COMMISSION OF INQUIRY (by COMMISSIONER GANESHWAR PRASAD LALA) v EMPEROR GOLD MINING CO LTD and Anor (ABU0051/2004)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, STEIN and FORD JJA

16, 24 March 2006

Administrative law — judicial review — Commission of Inquiry — error in law — Commission of Inquiry Act (Cap 47) ss 2, 2(1), 2(2), 3 — Interpretation Act ss 32, 35, 53 — Trade Union (Recognition) Act (Cap 96A).

This was an appeal from the decision of Connors J which declared that the report and recommendations of the Commissioner are null and void.

Prior to 1991, the goldmine at Vatukoula was owned by Emperor Gold Mining Co (Emperor) Ltd and Western Mining (WMC) Corporation. In 1991 the management of the mine was taken over by Emperor from WMC. In the same year, 436 miners who are members of the Fiji Mine Workers Union (FMWU) went on strike. Emperor allegedly refused to recognise FMWU for the purpose of collective bargaining under the Trade Union (Recognition) Act (Cap 96A). For failure to return to work despite repeated warnings, Emperor dismissed the striking workers.

On 14 August 1991, the workers calling themselves "the organising committee of the mine workers" reported the trade dispute to the Ministry of Industrial Relations and Employment which resulted in proceedings for judicial review. A Commission of Inquiry was then established pursuant to the Commission of Inquiry Act. G P Lala was appointed by the President as the sole Commissioner of Inquiry. The Commission was from 20 February 1995 to 10 May 1995. It appeared that the Commissioner delivered his report to the President on a date after a notice was published in the Government Gazette on 5 July 1995.

Emperor filed an application for leave to apply for judicial review of the report and recommendations of the Commission. On 28 March 1996 the then Chief Justice, granted leave. There was no further action until Emperor filed a summons to dismiss the application for want of prosecution. That application was refused.

By motion on January 2004, Emperor sought to have the matter reinstated to the list and was listed for hearing on 4 May 2004. The judgment was delivered on 11 June 2004. An appeal from that judgment was filed on 12 August 2004. Emperor sought certiorari to quash the report and recommendations, and sought various declarations.

The issue was whether or not the learned judge erred in law and in fact in holding that the extension of the Commission after 10 May 1995 was ineffective and accordingly the actions of the Commissioner after the time were ultra vires.

Held — (1) The Commission was issued under s 2 of the Commission of Inquiry Act (Cap 47). There was no challenge to the validity of the Commission and the initial appointment of the Commissioner under it. The principal contention of the Appellant was that the notice of 5 July 1995 was valid and extended the actual Commission. The notice of 5 July 1995 made reference only to extension of time. It cannot be taken as an extension of the Commission. Once 10 May 1995 had passed, the Commissioner had no power to continue with the Commission save, if the notice had been valid, in his presentation of a delayed report.

(2) The notice did not purport, nor was there any power, to extend the Commission which expired on 10 May 1995. The effect was that any action by the Commissioner to exercise the powers given in his Commission after it had expired was ultra vires his appointment and null and void.

(3) The Appellant also sought to give validity to the Commissioner's actions subsequent to 10 May 1995 under the doctrine of de facto appointment. The court agreed with Connor J that the Commissioner must have been aware of the duration of his Commission and when he continued to take evidence and submissions after that time period had expired, he was doing so while being aware of the lack of proper appointment and accordingly the benefit of the de facto doctrine was not available.

(4) The court ruled that the notice extending the time within which to present report was invalid. The failure to present the report before the date ordered in the Commission, namely by 10 May 1995, renders the report null and void.

Appeal dismissed.

No cases referred to

L. Daunivalu for the Appellant

M. S. Sahu Khan and *S. Sahu Khan* for the Respondent

K. Vuataki for the Interested Party

[1] Ward P, Stein and Ford JJA. This is an appeal from the decision of Connors J delivered on 11 June 2004 in which the learned judge declared that the report and recommendations of the Commissioner are null and void.

[2] A brief history of the matter may be gleaned from the High Court judgment.

