

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CIVIL PETITION NO. CBV 9 OF 2009**  
**(Court of Appeal ABU 17 of 2007)**

**BETWEEN** : **KABARA DEVELOPMENT CORPORATION**  
**LIMITED**  
*Petitioner*

**AND** : **ATTORNEY-GENERAL OF FIJI AND**  
**MINISTER FOR TRANSPORT AND CIVIL**  
**AVIATION**  
*Respondents*

**Coram** : **The Honourable Mr Justice Anthony Gates,**  
**President of the Supreme Court**  
**The Honourable Mr Justice William Calanchini**  
**Judge of the Supreme Court**  
**The Honourable Madam Justice Anjala Wati**  
**Judge of the Supreme Court**

**Counsel** : **Mr R. Matebalavu for the Petitioner.**  
**Ms S Levaci for the Respondents**

**Date of Hearing** : **20 August 2012**

**Date of Judgment** : **17 February 2014**

**JUDGMENT**

[1] This is a petition for special leave to appeal from a judgment of the Court of Appeal delivered on 16 October 2009 (Byrne, Pathik and Goundar JJA) affirming the

judgment of the High Court at Suva (Singh J) dated 12 December 2006. The High Court rejected the Petitioner's claim that its contract with the Respondents had been extended for a further period of ten years and also rejected the claim that the contract had been unlawfully terminated. The Petitioner's claim was dismissed and the Petitioner was ordered to pay costs in the sum of \$3000.00 within 21 days.

- [2] The present application by the Petitioner was filed on 30 November 2009 and was as a result 2 days out of time on the basis that the petition was required to be lodged at the Court registry no later than 27 November 2009 being 42 days from the date of the Court of Appeal decision, pursuant to Rule 6(a) of the Supreme Court Rules. This matter was not raised by the Court nor addressed by Counsel. The delay of two days will be considered in the context of the application for special leave to appeal.
- [3] The background facts may be stated briefly. The Petitioner entered into a contract with the Government on 29 August 1997. The agreement was between the Petitioner and the Controller of Government Supplies. Both the learned Judge in the High Court and the Court of Appeal found that the agreement comprised three documents which were required to be read together. The first document was the "*Call for Tenders*" dated 28 April 1997 being a letter from the Director of Marine to the Manager Tai Kabara Shipping. The second document was the "*Bid*" dated 1 August 1997 being a letter from the Controller of Government Supplies to the Manager Operations, Kabara Development Corporation. This letter informed the Petitioner that it had been granted the contract to provide shipping services to the Southern Lau Franchise area by the vessel "*Tai-Kabara*" at a cost of \$30,000 per month for a period of 3 years and under which performance would be reviewed every 12 months. The third document was the agreement itself dated 29 August 1997. The agreement was a one page document that stated that the "*Call for Tenders*," the "*Bid*" and the "*Letter of Acceptance*" were to be deemed to form and be construed as part of the agreement.
- [4] The agreement was for three years with no provision for extension or renewal. The successful tenderer was required to provide for a sailing every two weeks from Suva to the islands of the Southern Lau Franchise area. Every sailing was required to depart on the same day of the week, with an interval between departures of precisely two weeks. The agreement also stipulated that the vessel must be maintained in a

seaworthy condition and continue to have all required safety certifications and to carry all necessary safety and navigational equipment. Failure to comply with these provisions was a cause for termination of the contract.

- [5] The agreement required the successful tenderer to clearly indicate the arrangement if any that it intended to make in order to ensure continuity of service to the franchise area in any period during which the nominated vessel was out of service due to slipping, scheduled maintenance or breakdown. The agreement also provided for circumstances in which the contract might be cancelled and included the failure by the contractor to provide services on two consecutive occasions.
- [6] Before the expiry date of the three year contract (i.e. 29 August 2000) the Petitioner approached the Government for an extension of the franchise period for a further 9 years till August 2009. However on 29 August 2000 the Director of Marine wrote to the Petitioner advising that the contract entered into three years earlier was formally closed and that fresh tenders were being processed through the Major Tenders Board.
- [7] The Petitioner commenced proceedings by writ in the High Court seeking a declaration that the contract between the Petitioner and the Government embodied in the agreement dated 29 August 1997 and extended on 17 March 1999 subsists. The Petitioner also claimed general damages, damages for loss of the Petitioner's custom and goodwill and claimed for the loss of the franchise sum payable under the balance of the contract period.
- [8] The learned Judge found that there was no ten year extension and that the contract had been terminated in accordance with its terms. Although the Petitioner continued to provide franchise services after August 2000, that arrangement continued under a series of extensions for short periods until the fresh tender process was completed.
- [9] On the issue of the extension of the contract the learned trial Judge noted that the documents relied on by the Petitioner were two letters dated 19 and 24 March 1999. The first was an internal Memorandum from the Controller of Government Supplies to the Permanent Secretary for Communications, Works and Energy. It said that the Major Tenders Board in its meeting held on 17 March 1999 approved the extension of

