

IN THE SUPREME COURT OF FIJI ISLANDS

AT SUVA

CIVIL PETITION NO. CBV 0006 of 2012

(Fiji Court of Appeal No. ABU0056 of 2011)

BETWEEN

SUVA CITY COUNCIL

Petitioner

AND

R B PATEL GROUP LIMITED

Respondent

Coram : The Hon Justice Saleem Marsoof, Judge of Supreme Court
The Hon Justice Sathya Hettige, Judge of Supreme Court
The Hon Justice Anjala Wati, Judge of the Supreme Court

Counsel : Mr. L. Lajendra for the Defendant-Petitioner
Mr H. Nagin for the Plaintiff-Respondent

Date of Hearing : 15 August 2013

Date of Judgment : 17 April 2014

JUDGMENT OF THE COURT

Saleem Marsoof, JA

1. The Suva City Council (hereinafter sometimes referred to as “the Petitioner”), has sought special leave to appeal from the judgment of the Court of Appeal (Calanchini JA,

Chandra JA and Muthunayagam JA) dated 28th September 2012, which had the effect of setting aside, as far as the Petitioner was concerned, the judgment of the High Court of Fiji Islands at Suva (Hettiarachi J) dated 28th September 2011, dismissing originating summons.

2. Action by way of originating summons had been commenced by R.B. Patel Group Ltd., (hereinafter referred to as "the Respondent"), which is a limited liability company that operates a chain of supermarkets in Fiji, against the Suva City Council and four other local authorities constituted under the provisions of the Local Government Act, Cap 125, being the respective licensing authorities empowered to issue business licences in terms of the Business Licensing Act, Cap 204, seeking to challenge the interpretation given to the term "supermarket" given by the said authorities in regard to the ambit of the business licence issued by the said licensing authorities.
3. Before considering the grounds urged in support of the application for special leave to appeal, it would be useful to set out in brief the factual background of the dispute at hand, and highlight the matters that were in contention between the Petitioner City Council and the Respondent before the High Court and the Court of Appeal.

Matters in Contention

4. The dispute giving rise to the proceedings in the High Court arose in the context of the Business Licensing Act No. 3 of 1976, Cap 204. Of the provisions of the Business Licensing Act, the most important for the purposes of this application are sections 4 and 5, which are reproduced below in view of their importance to this case:-

"4. *The Minister may by notification in the Gazette, designate any business as being one in respect of which a Licence is required by the provisions of this Act.*

5 (1) *No person shall engage in any business designated under the provisions of section 4 in Fiji without a licence issued by a licensing authority in respect of each place in which such business is carried on or, in case of a hawker or other person carrying on business from or at no fixed address in Fiji, in respect of such businesses.*

(2) Any person who acts in contravention of the provisions of subsection (1) shall be guilty of an offence."

5. Fees applicable within the limits of the Petitioner Suva City Council with respect to the activities designated as business requiring a licence under the Business Licensing Act specified in notifications published in the Gazette from time to time as required by section 4 of the Act were specified in the schedule to the Suva (Business Licence Fees) By-Laws, 1995 made by the Suva City Council under section 17(2) of the Business Licensing Act. It is noteworthy that By-law 2 thereof provides that-

"Every person who, within the boundaries of the City of Suva engages in any of the businesses set out in the Schedule, whether jointly or otherwise, shall take out a business licence and pay a business licence fee at the rate per year set out in such Schedule." (emphasis added)

6. The Petitioner City Council had granted several licences to the Respondent acting in terms of the Suva (Business Licence Fees) By-Laws, 1995, for the years 2007, 2008 and 2009, to carry on in its supermarket situated at No. 148 Waimanu Road, within the limits of the Suva City Council, the designated business of "Shop, Large Supermarket with Liquor Licence". Apart from this licence, several other licences had also been granted to the Respondent with respect to other activities designated by the Minister under Section 4 of the Act as businesses requiring licence, namely "Agent Gas Cooking" "Butcher (only for the sale of frozen pre-packed meat)" and "Refreshment Bar".

7. A dispute arose towards the end of 2009, when further to a review of its business licences undertaken by the Respondent, its Solicitors, Sherani & Co., acting on the instructions of the Respondent, addressed a letter dated 16th December 2009 to the Petitioner Suva City Council, in which it was proposed that as the supermarket was licensed for "Shop, Large Supermarket with Liquor Licence", it may be allowed to sell meat, cooking gas, sweets and beverages, without levying additional fees as otherwise the Petitioner will defeat the whole purpose of a supermarket where all the aforesaid items are expected to be sold.

8. The Petitioner responded with its letter dated 3rd February 2010, in which it drew attention to the Suva (Business Licence Fees) By-Laws, 1995, and insisted that the proposal to allow the Respondent to carry out its business without obtaining its business licence is “unreasonable and unfair”. In its response, the Petitioner also pointed out that the failure to comply with entail penal consequences.
9. The Respondent paid the fees claimed by the Petitioner Council “without prejudice” to its rights and obtained the licences for 2010, but commenced proceedings against the Council in the High Court by its originating summons dated 10th June 2010, by which it had primarily sought a declaration with respect to the scope of its licence for “Shop, Large Supermarket with Liquor Licence” and orders restraining the said local authorities from demanding certain additional licence fees unlawfully.

Originating Summons

10. In the originating summons dated 10th June 2010 filed by it against the Petitioner City Council and the other licensing authorities cited jointly as Defendants thereto, the Respondent had sought in particular, the following relief:-

- (i) *An order or a declaration that the Business License Fees payable by the plaintiff for its supermarket business to the defendants pursuant to the defendants' respective Business License Fees By-Laws shall be for 'Shop, Large supermarket with Liquor License' only and no other Business License Fees in respect of its supermarkets situated within the Defendant's respective boundaries;*
- (ii) *An order that the defendants by themselves, their respective servants and/or agents be permanently restrained from demanding payment of other business license fees from the plaintiff apart from business license for shop, large supermarket with liquor license, and not to interfere in any manner whatsoever in the plaintiff's day to day running of its supermarkets situated within the defendant's respective boundaries; and*
- (iii) *An order that the defendants do pay costs on indemnity basis.*

11. In paragraph 21 of the affidavit in support dated 16th June 2010, filed on behalf of the Respondent by its Chief Operating Officer, Deepak Rathod, he stated that the Petitioner City Council and the other defendants cited in the originating summons “are wrongfully attempting to levy licence fees on certain types of products...which customers reasonably expect to be sold at any supermarket, for example frozen and pre-packed meats, clothes, toys, refreshments, fast food and gas for cooking.” In paragraph 22 of the said affidavit, he clarified that the Respondent “accepts that it must pay for licence fees to operate its supermarkets within the Defendant’s municipalities but denies that there is any requirement to pay multiple licence fees in respect of each and every type of products the Plaintiff sells within its supermarkets.”

12. While contesting affidavits had been filed by all the licensing authorities cited as Defendants to the origination summons, in view of the position that only the Petitioner City Council has applied for special leave to appeal against the decision of the Court of Appeal, it would suffice to refer to the affidavit dated 17th August 2010 by Jeremy Chang, the Acting Director Finance of the Petitioner Suva City Council. In paragraph 10 of the said affidavit, he has stated that the Respondent was not only in the business of Shop, Large Supermarket with Liquor Licence, but was also conducting several other designated businesses, namely Agent, Gas Cooking, Butcher (only for frozen pre-packed meat) and Refreshment Bar.” He also emphasised that except for 2010, the Respondent “always paid their respective business licence fees since they have been carrying out these businesses in the Defendants municipality”.

13. The matter proceeded to determination in the High Court on the aforesaid affidavit filed by Deepak Rathod dated 16th June 2010 on behalf of the Respondent, the several affidavits in reply filed on behalf of the relevant licensing authorities, amongst which was the affidavit in reply sworn by Jeremy Chang, the Acting Director Finance of the Petitioner Suva City Council dated 17th August 2010, and the affidavit in reply of the Respondent sworn by Deepak Rathod dated 12th October 2010. The High Court also took into consideration the written submissions filed by the parties before it. It was submitted on behalf of the Respondents that since the Petitioner City Council had issued a business licence to the Respondent to engaged in the designated business of “Shop,

Large Supermarket with Liquor Licence” at its place of business specified in the licence, it is wrong to charge and demand business licence fees for other designated businesses carried on at such place, which fall within the ambit of the usual business of “supermarket”. The Petitioner City Council had contended in its written submissions that the language of the Business Licensing Act was clear and unambiguous, and that it required all persons engaged in any designated business.