> The history of this matter commences prior to 1991 when the goldmine at Vatukoula was owned by Emperor Gold Mining Company (Emperor) Limited and Western Mining (WMC) Corporation and was managed by WMC. The involvement of WMC in the mines ceased in 1991 and management of the mine was then taken over by Emperor
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> In or about 1991, 436 miners, who were members of the Fiji Mine Workers Union (FMWU) went on strike. The reason for the strike was the refusal of Emperor to recognise the FMWU for the purpose of collective bargaining under the Trade Union (Recognition) Act (Cap 96A).
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> As a result of the failure of the workers to return to work and following various warnings, Emperor dismissed the striking workers between April and July 1991.
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> The Permanent Secretary of the Ministry of Employment and Industrial Relations on 14 August 1991 purported to accept a report of a trade dispute under the Trade Disputes Act from a group of workers calling themselves "the organising committee of the mine workers". This resulted in proceedings for judicial review coming before the court …
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> Without attempting to detail the history of events, the next relevant occurrence was the establishment of a Commission of Inquiry pursuant to the Commission of Inquiry Act.
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> The President by Commission dated 24 January 1995 appointed G P Lala as the sole Commissioner of Inquiry … The Commission was published in the Government Gazette of 3 February 1995.
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> The Commission of Inquiry commenced on 20 February 1995 when the Commissioner outlined the terms of reference and dealt with preliminary and procedural issues. [It] heard evidence from witnesses called by the interested parties and by the Commissioner himself. Emperor, FMWU and the Vatukoula Mine Workers Council were all represented before it.

[3] The terms of the Commission published in the Gazette stated that the period of appointment was to be from 20 February to 10 May 1995. However, the Commissioner continued to receive evidence and submissions after the 10 May 1995 and a notice, dated 5 July 1995, was published in the Government Gazette:

> EXTENSION OF TIME TO REPORT—
> COMMISSION OF INQUIRY, VATUKOULA MINES
>
> In exercise of the powers conferred upon him by Section 2 of the Commission of Inquiry Act, His Excellency the President has extended the period in which the Commissioner is to present his report to the 31st day of July 1995.

Dated this 5th day of July 1995
By Order
M. RIGAMOTO
Official Secretary
Office of the President

[4] It appears that the Commissioner delivered his report to the President on a date after that notice and before 31 July 1995.

[5] On 7 September 1995, Emperor filed an application for leave to apply for judicial review of the report and recommendations of the Commission and on 28 March 1996 the, then, Chief Justice, granted leave.

[6] It appears there was no further action until the Respondent filed a summons to dismiss the application for want of prosecution on 5 November 2001. That application was refused on 20 June 2003.

[7] The Respondent, by motion filed on 12 January 2004, then sought to have the matter reinstated to the list. This was granted and the matter listed for hearing on 4 May 2004. After the extreme delays that had beset the matter up to that time, judgment was delivered commendably promptly on 11 June 2004. This appeal, filed on 12 August 2004, is from that judgment.

[8] The form of wording used in the original application for judicial review was one that this court and the High Court has frequently criticised. Emperor sought certiorari to quash the report and recommendations and also sought declarations:

> "… that the decision and/or report and/or the recommendations of the Commissioner in so making the recommendations was unlawful, irregular, without jurisdiction and/or in access (sic) of jurisdiction, unreasonable, capricious and/or null and void and in any event there was no power to so act and
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> "that the Commission of Inquiry could not be validly appointed and/or there was no jurisdiction to appoint such a Commission as had been done under Commission of Inquiry Act."

[9] Order 53 requires leave to apply for judicial review. The court should be reluctant to grant leave when the application is in this compendious form unless there is clear reference in the statement in support to each ground. In this case the statement in support did little more than merely repeat the grounds already set out in the notice of motion. It would have been better if the court had, at the leave stage, required counsel to choose which of the grounds he relied on and to have deleted the remainder. The result was that Connors J, who also criticised the form of the motion, had to consider a wide ranging case much of which bore little relationship to the original application.

[10] In contrast the grounds of appeal in this court are reasonably concise, namely that the learned judge erred in law and in fact:

(1) in holding that the extension of the Commission after 10 May 1995 was ineffective and accordingly the actions of the Commissioner after the time were ultra vires;

(2) in declaring the whole report and recommendations therein as null and void when he did not consider and neither did the Respondent challenge all the recommendations in the report;

(3) in declaring the report was null and void [when] it only made recommendations and not decisions of any binding effect;

(4) in holding that the Commissioner was bound by the earlier decision of the High Court and as such was not in a position to make any recommendations contrary to the order of the court.

[11] We find it difficult to understand the need for this appeal. The events to which it related occurred more than 10 years ago. The recommendations of the Commission had no binding effect and had the government wished to implement any of them, it would have been free to do so irrespective of the High Court decision. Whatever the result of this appeal, it will have no effect on that position and it appears to be little more than an empty exercise.

[12] Counsel for the Appellant was able to tell us nothing to alter that impression. In particular, his assertion that, because the Commission of Inquiry had incurred considerable public expense, it is, in consequence, necessary to confirm its validity, is little short of fatuous. This appeal, whether or not successful, will achieve little more that unnecessary further cost to the public.

[13] The first ground relates to the legality of the actions of the Commissioner after 10 May 1995 and the effect of the Gazette Notice of 5 July 1995. The learned judge concluded that:

> The purported extension of the Commission after 10 May 1995 was ineffective and accordingly the actions of the Commissioner after that time are ultra vires.