the Petitioner's contract for ten years from 17 March 1999. The contract would expire on 17 March 2009. It was signed by V. Fung for the Controller of Government Supplies. The second letter was written on the Ministry of Communication, Works and Energy letterhead and signed by S. Umu for the Permanent Secretary. The letter was addressed to the Petitioner and informed the Petitioner that at its meeting on 17 March 1999 the Major Tenders Board had approved the extension of the contract for a further period of ten years from 17 March 1999 and expiring on 17 March 2009.

[10] The learned Judge noted that this letter was not signed by the Controller of Government Supplies nor was there any evidence that S. Umu was authorized by the Controller to sign the letter. Therefore the alleged extension was not executed in accordance with Regulation 19 of the Finance (Supplies and Services) General Regulations. Regulation 19 provided that only the Controller (i.e. the person in charge of the Government Supplies Department) or some person authorized by him, can execute any contract for the supply of goods and services. The Judge noted that the 1997 agreement had been signed by the Controller.

[11] Neither of the letters was signed by the Controller. The learned Judge noted that the Petitioner was aware of the system which had to be followed. There must be an advertisement of the franchise scheme, there must be a call for tenders, a tender reply and an agreement. That was the sequence before the 1997 agreement was finalised. What the Petitioner did in 1999 in seeking an extension was inconsistent with the standard procedure and there was no extension signed or authorized by the Controller.

[12] On the issue of termination of the agreement, the Judge accepted that the terms of the agreement dated 29 August 1997 applied to the series of short extensions after August 2000. As a result the Government had terminated the Petitioner's services by letter dated 20 December 2004 on the basis that the vessel specified in the agreement failed to provide services on two consecutive occasions between 8 October and 3 December 2004.

[13] The Petitioner appealed to the Court of Appeal on the following grounds:

- “1. *That the learned Judge was wrong in law and in fact in finding that the plaintiff’s case was one requiring the application of procedure regarding fresh or new tender prescribed under the Finance (Supplies and Services) (General) Regulations, 1982 and leading to a new contract, whereas the learned Judge ought to have found that the claim was based purely on the extension of a existing contract.*
2. *That the finding of the learned Judge that the letter of the Permanent Secretary for Communications, Works and Energy of 24<sup>th</sup> March 1999 was not authorised by the Controller of Government Supplies is erroneous in fact such letter being clearly based upon the earlier memorandum of the controller to the permanent secretary of 19<sup>th</sup> March 1999 confirming extension of the plaintiff’s existing shipping contract and by which the Director of Marine also was notified.*
3. *That the finding of the learned Judge that the extension of the plaintiff’s existing shipping contract was not executed pursuant to regulation 19 is erroneous in fact and law, in that it is inconsistent with the evidence that the existing contract is expressed to be entered into between the plaintiff as the contractor and the Major Tender Board as the employer albeit executed by the Controller of Government Supplies.*
4. *That the finding of the learned Judge that the procedure prescribed by the Finance Regulations was not followed during the extension of the plaintiff’s existing shipping contract is entirely misconceived, firstly because no procedure for the extension of an existing contract is to be found in the regulations, secondly, and by implication, in the absence of such procedure in the regulations the initial express power to award the shipping contract includes power to extend the existing contract.*
5. *That the finding of the learned Judge investing the Controller of Government Supplies with conclusive contractual power regarding supply of shipping services, by implication, invalidating authorisation of the plaintiff’s existing contract by the Major Tender Board of 17<sup>th</sup> March 1999, is misconceived, further is against the weight of the evidence firstly that the plaintiff’s claim rested on extension of an existing contract, secondly that the controller, the permanent secretary and the director of marine were, at all material times, equally knowledgeable of the extension granted to the plaintiff’s existing contract.*

