline passengers departing from or transiting through the Terminal Building at Nadi International Airport from the First day of January One thousand nine hundred and eighty-one until the 31 day of December, 1990 unless this agreement is sooner determined as hereinafter provided.
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> (3)The Grantee shall have the right to occupy for the purposes C of the concession part of the floor area in the transit lounge and the Departure Concourse of the Terminal Building at Nadi International Airport.
>
> .....
>
> AND THE GRANTOR for its part agrees:- D
>
> (5)To grant to the Grantee the sole and exclusive use of part of the transit lounge and the Departure area.
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> ... ...
>
> (7)Not to grant to any other person or corporate body any rights E or concessions which derogate from the rights of the Grantee under this concession."

The second agreement with which we are concerned was made between the parties on 3 December 1985. In the Recital it was stated that it was made "in consideration of the considerable improvements under alterations to be effected by the Grantee" in the duty free shopping area in the transit lounge at the airport; the area was F being extended as indicated in a plan which was attached to the agreement. The operative part of the agreement contained five clauses. It is necessary to refer to only two of them. They were as follows:

> "1.For the considerations aforesaid the Grantor grants to the Grantee the sole and exclusive use of all those areas both G original and extended of the Nadi International Airport as are shown in the attached plan (with right of ingress and egress thereof for all authorised users thereof and for the grantee's management and staff) as a duty free shopping area.
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> .....

> 5.Save as aforesaid the principal agreement shall remain in full force and effect."

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The principal agreement was stated in the Recital to be the Agreement made on 27 November 1978.

The third agreement with which we are concerned in this appeal was made between the parties on 1 January 1991, that is to say the day after the expiration of the period referred to in clause 2 of the 1978 agreement. Again that agreement was B referred to in the 1991 agreement as "the principal agreement" and in the Recital it was stated that the parties had agreed to vary the terms and conditions of the principal agreement in the manner set out in the operative part of the 1991 agreement. That contained six clauses. It is necessary for the purposes of this appeal to refer to only two. They are clauses 1 and 6 which read as follows:

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> "1)For the considerations aforesaid the Grantor extends the grant to the Grantee of the sole and exclusive use of all those areas currently used by the Grantee for the purpose of selling duty free goods at Nadi International Airport with right of ingress and egress thereto for all authorised users thereof and for the Grantee's management and staff as a duty free shopping
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> D area, to the 31st day of December, 1995.
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> 6)Save as aforesaid the principal agreement shall remain in full force and effect."

The reason why the respondent sought the declarations was that some publicity E had been given to plans which were being prepared by the appellant for the development of the airport. Those plans apparently included a number of shops in the transit and departure areas which would sell duty free goods. At the hearing of the action, which was commenced by originating summons as the respondent was seeking to have the High Court interpret the provisions of the three agreements, the appellant presented arguments that the principal agreement as varied by the F 1985 and 1991 agreements now gave the respondent an exclusive right to duty free goods from the area of floorspace which it actually occupied but did not give it such an exclusive right in respect of the rest of the part of the airport which comprised the departure and transit areas. The arguments which Mr. Inoke presented in this appeal in respect of the first set of grounds were essentially similar. He argued that, whatever rights were conferred by the principal agreement in 1978, G clause 1 of the 1985 agreement and clause 1 of the 1991 agreement both limited the respondent's exclusive right to the area of floorspace which it was entitled to use for the enjoyment of that right, that is to say the part delineated in the plan attached to the 1985 agreement. In the High Court Sadal J. rejected that argument; we have no doubt that he was right to do so.

Clause 5 of the 1985 agreement and clause 6 of the 1991 agreement had the effect that, except as provided in the operative parts of those two agreements, the principal agreement was to remain in full force and effect. As we have noted above, the concession which was granted by the 1978 agreement together with a right to occupy the particular area of floorspace for the purposes of the concession was "the exclusive shopping rights" to provide and sell duty and tax free goods in the transit area and the departure area of the terminal building at the airport. To safeguard the concession, by clause 7 of the 1978 agreement the appellant expressly agreed not to grant to any other person or corporate body any rights or concessions which derogated from the rights of the respondent "under this concession". The effect of clause 1 of the 1985 agreement was essentially to vary clause 5 of the 1978 agreement, which related to granting the respondent the sole and exclusive use of part of the transit lounge and departure areas. The 1985 variation varied that provision by providing for a larger area to be solely and exclusively used by the respondent. Clause 1 of the 1991 agreement varied that by extending the period for which the larger area could be solely and exclusively used by the respondent. Neither variation altered in any way the nature of the concession which was granted to the respondent by the 1978 agreement.