[14] Both counsel agreed that, if the appeal fails on the first ground, it will determine the matter and so we asked counsel to confine their submissions initially to this aspect of the appeal. For the reasons we now give we are satisfied that the appeal must be dismissed and we have not heard submissions on the remaining grounds.

[15] The Commission was issued under s 2 of the Commission of Inquiry Act (Cap 47):

> 2. — (1) The President may whenever he shall deem it advisable so to do issue a Commission under his hand and the Public Seal of Fiji appointing one or more Commissioners and authorising such Commissioner or Commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare.
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> (2) Every Commission shall specify the subject, nature and extent of the inquiry, and may contain directions generally for the carrying out of the inquiry and in particular as to the following matters:
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> (a) the manner in which the Commission is to be executed;
> (b) the appointment of a chairman;
> (c) the constitution of a quorum;
> (d) the place and time where and within which the inquiry shall be made and the report thereof rendered;
> (e) whether or not the inquiry shall be held in public.
>
> (3) Every Commission issued under this Act shall be published in the Gazette.

[16] There is no challenge to the validity of the Commission and the initial appointment of the Commissioner under it. The Commission sets out, in 10 numbered paragraphs, the matters into which the Commissioner is to inquire. It then continues:

> And I direct that the Commission of Inquiry shall be held in public.
> And I further direct that:
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> (i) The report of the Commission of Inquiry be tabled in Cabinet after its presentation to me.
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> (ii) You are hereby strictly charged that you shall not any time publish or otherwise disclose, save to his Excellency the President, in pursuance of these presents or by his Excellency's direction, the contents of any report so made,

or to be made by you, except such evidence or information as is received in the course of a sitting open to the public;

(iii) Using all diligence, you are required to report to his Excellency the President in writing under your hands, not later than 10th May 1995, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof:

(iv) The period of appointment of the Commission is 20 February — 10th May 1995.

Given the 24th day of January 1995.

K.K.T.MARA

President and Commander-in-Chief

[17] The principal contention of the Appellant is that the notice of 5 July 1995 was valid and extended the actual Commission. Counsel conceded that it is expressed only in terms of extending the time within which the report may be presented but suggests that it would be necessary to extend the time the Commissioner could receive submissions in order to make that effective. Counsel points out that s 5 states that the duty of the Commissioner is:

> … to make a full, faithful and impartial inquiry in accordance with the terms of the Commission and to report the result of the inquiry to the President accordingly.

In those circumstances counsel suggests that, if the court takes a purposive approach, it will read the terms of the Act in such a way that the commissioner can continue with the inquiry in order to make the report in accordance with his duty under s 5.

[18] We do not accept that is the correct approach neither do we accept the logic of suggesting that, if the report is not ready in time, it must follow that the inquiry cannot have been completed either. Many Commissions of Inquiry are such that the preparation of the report may require many weeks or even months to prepare after the evidence and submissions have been completed. We also note the reference in s 5 to the inquiry being made in accordance with the terms of the Commission.

[19] We do not consider this is relevant or advances the Appellant's case. As we have stated, the notice of 5 July 1995 makes reference only to extension of time. However, this ground of appeal also raises the validity of the notice itself in light of the fact that it was signed by the official secretary in the Office of the President.

[20] The Appellant's case is that the fact the notice was so signed is validated by s 32 of the Interpretation Act:

> 32. Where any written law (including any Order in Council) confers or imposes on the President a power or duty to make any subsidiary legislation or appointment, give any directions, issue any order, authorise any thing or matter to be done, grant any exemption, remit any fee or penalty or exercise any other power or perform any other duty, the exercise of such power or the performance of such duty by the President may, unless a contrary intention appears, be signified under the hand of a Minister, any Permanent Secretary to a Ministry or any Assistant Secretary:
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> Provided that proclamations and warrants shall be made or issued only under the hand of the President.

[21] We do not accept the Appellant's argument that the signing by the official secretary is covered by that section. The President's official secretary is not included in the persons who can sign subsidiary powers or duties. The section

limits them to a minister, permanent secretary to a ministry or any assistant secretary. Counsel for the Appellant has not sought to suggest that the official secretary falls into any of those categories.

[22] Our finding that the purported extension of the time to render the report was invalid because it was not signified under the hand of any person authorised to do so means that the report is also rendered null and void because it was presented after the time limited by paragraph (iii) of the President's concluding orders in the Commission.

[23] We pass to the suggested extension of the Commission by the notice of 5 July 1995. The power to issue a commission is vested in the President under s 2 of the Commissions of Inquiry Act. Any such commission must be issued under his hand and the Public Seal of Fiji and should specify whichever of the matters in subs (2) are relevant. His power to change any commission is limited by s 3:

> 3. In case any Commissioner shall be or become unable or unwilling to act, or shall die, the President may appoint another Commissioner in his place; and any Commission issued under this Act may be altered as the President may deem fit by any subsequent Commission issued by the President, or may be revoked altogether by a notification to that effect published in the Gazette.