The Decision of the High Court

14. The learned High Court Judge, considered the aforesaid evidence in the light of the written submissions filed by the parties, which also included submissions in regard to the various canons of interpretation of statutes and delegated legislation generally used for the interpretation of legislation, and after analysing section 5 of the Act, it observed at paragraph 47 of its judgment that the meaning of section 5 “is plain and obvious, and does not evince or produce any ambiguity or inconsistency.”

15. The learned High Court Judge concluded as follows in paragraph 70 of his judgment dated 28th September 2011 that-

“.....it is plain and obvious that according to the Business Licensing Act and By-Laws each designated business has to be issued a separate licence. It is immaterial whether the businesses are carried on in the same premises or not. What is important and required is that each of the designated businesses should have been issued separate licences.”

16. The High Court, accordingly dismissed the originating summons taken out by the Respondent against the Petitioner City Council and other defendants on the basis that it was “unfounded and baseless.” (paragraph 73 of the judgment)

The Decision of the Court of Appeal

17. When the matter came up on appeal before the Court of Appeal of Fiji at Suva, that Court came to a different conclusion. In its judgment pronounced on 28th September 2009, Suresh Chandra JA (with whom Calanchini JA, and Muthunayagam JA concurred) examined the schedule of the designated businesses in the By-Laws of the several defendants, as well as certain judicial decisions emanating from Fiji and elsewhere, and concluded in paragraphs 33 of his judgment that some meaning should be attached to the term "supermarket" when the licensing authorities charge a licence fee for such an establishment and more so "when they charge a higher fee than for other designated businesses."

18. In paragraphs 34 to 36 of his judgment, Suresh Chandra JA reasoned as follows:-

34. The By-Laws of a Town Council come within the scope of subordinate or delegated legislation where such Councils are authorized to formulate laws to be operative within their Council limits. It is in terms of such authorization that the By-Laws relating to Designated Business too have been formulated. It is an accepted principle of law that such by-laws should be certain and be reasonable. The judicial authorities starting with the introduction of the Wednesbury Principle (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223) have been adopted in many jurisdictions in dealing with such delegated legislation. The Courts have gone to the extent of striking down by-laws on such basis as had occurred in Bugg v D.P.P. [1993] 2 All ER 815.

35. When applying those principles to the present situation, it cannot be strictly said that the by-laws formulated by the Councils regarding Designated Businesses are unreasonable. However in the operation of them a certain amount of certainty should attach to them. If vague or wide terms are used, it should be possible to circumscribe their limits. It is my view that though the by laws relating to designated businesses have been properly laid down, in their operation they should be certain and be able to lay down their scope.

36. I am of the view that the 1st, 2nd, 3rd and 5th Defendants Councils who have charged a licence fee from the Plaintiff for "Shop: large Supermarket with liquor" should not

charge a separate fee for the other activities which have been categorized by the Councils as Designated Businesses among the activities of the Plaintiff's Supermarket.....”

19. It is on this basis that the Court of Appeal decided to set aside, as far as the Petitioner City Council and the 2nd, 3rd and 5th Defendants were concerned, the decision of the High Court, and allow their appeal. The Court also made a unanimous order at paragraph 40 (d) of the judgment to the effect that the Respondent is liable to pay as Business Licence Fee only the fee for “Shop, Large Supermarket with Liquor” in respect of the Petitioner and the 2nd, 3rd and 5th Defendants. As far as the 4th Defendant, Nausori Town Council was concerned, the Court of Appeal in paragraph 24 of its judgment made a finding that there is no designated in its By-laws as “Shop, Large Supermarket with Liquor” and since the Respondent has not claimed that it took a licence of that nature, its appeal should stand dismissed. The Court, in its benevolence, declined to make any order for costs against the Petitioner or the other Defendants.

Special Leave to Appeal to Supreme Court

20. The Petitioner, Suva City Council, by paragraph 2 of its petition dated 9th November 2012, has applied for special leave to appeal against the judgment of the Court of Appeal dated 28th September 2009 on the ground that the Court of Appeal-

- (a) *erred in law in holding that section 5 of the Business Licensing Act, Cap 204, applies only in respect of issue of licence, to the place of business, and not the type of business activity carried on;*
- (b) *erred in law in holding that Councils who have charged a licence fees from the Respondent for “Shop, Large Supermarket with liquor Licence” should not charge a separate fee for the other activities which have been categorised by the Councils as Designated Businesses among the activities of the Respondent's Supermarket ; and*
- (c) *erred in law in not holding that a Council is entitled to charge licence fee for every designated business activity under the provisions of section 4 of the Business Licensing Act. Cap 204.*

21. In terms of Section 8(1) of the Administration of Justice Decree No. 9 of 2009, the Supreme Court has 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, it is trite law that in a civil case such as this, where a Petitioner has not obtained the leave of the Court of Appeal to lodge an appeal to the Supreme Court, the Supreme Court may grant special leave to appeal as provided in Section 8(2) (b) of the said Decree only if he satisfies one of the several criteria set out in Section 7(3) of the Supreme Court Act No. 14 of 1998.

22. Section 7(3) of the Supreme Court Act of 1998 provides that –

In relation to a civil matter (including a matter involving a constitutional question), 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.*

23. The provisions of Section 7(3) of the Supreme Court Act quoted above, echo the sentiments expressed by Lord Macnaghten in *Daily Telegraph Newspaper Company Limited v McLaughlin* [1904] AC 776, which was the first case involving an application for special leave to appeal from a decision of the High Court of Australia to be decided by the Privy Council. Lord Macnaghten, at page 779 of his judgment, after observing that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of *Prince v Gagnon* [1882 – 83] 8 AC 103, in which it was stated that appeals would not be admitted,

“save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.”

24. These criteria have been examined and applied by the Supreme Court of Fiji in decisions such as *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Dr.*

Ganesh Chand v Fiji Times Ltd., (31st March 2011) and *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.*, (6th April 2011), and it is clear from these decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.

25. Learned Counsel for the Respondent has invited the attention of Court to the aforesaid decisions in resisting the application for special leave to appeal. He has also relied on the decision of this Court in *Dilip and Jyotishna Kumar v National Insurance Company of Fiji Ltd.*, CBV 009 of 2008 (9th May 2012), in which this Court had expressed surprise that the Court of Appeal had granted leave to appeal despite the matter being "barely arguable", but in my view what we have here is a question of interpretation of statute and subordinate or delegated legislation on which the Court of Appeal had disagreed with the view taken by the High Court, and the grounds raised for seeking special leave by the Petitioner cannot be brushed aside as being barely arguable.
26. I am satisfied that the three grounds urged by the Petitioner which are set out in paragraph 21 of this judgment are all far reaching questions of law of great general or public importance. However, in my view, for the purpose of this appeal, the interests of justice will be sufficiently met if special leave to appeal is granted on the following two questions, of which question (b) may be slightly modified in view of the fact that the other licensing authorities which may have been affected by the decision of the Court of Appeal, have not lodged any application for special leave to appeal against the said decision:-

(a) *Did the Court of Appeal err in law in holding that section 5 of the Business Licensing Act, Cap 204, applies only in respect of issue of licence to the place of business and not the type of business activity carried on?*

- (b) *Did the Court of Appeal err in law in holding that the Petitioner Suva City Council, which charged a licence fee from the Respondent for "Shop, Large Supermarket with liquor Licence" should not charge a separate fee for the other activities which have been categorised by the Councils as designated businesses among the activities of the Respondent's Supermarket?*

Interpretation of Section 5 of Business Licensing Act

27. Having granted special leave to appeal, it is now convenient to consider question (a) on which special leave to appeal was granted, namely, whether the Court of Appeal has erred in law in holding that section 5 of the Business Licensing Act, Cap 204, applies only in respect of issue of licence, to the place of business, and not the type of business activity carried on.