In His Lordship's judgment he found that the appellant had granted to the respondent a lease of the part of the building of it was given the sole and exclusive use. In our view he was wrong in making that finding. The agreement granted the respondent for a specific period a contractual licence to occupy that part of the building as long as the respondent discharged its obligations under the agreement; it did not grant a lease. However, His Lordship's finding in that regard was not essential to his decision to make the order which he did. We are satisfied that, unless the agreement was illegal or unenforceable, the declarations which he made were a remedy to which the respondent was entitled.

We turn now to grounds 1, 2, 8, 9, 10, and 11. The issues raised in them were not argued in the High Court. Generally an appellant is not permitted to raise on appeal a matter which he has not raised at the trial. We regard as most unfortunate that the appellant failed to raise the questions of illegality and unenforceability of the contract at the trial. However, this Court has a discretion, to be exercised judicially, to permit it to do so. In this instance the proceedings were brought in order to obtain declarations as to the effect of a contract. It would clearly be most unhelpful, to say the least, for the Court to-affirm such declarations unreservedly if the law invalidates the contract or has taken away or altered its effect. We have come to the conclusion, therefore, that we should consider and rule upon these grounds even though they raise matters which were not argued in the High Court.

We can dispose quickly of the appellant's argument that it was beyond its power to make an agreement with any person for that other person to provide at the airport facilities for the sale of duty free goods. Section 17(1) of the Civil Aviation Authority

Act confers powers on the appellant -

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> "(a) to enter into any contract whatsoever for the purposes of this Act;
>
> (b)to authorise any person to perform any act in furtherance of its functions and powers;
>
> (d)to provide at an airport, or to enter into an agreement with any other person to provide, facilities for -
>
> (x) the sale of duty free and other goods to arriving, departing and transit passengers ".

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Mr. Inoke submitted that paragraph (d) should be construed as empowering it to C enter into agreements only for it to provide together with another person facilities for the sale of duty free goods. In support of that submission he referred to section 17(2) which reads:

> "(2) In carrying out its powers under subsection (1), the Authority may, with the approval of the Minister, operate in partnership with any other person or as a member of a corporate body."

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In our view that subsection has two purposes. First, it permits the appellant to operate in partnership or as a member of a body corporate. Second, it restrains it from doing so without the Minister's approval. There is nothing to indicate that it is intended to limit the effect of section 17(1)(b).

E We accept that the words in paragraph (d) of section 17(1), if read alone, are capable of bearing the meaning which the appellant submitted that they bear but we are satisfied that section 17(1), read as a whole, does not have such a restrictive meaning. If it had been the intention of Parliament that it should do so, we should have expected that limitation to have been very clearly spelt out. Further as the appellant is given power to enter into a contract or agreement of any kind whatsoever F for the purposes of the Act, no useful purpose would have been served by including in paragraph (d) the phrase "or to enter into an agreement with any other person to provide". We are satisfied that the context requires that it be construed as empowering the appellant to enter into agreements with other persons for those other persons to provide facilities for the of duty free goods.

G The appellant submitted also that as a public authority it could not preclude itself from exercising its discretionary powers thereafter by entering into a contractual obligation to the respondent which would have that effect. If the agreement had been without time limit or for an unreasonably long period, the submission might well have had merit. However, in view of the short periods for which the agreements were entered into, that it is not the situation here.

As the appellant has pointed out to us, there is ample authority for the proposition that an agreement which has the effect of preventing competition in trade, even though reasonable as between the parties to it, may be unenforceable because it is against the interest of the public. It is then unenforceable on grounds of public policy (Attorney General of the Commonwealth of Australia v. Adelaide Steamship Company Limited [1913] AC 781 at 795). In the present case the agreement is for the respondent to have what was in effect a monopoly on the sale of duty and tax free goods within the transit and departure areas of the airport building. It is a monopoly within that very restricted locality; only a very small part of the public in Fiji, that is to say those using that area of the airport, is affected by it. It does not affect the public at large. In our view no useful purpose would be served by receiving additional evidence of the precise numbers of persons affected or by our sending the case back to the High Court for such additional evidence to be presented there. We are satisfied that this is not a case where the agreement has to be held unenforceable because of the public's interest generally in there being freedom of competition in the market place.