[24] It is conceded by counsel for the Appellant that section does not specify any power to extend a commission. Apart from the appointment of a substitute Commissioner, the only way a commission may be altered is by the issuance of a subsequent commission or by a notice of revocation. However counsel relies on the provisions of ss 35 and 53 of the Interpretation Act to validate the suggested extension of the Commission itself. Section 35 provides:

> 35. Where any written law confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises.

Section 53 is headed, "Construction of power to extend time" and provides:

> 53. Where in any written law a time is prescribed for doing any act or taking any proceeding, and power is given to a court or other authority to extend such time, then, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.

Those sections cannot override the clear requirements of s 2(1) of the Commissions of Inquiry Act.

[25] The Gazette Notice of 5 July 1995 simply purported to extend the time within which the report was to be presented. There was no power to extend the Commission and the notice cannot be taken as an extension of the Commission. As a result, once 10 May 1995 had passed, the Commissioner had no power to continue with the Commission save, if the notice had been valid, in his presentation of a delayed report.

[26] The learned judge found:

> The period of appointment of the Commissioner was from 20th February 1995 to 10 May 1995. The Commissioner continued to receive evidence and hear submissions after 10th May 1995.
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> By notice in the Government Gazette of the 5 July 1995, the *term of the Commission was sought to be extended* … As is apparent, the notice was under the hand of the Official Secretary and not of the President.
>
> The notification would not appear to be in accordance with the provisions of sections 2 and 3 of the Commissions of Inquiry Act. [He then sets out section 3]

> It would appear that this section would enable the President to alter the Commission previously issued. An extension of the period of appointment would be an alteration to the Commission. The section does not appear to enable the extension of the Commission in the manner that has been done. *It is the period of the appointment of the Commissioner that must be extended*. [Emphasis added.]

[27] It is clear that his conclusion is generally correct although the section, as we have stated, only allows alteration in the limited manner specified and that does not include an alteration of the period of the appointment. We must also differ from the learned judge's conclusion that the notice sought to extend the term of the Commission. It manifestly did not. Counsel for the Appellant suggests that was the intention but the notice plainly purports only to extend the period within which the Commissioner was to present his report. The terms are clear and there is no suggestion of an intention to extend the Commission itself.

[28] If this was intended as an alteration of the Commission it was required by s 2(1) to be issued under the hand of the President and the Public Seal of Fiji. Section 32 of the Interpretation Act does not cover this. That section covers situations where a written law confers a power to make any subsidiary legislation or appointment. Under the Commissions of Inquiry Act, the Commissioner is appointed by the Commission itself and it cannot, therefore, be considered to be a subsidiary appointment. We would suggest that is the reason why, if a Commission is to be altered beyond the appointment of a substitute Commissioner, s 3 requires a fresh Commission under the hand of the President.

[29] The notice did not purport, nor was there any power, to extend the Commission which expired on 10 May 1995. The effect is that any action by the Commissioner to exercise the powers given in his Commission after it had expired was ultra vires his appointment and null and void.

[30] In the light of that conclusion, the Appellant seeks to give validity to the Commissioner's actions subsequent to 10 May 1995 under the doctrine of de facto appointment. However, as he concedes, that doctrine gives no assistance to an appointee if he is aware of the defect in his appointment or, in the present case, in the continuance of his appointment under the Commission.

[31] When dealing with this, Connor J found:

> The Commissioner must have been aware of the duration of his Commission and when he continued to take evidence and submissions after that time period had expired he was doing so whilst being aware of the lack of proper appointment and accordingly the benefit of the de facto doctrine is not available.

We agree.

[32] In the High Court, counsel for the Appellant also suggested that continuation of the Commission after 10 May 1995 was a minor procedural irregularity and fell within the de minimis rule. The learned judge correctly rejected that argument and, although counsel raised it in his written submissions, he agreed at the hearing before us that it was not appropriate in this case.

[33] We are satisfied that the notice extending the time within which to present the report did not extend the Commission so it expired on 10 May 1995. Any exercise of his powers under the Commission after 10 May 1995 was ultra vires his Commission and is null and void.

[34] We are also satisfied that the notice extending the time within which to present his report was invalid and so the failure to present the report before the date ordered in the Commission, namely by 10 May 1995, renders the report null and void also.

[35] The appeal is dismissed. This was a totally unnecessary appeal but it was equally unnecessary for the Respondent to seek to have the matter determined eight and a half years after the report was presented and more than eight years after its original application. In those circumstances we make no order for costs.

Appeal dismissed.