28. It is manifest that the words "*only in respect of issue of licence*" used in the formulation of ground (a) for seeking special leave to appeal set out in paragraph 2 of the Petitioner's petition to this Court dated 28th September 2009 has been prompted by the following passage of the impugned judgment of the Court of Appeal:-

"22.The words in Section 5 "in any business designated under the provisions of section 4" have to be read with the remaining portion of the section namely "in Fiji without a licence issued by a licensing authority in respect of each place in which such business is carried on" and cannot be dissociated from that portion. As I have stated in para.13 above, the issue of a licence applies to the place of business."(emphasis added)

29. The Court of Appeal made this observation when it was considering the submissions made by the contending parties before it on the interpretation of sections 4 and 5 of the Business Licensing Act, in the context that the High Court had taken a contrary view in making its order to dismiss the originating summons taken by the Respondent. In its judgment dated 28th September 2011 the High Court expressed the view that there is only one meaning that can be seen in Section 5 of the Business Licensing Act, namely that "whoever intends to carry on any of the businesses designated under the provisions

of section 4 of the Business Licensing Act, a licence has to be obtained for each and every business irrespective of *the place* where the business is carried on.”

30. The High Court was there dealing with the submission of the Respondent that since it is operating a large supermarket, it must “only be liable to pay business licence fees for running a large supermarket in each place of business notwithstanding the fact that it also sells pre-packed meat, is agent for Fiji Gas and Bluegas, agent for Telecom Fiji, Vodafone and Digicel in the sale of telecards or recharge cards, or in any event carries any other designated businesses under the respective Defendants’ Business Licensing By-laws”(paragraph 2.2 of Respondent’s written submissions dated 11th November 2010 filed in the High Court).
31. In this context, the High Court considered the various canons of interpretation generally used for the interpretation of legislation, and having found no ambiguity or uncertainty in regard to the meaning of section 5 of the Act, it observed as follows:-

“47. When section 5 of the Business Licensing Act is scrutinized its literal meaning is plain and obvious, and does not evince or produce any ambiguity or inconsistency. It very clearly states that if a person engages in any business designated under the provisions of section 4, he must have a business licence. Further, it evinces that the licence so obtained is valid for a particular designated business to be carried on a particular place. It never suggests that several designated businesses can be carried on in the same premises under one licence.”(emphasis added)

32. The Court of Appeal did not appear to have any difficulty with the view adopted by the High Court except for the words in the above quoted passage that are italicized by me. This is clear from the following passages of the Judgment of Chandra JA:-

“13. According to S.5 a person who wishes to engage in a business designated under S.4 has to obtain from the Licensing Authority a license to engage in such business. The Section caters to two types of situations, firstly, where

the business is carried on in a designated place, when it stated "in respect of each place in which such business is carried on" and secondly to a situation where there is no fixed place of business, such as in the case of a hawker or other person who has no fixed place of business. In both situations to engage in business, a license has to be obtained.

14. *From the above provisions it would appear that if an entrepreneur wishes to engage in the business of a Supermarket, and call it as such, would come under the category of Designated Business of "Shop, Large Supermarket without Liquor License" or "Shop: large Supermarket with Liquor License". The venture in the present case falls under the second category, namely "Shop: large Supermarket with Liquor License".*

15. *There is no dispute that an entrepreneur who wishes to have the business of a Supermarket has to obtain and pay a licence fee. But the question at issue is as to what "activities" of trade or business he could carry out in such a Supermarket with or without paying a further licence fee. Should he pay a license fee for every activity in the nature of a business that is carried on in such a Supermarket or is he entitled to carry any such activity as he has obtained a license to carry on in a Supermarket under the designated category of "Shop: large Supermarket with liquor licence". (emphasis added)"*

33. This is the context in which the provisions of the Business Licensing Act, No. 3 of 1976, Cap. 204, come up for interpretation in this appeal. Before considering in some detail, the relevant provisions of the Act, it is worth noting that the High Court looked into the various canons of interpretation which would assist a court where the legislation in question is ambiguous or unclear. In paragraph 47 of its judgment of the High Court (quoted in paragraph 30 of this judgment) adopted a literal interpretation and found no ambiguity in section 5 of the Business Licensing Act. The Court of Appeal also took a literal approach, and in arriving at its decision, examined at some depth the ordinary meaning of the word "supermarket" in the light of dictionary definitions and some case law from several jurisdictions.

34. It is necessary for the purposes of this appeal to look closely at the provisions of the Business Licensing Act that has yielded different results in the High Court and the Court

of Appeal. It is clear from the preamble to the Business Licensing Act that it was enacted with the objective of repealing the Licence Ordinance then in force, and to replace it with a system of licensing instituted by the said Act. The Act constituted certain licensing authorities, provided for the designation of businesses that may be regulated by the Act by notification in the Gazette, made provisions for the maintenance of a Register of Licences, the issue, renewal, transfer, custody and production of licences, prohibited any person engaging in any designated business without a licence to engage in such business, made it compulsory to exhibit in a conspicuous part of the premises in which a business licensed under the provisions of the Act is carried on, a notice giving the name of the licensee, provided for a fund to receive all revenue from licence fees to be channelled into the consolidated fund, other than the five per centum thereof earmarked for the upkeep of the Fiji Visitors Bureau, provided for the making of Regulations and by-laws, and prescribed penalties for offences under the Act.

35. An examination of the relevant provisions of the Business Licensing Act would reveal that it was intended to create a system which is in essence personal to the person who holds it (sections 5, 9, 15 and 18), and is not generally transferable (sections 13 and 14), the term "person" having been used in the Act in a broad sense to include "a partnership and a body of persons, corporate or unincorporate" (Section 2). Section 5 of the Act is best understood in the light of the personal character of the licence to do business, and the words "in respect of each place in which such business is carried on" used in section 5(1) of the Act simply signify that in the event of any person who is engaged in any designated business wishes to carry on his business in more than on one place, he or it has to obtain a separate licence with respect to each such place in which he carries on his business. Section 5(1) also distinguishes between a person carrying on business from or at one or more place, a business person who has no fixed place of business, relaxing in the latter case the requirement that the licence must be with respect of each place where such business is carried on, to permit such a person to carry on his or its business with one licence without any reference therein to a place of business.

36. The contention of the Petitioner before the High Court as well as the Court of Appeal, as reflected in paragraph 17 of the judgment of the Court of Appeal, was that if

a person is carrying on different activities of trade within a supermarket which fall within other categories of designated businesses as well, such person "should obtain licences for such activities too in addition to the licence for the Supermarket." While the High Court upheld this submission, the Court of Appeal has rejected it. The High Court did not go into the question as to whether such other activities carried on in a supermarket could reasonably fall into the usual business activity associated with a supermarket, but the Court of Appeal went into this question at length in the light of judicial decisions from Fiji and elsewhere, and concluded that the activities of the Respondent fell within the ambit of the licence of the Respondent, which was for the designated business of "Shop: large Supermarket with Liquor License".

37. It is noteworthy that as far as the meaning of section 5 of the Business Licensing Act is concerned, the words used in the section stand loud and clear, and is devoid of any ambiguity. Whether one adopts a purely literal approach, a more purposive approach, or even the golden rule of statutory construction, it is clear that the section is capable of only one meaning, and that is that the licence issued under the Act is personal in character, except that in the event that the licence holder engages in his business from one or more place of business, a separate licence has to be obtained with respect to each such place of business. This was how the High Court interpreted the provision, and in our view this was how the Court of Appeal saw it as well, although its reference to place of business in paragraphs 13 and 22 of its judgment has been miss-construed by the Petitioner to mean that section 5 of the Business Licensing Act, applies only in respect of issue of licence, to the place of business, and not the type of business activity carried on.
38. What the Court of Appeal endeavoured in its judgment was to highlight the two factors that come into play when a person who carries on business in or at one or more place of business applies for licence. The two factors are, (1) the nature of the business activity involved, and (2) the place, if any, where the business is intended to be carried on. It is clear from the judgment of the Court of Appeal that it was conscious of the fact that any licence to be issued to such a person under the Act should have regard to both the nature of the business, assuming that it is a designated business, and the intended place or places of business.