We come finally to the question of the effect which the Fair Trading Decree 1992 may have had on the agreements. We are satisfied that at least up to the time when the Decree took effect, they were enforceable. The issue is whether the Decree has rendered them unenforceable from the date when it took effect. The objectives of the Decree are stated in section 2 as follows-

> "(a)the promotion of the interests of the Consumers;
>
> (b)the promotion of the effective and efficient development of industry trade or commerce;
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> (c)the need to secure effective competition in industry, trade or commerce;
>
> (d)the need to encourage improvements in productivity and efficiency in industry, trade or commerce in Fiji"

Section 3 provides that the Decree applies to every person who "does an act or makes an omission within or out of Fiji that constitutes a contravention of this Decree".

Clause 4 (3) reads:

> "(3) Effect - relevant time
>
> Where a provision of this Decree is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Decree applies in relation to the provision

of the contract or the covenant at any time when the provision of the contract or the covenant has or its likely to have that effect notwithstanding that -

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time."

So far as is relevant in these proceedings section 27 of the Decree provides:

"(1) If a provision of a contract -

.....

(b) has the purpose, or has or is l ikely to have the effect, of substantially lessening competition, that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a person.

(2) A person shall not -

(a) make a contract or arrangement, or arrive at an understanding, if-

.....

ii) a provision of the proposed contract, arrangement or .. understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision -

ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(3) For the purposes of this section ..... "competition", in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding,: means competition in any market in which a person that is a party to the contract, arrangement or understanding or would be a party to the

> proposed contract, arrangement or understanding, or any body corporate related to such a person, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services." (emphasis added)

"market" is defined in section 4(8) Of the Decree as follows:

> "For the purposes of this Decree, unless the contrary intention appears, "market" means a market in Fiji and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

In view of the provisions of section 27(2)(b) which we have underlined, section 27 clearly could apply to the principal contract and the two later agreements to vary it, notwithstanding that they were in force before the Decree was made. Their effect is to prevent any person from competing with the respondent in part of the "market" for the supply of duty free goods which exists at Nadi International Airport and involves selling to persons departing Fiji or in transit at the airport. That is the purpose of the granting of an exclusive right to supply the goods there and of clause 7 of the principal contract. However, it is impossible to say whether the purpose is to lessen competition substantially, as referred to in section 27(2)(b)(ii), without knowledge of what the particular market comprises. Counsel were unable to agree before us what it was. We have come to the conclusion, therefore, that, although we have been able to decide all the other issues in the appeal the effect of section 27 of the Decree, if any, on the principal contract as varied by the two later agreements is a matter which we cannot resolve.

Rule 23(3) of the Court of Appeal Rules provides as follows:-

> "(3) A new trial may be ordered on any question without interfering with the finding or decision upon any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is mentioned in paragraph (2) affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that part only, or as to that party or those parties only, and give final judgment as to the remainder."

We have considered whether we should order a new trial, limited to the issue of the effect of the Fair Trading Decree 1992 on the contracts. However, in view of the conclusions to which we have come in this appeal, we have decided that the better course is for us to affirm Sadal J's order granting the declarations but at the same time to reserve leave for the appellant to commence proceedings in the High Court,

if it thinks fit, for further declarations as to the effect of the Decree on the principal contract, as varied by the 1985 and the 1991 agreements. As the respondent has succeeded on all the issues except that in respect of the Decree, which was raised for the first time in this Court, the appellant must pay the respondent its costs of the appeal.

Decision

The order which is the subject of the appeal is affirmed but with leave reserved for the appellant, if it thinks fit, to commence new proceedings in the High Court for declarations as to the effect of the Fair Trading Decree 1992 on the principal contract, as varied.

The appellant is to pay the respondent its costs of this appeal.

(Appeal dismissed.)