6. *The learned Judge's conclusion that Marine Department officers acted responsibly in not allowing the vessel to sail is inconsistent with his finding of fact that ships often take in water and that leaks in ships are to be expected, and with the evidence that the list of repairs was compiled when the vessel was actually on the slipway and further the evidence that the vessel did not have to be dry docked immediately as the result of the inspection by the marine department officials.*
7. *The learned Judge's conclusion that the plaintiff could not rely on **force majeure** was wrong in law given his acceptance of the principle that accidents to machinery can be a **force majeure** event, and given the evidence firstly that slipping of the plaintiff's vessel was unscheduled further was the direct result of the marine officer's own unilateral decision, secondly that the plaintiff had in such circumstance used all reasonable endeavours to find a substitute vessel.*
8. *The learned Judge wrongly exercised his discretion in concluding that the contract had been terminated pursuant to clause Cancellation of the Contract, paragraph 1, in that when reaching his decision the Judge placed undue reliance upon inability **per se** of the plaintiff to carry out the two voyages and thereby failed to take any or sufficient account of the evidence firstly that the plaintiff's dilemma was created by the marine officers' unilateral decision to have the plaintiff's vessel dry docked immediately, secondly reasonable effort immediately put in place by the plaintiff to find substitute vessel, thirdly the relatively unblemished delivery of contract service by the plaintiff over 7 year period, in the circumstance His Lordship ought to have applied deminimis rule in exercising his discretion."*

[14] The Court of Appeal noted that the contract dated 29 August 1997 was for three years with no provisions for extension or renewal. There was as a result no contractual right given to the Petitioner that required the Government to offer an extension or renewal.

[15] In relation to the two pieces of correspondence relied upon by the Petitioner in support of its claim that an extension of ten years had been agreed to by the Controller, the Court of Appeal noted that there was also evidence before the learned High Court Judge that contradicted the contents of that correspondence. The Court of Appeal at paragraphs 24 and 25 of its judgment referred to a written memorandum dated 26 February 1999 from the Controller to a Mr Waisale Salu who was at the time

the Assistant Director of Marine Security. The Controller advised Mr Salu that the Major Tenders Board at its meeting on 25 February 1999 had decided not to approve the extension of the existing contract for additional ten years as requested by the Honourable Assistant Minister for Communications, Works and Energy. The Court of Appeal agreed with the conclusion of the learned High Court Judge that the correspondence relied upon by the Petitioner did not establish that there had been agreement by the Government to extend the contract.

[16] The Court of Appeal concluded (para. 46) that the Petitioner had no contract for 10 years because the tender process under the regulation was not followed and because the Controller had not signed the contract. The Petitioner knew or ought to have known the procedure and could not rely on any ostensible authority which might have appeared to be given to S. Umu, to sign on behalf of the Controller. The Petitioner had chosen a different approach to obtain an extension by writing directly to the Minister's office. That was not the correct procedure in order to obtain a franchise contract or an extension or renewal of an existing contract.

[17] The Court of Appeal also agreed that the necessary dry docking of the Petitioner's vessel in October 2004, thereby preventing it from performing its contractual obligation to provide the required shipping services was not a force majeure. The failure to service the route in accordance with the terms of the agreement for a lengthy period was clearly an avoidable breach which entitled the Controller to terminate the arrangement under which the Petitioner had continued to provide a shipping service pursuant to a series of short extensions since August 2000.

[18] The Court of Appeal dismissed the appeal and ordered the Petitioner to pay the Respondent's costs fixed in the amount of \$5000.00.