39. In paragraphs 13 and 22 of its judgment, the Court of Appeal stressed that except in the case of a hawker or other person with no fixed place of business, any licence issued under the Act must relate to a designated business to be conducted in one, and only one, place of business. It is equally clear that the Court of Appeal did not construe section 5 of the Act to mean that several designated businesses can be carried on in the same premises under one licence, nor was that the contention of the Respondent before court.
40. In paragraph 22 of the impugned judgment of the Court of Appeal, the relevant part of which has been quoted in paragraphs 18 and 29 of this judgment, it has made reference to paragraph 13, quoted below, wherein it has clearly stated that a business licence is issued to a person and not for a place of business, but where a person engages in a designated activity in a particular place, the licence issued to the particular person will be confined to such place of business.

“13. According to S.5 a person who wishes to engage in a business designated under S.4 has to obtain from the Licensing Authority a license to engage in such business. The Section caters to two types of situations, firstly where the business is carried on in a designated place, when it stated "in respect of each place in which such business is carried on" and secondly, to a situation where there is no fixed place of business, such as in the case of a hawker or other person who has no fixed place of business. In both situations to engage in business, a license has to be obtained.” (emphasis added)

41. For these reasons, I have no difficulty in holding that the Court of Appeal did not err in law in its impugned judgment in regard to its interpretation of section 5 of the Business Licensing Act, Cap 204, as it clearly did not decide that the section applies in regard to the issue of licence to the place of business in or at which any person does business rather than to the type of business activity any person might carry on.
42. Accordingly, I answer the first question on which leave was granted in the negative, and against the Petitioner,

Activities of a Supermarket

43. The other question on which leave was granted in this case, which in my view goes to the heart of the dispute between the Petitioner and the Respondent, is whether the Court of Appeal erred in law in holding that the Petitioner Suva City Council, which has charged a licence fees from the Respondent for "Shop, Large Supermarket with liquor Licence", should not charge a separate fee for the other activities which have been categorized by the Councils as designated business among the usual activities of a "supermarket".
44. In the course of his submissions before this Court, Mr. Nagin has relied heavily on the principle that in interpreting the word "supermarket" or any other word or phrase used in any subordinate or delegated legislation, the word or phrase has to be given its ordinary and natural meaning, and that when interpreted accordingly, the business of a "supermarket" would include the retail sale of items such as cooking gas, frozen meat and even refreshments. He has submitted that the licence fee for a "supermarket" is higher than the fee prescribed for any other category of "shop", and the objective of the Business Licensing Act is to maintain some degree of general oversight over business activities carried on within the limits of a local authority, while collecting some revenue as licence fees.
45. Mr. Lajendra, on the other hand, has stressed the regulatory considerations involved in the issue of business licences, and in particular, the requirement that for "Agent Gas Cooking", the National Fire Authority has to give its certification after inspection and examination of fire safety measures in place at the place of business, and for Butcher (frozen meat) the Central Board of Health must issue a health permit before a business licence is issued. He has contended forcefully that the fees specified in the by-laws for issue of licenses have been fixed considering the expenses that have to be incurred in verifying the suitability of issuing such certification and permits in the first instance as well as for its continued supervision, and submitted that accordingly, the Business Licensing Act as well as the regulations and by-laws enacted there under are regulatory in character and not pure and simple revenue measures.

46. I prefer to deal first with the submissions made by Mr. Lajendra, which I believe, relate to the regulatory measures which have to be complied with before making an application for a licence under the Business Licensing Act. For the purpose of considering the submissions of Mr. Lajendra, it would be necessary to look at some of the laws and regulations that exist in Fiji that have created various specialized bodies to regulate safety measures for the protection of the public who patronise supermarkets. For instance, the National Fire Authority established by the National Fire Safety Act of 1994 as subsequently amended by the Fiji Fire Service (Amendment) Act of 1997 and the National Fire Safety (Amendment) Decree of 2009, which incidentally repealed and replaced the Suva Fire Brigade Act (Cap. 129), conferred various powers on the National Fire Authority, and in particular, the Structural Fire Safety Department of the Authority “to inspect and certify premises, whether residential, commercial, industrial or otherwise” in relation to the safety and measures for the implementation of fire safety, including compliance with the National Building Code, other written laws and regulations (section 11(k) of the Act read with section 11A(2)(i) thereof). While the National Fire Authority is a regulatory body with extensive powers, the fees charged by it for its services are nominal.

47. Similarly, the activities of importing, transporting, slaughtering, packing and selling of meat products, are also regulated by specialized laws and regulations. Apart from the Customs Act of 1986 and the Customs Tariff Act of 1986, legislation such as the Animals Importation Act (Chapter 159) and the Food Safety Act of 2003 impact on such activities. Although for the purpose of this judgment, it is not necessary to go into the details of these regulatory measures, it is significant to note that the Food Safety Regulations, 2009, in its Twenty-Sixth Schedule, lays down various fees for the issue of a Food Business Operations Health Licence, which is FJD 800 for an Abattoir, FJD 800 for Meat and Meat Product Processing, FJD 200 for a Butcher Shop, FJD 400 for Retail and Catering (eg Retailer with Fast Food Counter) and FJD 200 for any unspecified category.

48. It manifest that the expenses involved in obtaining the necessary certification of compliance from the National Fire Authority and the requisite licence from the Central Board of Health are recoverable under the relevant legislation and subordinate legislation from the applicant for such certification or licence, and not from the licensing authority constituted under the Business Licensing Act, which in this instance is the Suva City Council. In my considered view, the submission made by Mr. Lajendra that the fees specified in the Suva (Business Licence Fees) By-laws 1995 have been computed to accommodate the expenses that have to be incurred in verifying the suitability of the specified place of business in regard to fire safety and food safety measures, is therefore devoid of merit.
49. I must hasten to add that I have examined the provisions of the Business Licensing Act carefully, and my examination did not disclose regulatory objectives in the Act or in the Suva (Business Licence Fees) By-laws 1995. In my opinion, the legislative scheme put in place by the Business Licensing Act is intended, to provide a mechanism for the licensing of, on payment of a fee prescribed by the respective licensing authority, activities which are designated by the Minister by notification as business that require a licence, and for the maintenance of a Register of Licences and a Register of Business Names. The fees collected by the licensing authorities, are required by section 16 of the Act to flow into the consolidated fund after being deposited into the fund of the relevant licensing authority, except for five percent of such fees that is payable to the Chief Accountant "for the maintenance of the Fiji Visitors Bureau".
50. Nor does the Business Licensing Act provide for any role to be played by the licensing authority in the regulation of the activities falling within its ambit, that function being assigned to more specialized agencies such as the National Fire Authority and the Central Board of Health, and there is no provision in the Act for the utilization of the licence fees collected by the licensing authorities to meet the cost of any of their regulatory activities. I am therefore firmly of the opinion that the Business Licensing Act bears a revenue rather than a regulatory character, and that the Suva (Business Licence Fees) By-Laws, 1995 as well as the relevant By-laws made by the other City Councils are purely revenue measures.

51. In the context of the Suva (Business Licence Fees) By-Laws, 1995, it may be noted at the outset that considering the large variety of activities which would require a licence under the Act, the notification and the relevant by-law, which range from those of abattoir, accountant, auditor, agency (in specialized fields such as banking, employment, advertising, betting, customs, insurance, shipping, tax and travel, agent - commission etc. to table - billiard and pool (including other games of amusement), theatre, valuer and visiting professional (with part-time office or surgery), it is manifest that no local authority or any other specialised authority or board would be competent to have any regulatory or supervisory oversight over such wide-ranging activities, and that was clearly not the objective of the Business Licensing Act or the subsidiary legislation made there under.

52. The issue that arises in this case was previously considered by the Supreme Court of Sri Lanka in *The Manager, Bank Of Ceylon, Hatton v. The Secretary, Hatton Dickoya Urban Council* (2005) 3 Sri LR 1 (7 December 2005) (Bandaranayake J, Amaratunga J and Marsoof J) (hereinafter, *Bank of Ceylon*) albeit in a slightly different but relevant context. The question in *Bank of Ceylon* was whether the Petitioner Bank was liable to pay a separate tax under the Urban Councils Ordinance for conducting the business of pawn-brokering which according to the Hatton Dikoya Urban Council was separate and distinct from the activity of banking for which the Petitioner Bank had already paid a license fee for banking. In determining the issue, the Court observed:

*“On a careful consideration of the issue before us, it is clear that the petitioner Bank is carrying on banking business, which includes money lending as well as pawn-brokering. Both money lending and pawn-brokering are part and parcel of the banking business of the petitioner Bank and pawn-brokering cannot be separated from the money lending business of the petitioner Bank. Therefore the respondent could levy a tax on the basis of the issuance of business licence for the banking businesses of the petitioner Bank which in turn would include money lending as well as pawn-brokering carried out by them.” (Bank of Ceylon, *ibid*, 8-9).*

53. For these reasons, I am inclined to agree with the submission made by Mr. Nagin before this Court that the objective of the Business Licensing Act is to maintain some degree of general oversight over business activities carried on within the limits of a local authority, while collecting some revenue for the State through the issue of business licences through the relevant licensing authorities. The licence fees prescribed by the Suva (Business Licence Fees) By-Laws, 1995 are payable in addition to the more specialised licences that may become necessary to obtain under other relevant laws and regulations which focus on regulatory measures. Thus, a person who wishes to function as a Butcher (only for the sale of frozen pre-packed meat) should, as noted in paragraph 47 of this judgment, pay FJD 200 for the Butcher Shop Licence under the Food Safety Regulations, 2009 in addition to the FJD 100 payable for the Business Licence under Suva (Business Licence Fees) By-Laws, 1995, unless the relevant licence fees have been varied by subsequent regulation or by-law.
54. It is now convenient to return to the main question on which special leave to appeal has been granted in this case, namely, as to whether the Court of Appeal had erred in law in holding that the Petitioner Suva City Council, which has charged a licence fees from the Respondent for "Shop, Large Supermarket with liquor Licence", should not charge a separate fee for the other activities which have been categorized by the Councils as designated business among the usual activities of a "supermarket". More specifically, the question is whether the Respondent, who had obtained a licence for "Shop, Large Supermarket with liquor Licence" issued under the Business Licensing Act by paying FJD 250 to the Petitioner Council, should have also obtained licences for the designated businesses of Agent (Gas Cooking), Butcher (only for sale of frozen pre-packed meat) and Refreshment Bar, after paying the licence fee of FJD 50, 100 and 100 respectively as was then for those licences under the Suva (Business Licence Fees) By-Laws, 1995?
55. It has been strenuously contended by Mr. Nagin, who appeared for the Respondent that the Petitioner Council was not entitled to charge a separate fee for the agency in gas cooking, for the sale of frozen pre-packed meat and for the fast food counter run by the supermarket in question as these activities are part of the usual activities of a

“supermarket”, while Mr. Lajendra has argued with equal force that all designated businesses require a separate licence.

56. In dealing with this question, it is necessary to note at the outset that the dispute revolves around the meaning of the term “supermarket”, which has not been defined in the Business Licensing Act, the notification made by the Minister under section 4 of the said Act or in the relevant Suva (Business Licence Fees) By-Laws, 1995. However, the word “business” has been defined in section 2 of the Business Licensing Act, according to which “business” means “any form of trade, commerce, craftsmanship, calling or other activity carried on for the purpose of gain.” This is a very wide definition, but it is not all such activity that would require a licence under the Act, as the Act itself by section 4 confers the power on the Minister to “designate any business as being one in respect of which a licence is required by the provisions of the Act” by notification published in the Gazette.
57. While after the enactment of the Business Licensing Act, notifications have been made from time to time and published in the Gazette, as required by section 4 of the said Act designating the activities that required a business licence, at all material times, it was Legal Notice No. 78 of 1985 titled “Designation of Business Requiring Notice”, found at page 87 of the Supreme Court Record, which was in force. This notification clearly shows that “Shop, Large Supermarket with Liquor Licence” was one such designated business, and so were “Agent, Gas (Cooking)”, “Butcher (only for sale of frozen pre-packed meat)”, and “Refreshment Bar”. These and other designations found in the said notification, have been followed in preparing the Suva (Business Licence Fees) By-laws 1995, which specify the applicable licence fee for each such designated business. Unfortunately, there is no definition of the term “supermarket” in the Act or in any of the regulations or by-laws made in terms of the Act.
58. The Court of Appeal, which was obviously not helped by the absence of a definition of the term “supermarket” in the Act or any of its subsidiary legislation, was also troubled by the vague and overlapping nature of the list of designated businesses listed in Legal

Notice No. 78 of 1985 and the Suva (Business Licence Fees) By-laws 1995, and observed as follows:-

"28. It is seen that in the above list there are a few designated businesses which appear to be very wide and vague, such as "Shop Domestic Appliances", "Shop Green Grocer", "Shop Small Retailer", "Shop Household Appliances", "Wholesale and Retail", "Shop Wholesale", "Shop Wholesale and Retail"."

59. In fact the list is much longer and a fuller list of various categories of designated businesses, for example, that are essentially "shops" appear in the Notification of the Minister and in the By-laws of the Councils. The list ranges from "S20. Shop, Agriculture, Industrial and Consumer Chemical Sales" to "S49. Shop, Wholesale and Retail", and the main activity of the Respondent which is "S32. Shop, Large Supermarket with Liquor Licence" is just one of them that attracts the highest fee under the "Shop" category. All that is clear from a perusal of the list is that a "supermarket" is a species of "shop", but there is no guidance in the Business Licensing Act or regulations or by-laws made there under as to what constitutes a "supermarket" or what are the activities a person having a licence to carry on the business of "supermarket" can engage in.

60. Dealing with the contention of the Petitioner City Council before the Court of Appeal that although the Respondent has obtained a license for "Shop, large supermarket with liquor license" it has to pay additionally for the various trading activities carried on in its supermarket which are covered by other designated businesses, such as "Agent Gas Cooking" "Butcher (only for the sale of frozen pre-packed meat)" and "Refreshment Bar", the Court of Appeal observed at paragraph 30 of its impugned judgment that-

"30. The activities of trade as set out above are similar to activities in a Supermarket as stated in the Judgment of Kermode J in R v Central Divisional Liquor Tribunal Ex parte Hari Ram Maharaj (S.C. Judicial Review No.19 of 1984); "A reasonable requirement of anyone living in the neighbourhood of a supermarket is that a shopper should be able to purchase groceries and beverages and other household requirements in the one store".

The Court of Appeal also referred to the decisions in *Fine Fare Ltd v Aberdare Urban District Council* 1965 1 All E.R. 679 and *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd and Another* (2007) ZWSC 109, which support its decision.

61. It therefore becomes necessary to consider the question of interpretation in the light of the fact that what is involved in this appeal is primarily the construction of subsidiary or delegated legislation, as opposed to primary legislation. In this context, it is necessary to mention that just as statutes gradually supplanted the common law during the twentieth century, regulations, by-laws, directions and other subordinate legislation made by administrative agencies have now eclipsed statutes as sources of law. The question then is whether the canons of interpretation developed by the courts for the interpretation of statutes largely in the last century, would apply in the same vein to the interpretation of such subordinate legislation, except that additionally, delegated legislation may, by their very nature give rise to questions of *vires*, both procedural and substantive, as well as consistency with the primary legislation in terms of which they were made, which questions do not usually arise in the case of primary legislation. In some instances, the complexity of such delegated legislation may also require some variations in the application of the said rules of interpretation.
62. Generally speaking, there are two schools of thought in relation to the interpretation of statutes, the literal and the purposive. The literal approach, which was defined and explained by Higgins J. in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-2, seeks the intention of the legislature through an examination of the language in its "ordinary and natural sense ... even if we think the result to be inconvenient or impolitic or improbable". This method was also preferred by McHugh J. in *Hepples v FCT* (1991-1992) 173 CLR 492, 535-6, even if it produces "anomalies or inconveniences". Courts have stressed that they "cannot depart from the literal meaning of words merely because the result may ... seem unjust" (*CPH Property Pty Ltd & Ors v FC of T* 98 ATC 4983, 4996 *per* Hill J.) or even "lead to a manifest absurdity" (*R v The Judge of the City of London Court* [1892] 1 QB 273, 290 *per* Lord Esher).