[19] In its Petition, the Petitioner has set out the grounds upon which it relies for its application for special leave to appeal. They are as follows:

- (a) *The Learned Justices of the Court of Appeal erred in law in upholding the Learned Trial Judge that regulations 3, 4, 12, 18 and 19 of the Finance (Supplies and Services) Regulations, dealing with tenders for services to government departments,*

*applied to purported extension of the shipping franchise contract held by the appellant, and to the exclusion of other relevant legal considerations.*

- (b) *The Learned Justices of the Court of Appeal erred in law and in fact in upholding the Learned Trial Judge's finding that the appellant did not hold a 10 year contract, given firstly that the Finance (Supplies and Services) General Regulations do not expressly prohibit extension of contract, further in view of the following:*

  - (i) *that ordinary contract law permitting mutual extension of its term applied to the appellant's existing contract;*
  - (ii) *that the 10 year extension was made and sanctioned by the Major Tenders Board;*
  - (iii) *that likewise, approval of the 10 year extension was sanctioned by the Controller; and*
  - (iv) *that at all material times there was continuation of payment of the agreed sum by the Director of Marine.*
- (c) *The Learned Justices of the Court of Appeal erred in law in that Their Lordships, while concluding that regulations 3, 4, and 19 of the Finance (Supplies and Services) General Regulations were conclusive of the authority of the Controller over the Appellant's existing contract, nevertheless failed to address at all or adequately Appellant's submission that initial term of its contract had been duly varied by mutual extension under ordinary contract law.*
- (d) *The Learned Justices of the Court of Appeal erred in law and in fact in that, Their Lordships' decision upholding the Learned Trial Judge that Appellant's failure to service route for two trips was avoidable breach is contrary to the weight of the evidence.*
- (e) *The Learned Justice of the Court of Appeal erred in law and in fact in that, Their Lordships' decision upholding the Learned Trial Judge that dry docking of the Appellant's vessel did not constitute force majeure is contrary to the weight of the evidence.*
- (f) *The Learned Justices of the Court of Appeal erred in law and in fact in deciding that termination of the Appellant's contract was not a drastic penalty in all the circumstances, given especially that authority to determine the contract vested in the Permanent Secretary as Principal and not on the Director, further availability under the contract of less severe remedy.*



(g) *The Learned Justices of the Court of Appeal erred in law and in fact in upholding the Learned Trial Judge by placing undue weight on the evidence pertaining to the Appellant's request for assistance through the office of the Assistant Minister, thereby drawing unfair inferences and conclusions not supported by consideration of the balance of the evidence.*"

[20] At the time when the Petition was filed and the application for special leave was heard by the Court, section 8(1) of the Administration of Justice Decree 2009 provided that the Supreme Court had exclusive jurisdiction, subject to such requirements as prescribed by law, to hear and determine appeals from all final judgments of the Court of Appeal. However, under section 8(2) of the Decree, an appeal may not be brought from a final judgment of the Court of Appeal unless, in the absence of leave to appeal having been granted on a question certified by the Court of Appeal to be of significant public importance, the Supreme Court gives special leave to appeal. Pursuant to section 7(3) of the Supreme Court Act 1998 in a civil matter the Supreme Court must not grant special leave to appeal unless the case raises (a) a far-reaching question of law; (b) a matter of great general or public importance, (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[21] In our judgment the two issues that were considered and determined by the Courts below do not satisfy the requirements that need to be established for this Court to grant special leave. Whether the contract was extended by agreement between the parties was a question to be determined with particular reference to the facts and the evidence before the learned trial Judge. The Court of Appeal agreed with his findings and we find no basis for granting special leave under section 7(3) of the Supreme Court Act.

[22] Whether the contract was terminated unlawfully by the Government involved a consideration of the law relating to "*Force Majeure*" and the principles to be applied in the interpretation of clauses in a contract. The law on both matters is well settled and has been correctly applied by the Court of Appeal.

[23] The application for special leave to appeal to this Court is refused and the Petition is dismissed. The Petitioner is ordered to pay the costs of the proceedings in this Court

which we fix at \$5000.00 to the Respondents within 28 days from the date of this judgment.

**Orders:**

1. *Petition for special leave to appeal is dismissed.*
2. *The Petitioner is to pay costs of \$5000.00 to the Respondents within 28 days.*

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**HON. MR JUSTICE ANTHONY GATES  
PRESIDENT OF THE SUPREME COURT**

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**HON. MR JUSTICE WILLIAM CALANCHINI  
JUDGE OF THE SUPREME COURT**

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**HON. MADAM JUSTICE ANJALA WATI  
JUDGE OF THE SUPREME COURT**