63. An alternative method of interpretation applied by the courts is known as the purposive approach, which is an approach to statutory interpretation in which the courts interpret legislation in the light of the purpose for which it was enacted and which promotes the purpose of the legislation. This approach recognizes that “statutory interpretation cannot be founded on the wording of the legislation alone”(per Lacobucci J in *Re Rizzio & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at paragraph 21) and permits courts to utilize extraneous pre-enactment material such as cabinet memoranda, draft bills, Parliamentary debates, committee reports and white papers. The purposive approach was explained by Kirby J in *FC of T v Ryan*, (2000) 42 ATR 694, 715-716, in the following manner:-

“In this last decade, there have been numerous cases in which members of this court ... have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature ... even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose ... This court should not return to the dark days of literalism.”

64. Somewhere between the strictly literal method of interpretation and the purposive approach to interpretation lies the “golden rule”, which was clarified by Viscount Simon LC in his judgment in *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] 3 All ER 549 at 553 as follows:-

“The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation that which will reverse the previous law, for the purpose of a large number of our statute law is to make lawful that would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow.... At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of legislation, we should avoid a construction that would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result.”

65. While there is absolutely no ambiguity in the language used by the legislature in the Business Licensing Act, the subsidiary legislation consisting mainly of the notification made by the Minister under section 4 of the said Act and relevant Suva (Business Licence Fees) By-Laws, 1995 did give rise to certain questions of construction, some of which as I have already noted in paragraphs 17 and 18 of this judgment, were considered by the Court of Appeal. The Court of Appeal has in paragraph 34 of its judgment, very rightly emphasised that subsidiary legislation should be certain and reasonable, and could be struck down in certain situations as those that occurred in *Bugg v D.P.P* [1993] 2 All ER 815. In the said case, Woolf LJ at page 822 of his judgment observed that there is a distinction between substantive and procedural invalidity of subsidiary legislation, and adverted at page 822 of his judgment to substantive invalidity, as -

“.....where the bye-law is on its face invalid because either it is out with the power pursuant to which it was made because, for example, it seeks to deal with matters outside the scope of the enabling legislation, or is patently unreasonable . . .”

66. The Court of Appeal also referred to the decision in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, which set down the standard of unreasonableness of public body decisions which render them liable to be quashed by judicial review or by writ of *certiorari*. Lord Greene M.R at page 229 of that celebrated decision laid down three conditions on which court would intervene to correct a bad administrative decision on the basis that it was made unreasonably, in the following words—

“Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington

LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”(emphasis added)

67. The Court of Appeal has after careful consideration of the Suva (Business Licence Fees) By-Laws, 1995, in the context of the section 4 notification and the provisions of the Business Licensing Act, held that the said by-laws are not unreasonable in the Wednsbury sense, but it must be stressed that this does not mean that the Petitioner can seek to interpret and apply it in a manner which violates the principles so well enunciated by Lord Greene MR, or the courts can sanction such a result. It is necessary to bear in mind that the said subsidiary legislation is essentially revenue rather than purely regulatory in character, and additionally, seeks to impose penal sanctions on any person who infringes the said subsidiary legislation. In my view, such a piece of delegated legislation should necessarily be interpreted strictly against the licensing authority, if there be any doubt as to its implications. This in my view is because the licensing authority, in the final analysis, has the power to define special words used by it in the subsidiary legislation, to lay down guidelines and to clarify any uncertainty or rectify any anomaly that may exist. As Ellenbrough CJ remarked in *Warrington v Furber*, (1807) 8 East 242 at 245; 103 ER 334 at 335, “where the subject is to be charged with a duty, the cases in which it is to be attached ought to be fairly marked out.” Lord Wynford expressed the same principle differently in *R v Winstanley* (1833) 1 CJ 434, 445; 148 ER 1492, 1496, stating that “if there is any doubt about these words, the benefit of the doubt should be given to the subject”.
68. Although in modern times courts have moved away from a strict interpretation preferring to adopt a purposive approach to revenue legislation and subsidiary legislation, they still tend to interpret statutes and regulations which encroach upon the liberty of the subject or which seek to impose penal sanctions, without using any presumptions in favour of the taxing authorities’ subject. In doing so, they have consciously attempted to adopt a construction “which advances and does not frustrate or defeat the ascertained purpose of the legislature”(per Kerby J. in *FC of T v Ryan* (2000) 42 ATR 694, 715-716. Since, in my view, the Suva (Business Licence Fees) By-

Laws, 1995, and the similar by-laws of the other licensing authorities, are revenue measures, which seek to tax business activities carried on within their limits, it needs to be observed, as did Deane J. in *Hepples v FCT*(1991-1992) 173 CLR 492, at 535-6, that-

“.....the least that such a taxpayer is entitled to demand of government is that, once the relevant provisions are finally identified, a legislative intent to impose a tax upon him or her in respect of a commonplace transaction will be expressed in clear words...”

69. While in my view, the High Court did not deal in depth with the meaning of the word “supermarket”, which necessarily required interpretation in the context of this case, the Court of Appeal considered the matter carefully in the light of the ordinary meaning of the term. In paragraph 32 of its impugned judgment, it referred to the decision of the Supreme Court of Zimbabwe in *Metro International (Pvt) Ltd v Old Mutual Property Investment Corporation (Pvt) Ltd and Another* (2007) ZWSC 109, in which reliance was placed on the New Collins Concise Dictionary (1982), which described a “supermarket” as a “large self-service store retailing food and household supplies.” Similar definitions are found in other dictionaries such as the Longman's Dictionary of Contemporary English (1978) - “large shop where one serves oneself with food and goods”, the Chamber's 20th Century Dictionary (1983) - “large, mainly self-service, retail store selling food and other domestic goods” and the New Zealand Pocket Oxford Dictionary (1986) - “large self-service store usually selling food and some household goods.” All these definitions are essentially similar and are consistent with the Business Licensing Act, the Designation Notification made by the Minister and the relevant by-laws.
70. In *Australian Hotels Association (Tasmanian Branch) v Licensing Board* [2006] TASSC 91, The Supreme Court of Tasmania had to deal with an application for the review of a decision taken by the Licensing Board of Tasmania to grant an “off licence” to Woolworths Limited, which owns a large number of liquor outlets throughout Australia, for the sale of liquor at the supermarket of the said company in the Kingston Town Shopping Centre. Evans J., in paragraph 25 of his judgment, referred to the meaning attributed by the Macquarie Dictionary, 2nd Edition to the

noun “supermarket” (a large, self service, retail store or market selling food and other domestic goods), and observed as follows:-

“I find it instructive that the activity that identifies a large store or market as a supermarket is the retail sale of food and other domestic goods; this is a core, in fact defining activity of a supermarket as without it a premises could not be so described.”

71. Legislative attempts to define the term have yielded similar results. For instance, in Part 4 of the Food (Nutritional Information) Amendment Regulation 2012, made under the Australian Food Act 2001, “supermarket” is defined to mean “*a large shop selling food and other household items where the selection of goods is organized on a self-serve basis and the goods on offer include all of the following: (a) bread; (b) breakfast cereal; (c) butter; (d) eggs; (e) flour; (f) fresh fruit and vegetables; (g) fresh milk; (h) meat; (i) rice; (j) sugar; (k) other packaged food.*” There are other similar definitions found in other legislation and subsidiary legislation in most developed jurisdictions, which need not be referred to at length in this judgment.
72. Such legislation and subsidiary legislation have come up for interpretation in other jurisdictions before their courts and administrative bodies. An illustrative decision is *Re Nidigal and Australian Community Pharmacy Authority*, (2007) 99 ALD 124, in which the Australian Administrative Appeals Tribunal considered the meaning of the term “supermarket” as used in the National Health (Australian Community Pharmacy Authority Rules) Determination of 2006, as amended by Section 6 of the subsequent Amendment Determination of 2007 (No 1), which defined “supermarket” as “*a retail store or market, the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods*”. Dealing with an application for review of a decision of the Australian Community Pharmacy Authority, the Tribunal observed that,

“...taken together with the sale of petrol, oil, lubricants, newspapers, soft drinks and various other items changes the complex from a pharmacy selling additional items to what is in effect more akin to a convenience store and thus within the definition of a supermarket.” (emphasis added)

73. It is interesting to note that the Australian decision echoes the decisions of a Scottish court pronounced more than a century ago in *Patrick Thomson, Ltd v. Somerville*(1) (1917) S.C. (J.) 3. This case involved shops, which carried on more than one type of business, there being different days prescribed by local regulations for the closure of each such business. The issue was whether given that there were other businesses also carried out in the shop, on which days should each such business close. In a carefully considered judgment, the Lord Justice General, Lord Strathclyde, commented that the regulation in question “does not apply to a case like the present where the shop is in the occupancy of one person who carries on therein *a variety of different trades or businesses.*”
74. This decision was considered in *MacDonald v. Groundland* (2) (1923 S.C. (J.) 28d, which came up for decision six years after the *Patrick Thomson* case. In this case, learned Counsel sought to distinguish the decision in *Patrick Thomson*, but Lord Justice-Clerk, strongly disagreed with Counsel when he ruled as follows at page 31 of his judgment –

“Having given careful attention both to the argument and to the decision in Patrick Thomson’s case (1), I am quite unable to see that any radical distinction, either in fact or in law, can be drawn between it and the case with which we are now concerned. The only distinction in fact which has been suggested is that, whereas we are here dealing with a business which forms a substantial part of small premises, the court was there concerned with a business which forms a substantial part of large premises. That is a perfectly accurate distinction in fact; but I am unable to see that it affected the judgment which was pronounced in Patrick Thomson’s case (1).” (emphasis added)

75. A more recent decision on the ambit of a supermarket is *Mount Hagen Town Authority v Steamships Joint Venture Pty Ltd* [1990] PGNC 115; [1990] PNGLR 350; N911 (24 August 1990). In this case, the question was whether the Town Authority was entitled to levy a separate licence fee for a butchery which was part of a supermarket, in terms of section 33 of the Mount Hagen Town Authority Act 1989 (Western Highlands), which was a clear piece of revenue legislation which permitted the levying of fees for various trading and other activities. The Court was guided by common parlance, and held that the fee for the “supermarket” would encompass the butchery as well, and no

additional licensing fee should be charged. In the course of his brief judgment, Woods J. noted, “the word “super” in “supermarket” means everything.”

76. Some of the decisions discussed above dealt with the meaning of the term “supermarket” in various legislation and subsidiary legislation in Fiji and other jurisdictions, it is clear from these that courts and other special tribunals have recognised the development of the concept of a “supermarket” to unprecedented heights. Though the decision of the Supreme Court of Sri Lanka (*The Manager, Bank of Ceylon, Hatton v. The Secretary, Hatton Dickoya Urban Council, supra*) concerned a banking license, that Court interpreted the concept of “banking” broadly to include money lending and pawn brokering. That approach may be followed in this case in interpreting the scope of “supermarket”. In the process, this rapid development of the “supermarket” industry has given rise to many regulatory and policy issues, which is not the function of this Court to grapple with. However, this Court strongly recommends the relevant ministry to consider those regulatory and policy issues and introduce necessary supervision of the supermarket industry, which if left to grow unsupervised may create more problems than it solves. Many nations have already taken note of these issues, and introduced laws for the supervision and regulation of the supermarket industry, while other legislation and regulatory measures are in contemplation. For instance, a draft Liquor Licensing (Sale of Wine in Supermarkets) Amendment Bill 2013 is on the drawing boards in the Australian city of Adelaide, which seeks to address issues such as whether the hours of the day and night in which a supermarket with liquor licence should be kept open and the question whether a minor should be employed to sell liquor which he or she does not have the legal capacity to buy. Fortunately, in this case this Court is not called upon to deal with such issues, or even the question of whether the licence fee for a “Shop, Large Supermarket with Liquor Licence” should have been much higher than what had been specified for the same in the Suva (Business Licence Fees) By-Laws, 1995. These issues do not concern this Court in this case as it deliberates the questions in regard to which special leave to appeal has been granted in this case.

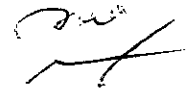
77. In my opinion, there is no uncertainty or ambiguity in regard to the meaning of the term “supermarket”, or what would fall within the ambit of a licence issued for a “Shop,

Large Supermarket with Liquor Licence". The term "supermarket", which represents a form of business which has developed as never before in the first decade of the new millennium, and the years to follow, envisages many business activities which might get caught up with other "designated business" as set out in the relevant section 4 notification, and the schedule to the relevant by-laws. As pointed out in the impugned judgment of the Court of Appeal, some uncertainty in regard to the ambit of a designated business of "Shop, Large Supermarket with Liquor Licence", had arisen due to the vagueness in the designations arising from the lack of definitions of the terms used and guidelines as to how they should be understood, and the existence of considerable overlap in the designated businesses, for which a trader or consumer cannot be blamed. In these circumstances, I hold that if there be any ambiguity or inconsistency in the scope of the "designated business" such ambiguity or inconsistency have to be resolved in favour of the subject, in this case, the Respondent, who would otherwise be in jeopardy of being penalized.

I therefore have no difficulty in answering question (b) on which special leave to appeal has been granted by this Court in the negative, and against the Petitioner. I hold that the High Court in this case was wrong in refusing originating summons in all the circumstances of this case, and the Court of Appeal had no alternative but to hold as it did unanimously. In my considered opinion, the term "supermarket" has to be given its ordinary meaning, and a supermarket which has obtained a licence for "Shop, Large Supermarket with Liquor Licence" should not be called upon to obtain additional licences with respected to other designated businesses which fall within the concept of a "supermarket". More specially, I hold that it was wrong for the Petitioner to call upon the Respondent to obtain licences for Agent Gas (Cooking), Butcher (only for sale of frozen pre-packed meat) and Refreshment Bar on the basis of the facts as have been revealed in the affidavits filed on behalf of the Respondent and the Petitioner Council in the High Court.

78. I would answer all the questions on which special leave was granted against the Petitioner and accordingly, I would affirm the decision and orders of the Court of

Appeal and dismiss the appeal. In all the circumstances of this case, I make no orders as to costs.



.....
Hon. Justice Saleem Marsoof
Justice of the Supreme Court

Hon. Justice Sathya Hettige, JA.

79. I have had the advantage of perusing in draft the judgements proposed by Marsoof and Wati JJ.
80. I am afraid that I cannot agree with the views of my learned and noble colleague Wati J who has expressed certain reservations in her dissent. I find that those reservations are based on several propositions, such as that the Business Licensing Act was intended to regulate health and safety concerns, all of which I find are unfounded.
81. Health and safety concerns do not fall within the purview of the Business Licensing Act, which is a purely revenue measure. Marsoof J, in his judgement, has considered this question very carefully.
82. It is also to be noted that the trading activities which are in dispute in this application fall within the ambit of usual business of the supermarket and cannot be separated.
83. In any event, if there is a doubt as to whether other trading activities fall within the concept of "supermarket" the doubt should be resolved in favour of the respondent, given that there are no statutory guidelines or clarifications.
84. In the circumstances I also hold that the statutory provisions in the Suva (Business Licence Fees) By – Laws 1995, in the absence of any ambiguity or uncertainty should be construed in favour of the respondent. As such, I fully agree with the reasoning and the judgment of Marsoof J.

85. Accordingly, I will hold against the Petitioner and dismiss the appeal while affirming the judgement and orders of the Court of Appeal.



.....
Hon. Justice Sathya Hettige
Justice of the Supreme Court

Hon. Justice Madam A. Wati, JA.

86. I have had the opportunity of reading the draft judgment of his Lordship Justice Marsoof. It is my misfortune that I disagree with him on the principal question on appeal.
87. The facts of the case are well set out by His Lordship and as such I do not consider it necessary to reiterate the same. I will focus on the main issue in the appeal.
88. Before I delve into the main issue, I agree with His Lordship that the principal question on appeal requires that special leave be granted for determination of the same. The main issue is a matter of great general importance as it is going to affect the administration of the local government and the businesses located in each district of the nation.
89. The Suva City Council is bestowed with the legal responsibility of administration of businesses and its activities in its municipality. The question on appeal will not only have an effect on collection of revenue, but will affect its position as a watchdog on business operators to require conformity to different regulatory measures such as health and safety.
90. From the point of view of the business operators, the appeal will affect their rights to operate large supermarkets with different business activities. It will also have an impact on its revenue.
91. May I say that in general the question on appeal is essential from an investment point of view.

92. I will proceed to the main question on appeal. There is in principal 3 reasons why I cannot agree with His Lordship.

93. The first arises from the construction and interpretation of ss. 4 and 5 of the Business Licencing Act Cap. 204 ("*BLA*").

94. Ss. 4 and 5 reads as follows:

"4. The Minister may, by notification in the Gazette, designate any business as being one in respect of which a licence is required by the provisions of this Act.

5 (1). No person shall engage in any business designated under the provisions of section 4 in Fiji without a licence issued by a licencing authority in respect of each place in which such business is carried on or, in case of a hawker or other person carrying on business from or at the no fixed address in Fiji, in respect of such businesses.

(2). Any person who acts in contravention of the provisions of subsection (1) shall be guilty of an offence".

95. I have no doubt that ss. 4 and 5 provides for two different situations and casts different responsibilities and obligations on administrators and business operators.

96. S.4 no doubt states that the Minister may regulate each business as one in respect of which licence is required. What flows from this is that if the Minister has designated different business activities then a body operating in those different business activities has to pay separate licence for the operation of the same. In summary, this section targets different business activities.

97. S.5 (1) on the other hand targets different places in which such businesses are carried on. It says that each body must have a separate licence to operate from separate places. It basically applies to a business with more than a branch or locality.

98. Pursuant to s. 4 of the BLA, a subsidiary legislation by Legal Notice No. 78 of 1985 was enacted to indicate the businesses in respect of which a licence is required. Amongst the many are:

- *Shop, Large Supermarket with Liquor Licence.*
- *Agent, Gas (cooking).*
- *Butchers (only for the sale of frozen pre-packed meat) and*
- *Refreshment Bar.*

99. To determine whether the petitioner needs to pay separate business licence fee for the different business activities described above, the answer is found in s.4 of the BLA. The section is plain, clear and unambiguous in its direction and interpretation. The Court of Appeal ought not to have delved into the definition of “*supermarket*” to find the answer. There was no need to apply the canons of statutory interpretation. It is not the duty of judges to apply their opinions of sound policy so as to modify the plain meaning of the statutory words. I have no temptation, in a matter of this kind, to speculate or read into the statute anything which is not there, but I cannot find that s. 4 is either incomplete or ambiguous.

“...The principles of construction which apply in interpreting such a section are well established. The difficulty is to adapt well-established principles to a particular case of difficulty. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words.”

Underlining is Mine

Per Viscount Simon, L.C. in Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] 3 All ER 549 at 553.

100. The Full Court of Appeal and my brethren judges of the Supreme Court are of the view that the supermarkets are expected to sell many items like cooking gas, frozen pre-packed meat, food, refreshment and likewise. I agree it does. The modern day concept of a supermarket could almost include anything like MHCC in Fiji. It could include sale of groceries, butcher, drapery, pharmacy, phone shops, jewelleries shops and likewise. Would this mean that one licence fee would suffice for trading in those separate business activities? My answer is in the negative. The purpose of designating different business activities was to charge separate licence fee. I see no other purpose of enactment of s. 4. S. 4 of the BLA could have otherwise simply targeted different traders instead of different business activities.
101. The Counsel for the respondent argued that there is no purpose of operating "*Shop, Large Supermarket with Liquor Licence*" if one cannot trade in all these other businesses.
102. The fact is that if a business licence fee is paid for "*Shop, Large Supermarket with Liquor Licence*", that business by virtue of its large floor space and designation as a supermarket able or permitted to trade in several business activities but that does not preclude the fact that the legislature requires different licence fee for different business activities be paid. I will contrast this situation with a single trader. He will not be permitted to trade in with the same business activities as a large supermarket. That dealer neither has the capacity in terms of large floor space to deal with different business activities nor was it ever intended by him and permitted by the Council to operate as a supermarket. However, the supermarket is permitted to sell many things and have separate activities like food courts, restaurants and likewise because these are definitely within the ambit of the supermarket. That is perfectly alright but for a supermarket to trade in all those activities without payment of fee is contrary to the spirit of s. 4 of the BLA.
103. The second reason for my disagreement emanates from my reading of the designated business activity of "*Shop, Large Supermarket with Liquor Licence*". The words "*with liquor licence*" give a clear indication that liquor licence is included with the business licence for "*Shop, Large Supermarket*". It is clear that Liquor Licence need not be paid separately.

104. This gives two indications. One, that if the legislature intended that other business activities could be included without the need to pay a separate licence fee, it would have done so in a similar fashion like it included liquor licence. Secondly, by not including other business activities with the term "*with liquor licence*", the negative is denoted that one cannot conduct other business activities without payment of the prescribed fee.

105. The third reason is the uniformity of the application of the rules. I am only making this comparison because the Justices of Appeal had unanimously made a point that the licence fee for the "*Shop, Large Supermarket with Liquor Licence*" is higher than the rest of the business activities. The fees for the different business activities are:

<i>Agent, Gas (cooking)</i>	-	50
<i>Butcher (only for sale of frozen pre-packed meat) and</i>	-	100
<i>Refreshment Bar</i>	-	100
<i>Shop, Large Supermarket with Liquor Licence</i>	-	250

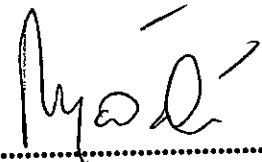
106. I find that although the fees for operating "*Shop, Large Supermarket with Liquor Licence*" is the highest, there is not a marked different compared to the fee of a single trader. A Supermarket could operate with different business activities including all of the above and earn revenue, whilst single traders are confined to operation of one business activity and charged half the business licensing fee. The charge on the "*Shop, Large Supermarket with Liquor Licence*" is not at all proportionate to the number of activities they trade in. I do not thus understand and agree that any finding based on the fact that the large supermarket pays a higher fee is sound in law or policy given the spirit of s. 4 of the BLA.

107. My final comment is not a legal reasoning but something which I want to say in passing. This does not form the dicta of my dissent but a mere observation.

108. Since the enactment of the subject BLA, the practice to levy different licence fees separately for different business activities had been prevalent. There are many businesses in Suva registered under the business activity of "*Shop, Large Supermarket with Liquor Licence*", including the respondent. All these businesses had been paying fees for different business activities. For the Court to make a decision as important as

one which would affect its administration and collection of revenue and the past practice, the whole purpose of the designation of business activities needs to be looked at. The purpose to my mind is one and none other than to charge fees for different activities. To provide the respondent rescue, because it is a supermarket, is to my mind giving the legislative provision an interpretation which is neither envisaged nor needed.

109. A sum of \$250 for a supermarket is a very meagre amount. It makes no sense that in this era, a business licencing fee could be as low as that. Moreover having paid fees for different business activities previously, the respondent had by conduct accepted that it ought to pay different licence fees for different activities it is trading in. It now cannot give a narrow linguistic interpretation of the definition of supermarket to avoid what has been the accepted practice in the past and has been applied and implemented on other businesses of the same nature. The word supermarket must not be construed to alter the previous policy of the law which in my view had been to pay different licence fee for different business activities.
110. For these reasons the appeal must be allowed and the decision of the High Court affirmed and restored.

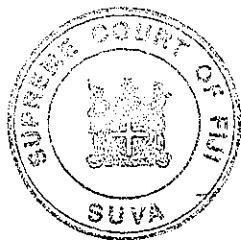


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Hon. Madam Justice A. Wati
Justice of the Supreme Court

(Dissenting)

111. **The Orders of the Court are:** (by majority decision)

1. *Special leave to appeal granted on three specific questions.*
2. *After consideration of all questions, all questions are answered in favour of the Respondent.*
3. *Accordingly, the appeal is dismissed.*
4. *Judgment and Orders of the Court of Appeal dated 28 September 2012 is affirmed.*
5. *No order for costs.*



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Hon. Justice Saleem Marsoof
Justice of the Supreme Court

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Hon. Justice Sathya Hettige
Justice of the Supreme Court

Solicitors:

Lajendra Law for the Petitioner.
Sherani and Company for the Respondent.