IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal Nos. 45, 51, 57 & 61 of 1983.

Between :

K.R. LATCHAN BROS. LTD — Appellant

- and -

1. SUNBEAM TRANSPORT
2. PACIFIC TRANSPORT
3. TRANSPORT CONTROL BOARD — Respondents

Mr. G. P. Shankar for the Appellant
Messrs S. M. Koya and F. Latel for the First and Second Respondents.
Mr. Ali for the Third Respondent.

Date of Hearing : 19th march, 1985

Delivery of Judgment : 22nd March, 1985

JUDGMENT OF THE COURT

Speight, V.P.

The notice of appeal filed herein reads as follows:-

> "L E T all parties concerned attend before FIJI COURT OF APPEAL at Government Buildings, SUVA on Tuesday the 19th day of March 1985 at the hour of 2.15 o'clock on the hearing of an application on the part of the appellant that Stay be granted in respect of orders made by the Supreme Court and upheld on appeal by this Honourable Court quashing the appellant's Road Service Licence pending the hearing and determination of the appellant's appeal to Her Majesty in Council".

It will be convenient to refer to the appellant as Latchan and the first and second respondents as Sunbeam and Pacific. The Third Respondent, represented by Mr. Ali, advised the Court that it took a neutral stance in the matter, and did not wish to be heard.

To understand the true nature of the relief which is sought it is necessary to refer to earlier proceedings.

In March 1983 the Transport Control Board heard applications from the Appellant for Road Services Licenses to enable it to run Express Services from Suva - Lautoka - Suva; travelling around Viti Levu in both clockwise and anticlockwise directions - referred to as Double Circular Services. Although there were some existing Services between Suva and Lautoka operated by companies other than Latchan, there had not previously been licenses of this kind.

A number of companies, including the respondents Sunbeam and Pacific, opposed these applications on the grounds that (a) the services were not necessary and (b) they would adversely affect existing services which in part or in whole covered the same route. Some of the companies also countered by applying for Double Circular licenses on their own behalf.

During the hearings the Board made certain rulings and overruled certain objections. In particular, when counsel for Sunbeam was speaking in support of his client's objection, the Board ruled that Sunbeam could not oppose an application by another company and also apply itself. This ruling was patently incorrect. Sunbeam was put to its election and under protest agreed to withdraw its application. The Board reserved its decision and on 27th April 1983 granted the Double Circular License to Latchan and dismissed all other applications.

The appellant then commenced to run the services.

The Respondent companies, with leave, moved for Judicial Review under order 53 of the Fiji Rules, seeking to have the grants by the Board quashed.

After a lengthy hearing, Kermode J. on 9th September 1983 made an order for certiorari and quashed the determinations of the Board on a number of grounds, including bias and breach of natural justice, and a rehearing of the licensing applications was ordered.

The Board then adopted a most unusual course. It met, immediately after the delivery of Kermode J's decision, it passed a resolution that it would appeal - a most extraordinary step - and it called in the Latchan licenses for cancelling, and issued temporary licenses to the same effect in lieu.

Not surprisingly Sunbeam and Pacific again took steps to obtain Judicial Review of those later proceedings and Rooney J on 18th October 1983 quashed the orders granting the temporary licenses, and he issued injunctions against Latchan preventing it from applying further for, and the Board from granting, any Double Circular licenses. He was also very critical and in our view rightly, of the conduct of the Board. This injunction has been since varied to restrict its effect until such time as the Board rehears the original applications.

Latchan appealed to this Court against the judgments of Kermode and Rooney J.J. and these appeals were amalgamated for hearing purposes.

It also sought, in November 1973 to have this Court grant "a stay of execution" pending the hearing of the appeal proper. This the Court declined to do, in a Judgment of 22nd November 1983-more of this anon.

The Court heard the substantive appeal on 14th, 15th and 16th March, 1984. On 30th March 1984 in a lengthy reserved decision the Court dismissed the appeals - some point is made in the present hearing that Kermode J's judgment was upheld in respect of his findings of breach of natural justice but not on his finding of bias.

It is accordingly necessary to say that the grounds upon which the judgment was upheld were :

1. That at its original hearing the Board had adjourned to enable its inspectors to carry out load checks on existing services to determine public need, and the Board had said that these reports would be made available to the parties before the hearing resumed. In fact the Board's inspectors did carry out checks and reported little demand for the proposed service and poor loadings on existing services. These reports were not shown to the parties by the Board before it delivered its reserved decision, contrary to the undertaking which had been given.

2. One of the Respondents (Sunbeam) had been forced by the Board to withdraw its application - wrongly as we held - and hence had been denied a hearing.

The grounds which were sustained therefore were each based on breach of natural justice at the licensing hearings.

From this decision the Appellant has obtained leave from the Single Judge (Mishra J.A.) to appeal to the Privy Council. It is understood that that appeal will be heard later this year.

The appellant also applied to the Single Judge in the same document for "a stay" of this Courts decision.

It apparently relied for such an application on the provisions of Rule 5 of the Fiji (Procedure in Appeals to Privy Council) Order 1970 which reads as follows :

> "5. A single judge of the Court shall have power and jurisdiction -
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> (a) to determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;
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> (b) generally in respect of any appeal pending before her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require :
>
> Provided that any order, directions or decisions made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision."

The power to grant a stay however is prescribed in Rule 6 which immediately follows, and being a special provision can be taken to limit the more general powers in Rule 5(b) in this regard.

Rule 6 reads as follows:-

> "6. Where the decision appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

That Rule, relating to Privy Council appeals is not dissimilar to Rule 25 of the Court of Appeal rules dealing with a stay pending a Court of Appeal hearing. Inferentially the Court of Appeal may, prior to a hearing, stay "execution of or proceedings under the decision of the court below" - not dissimilar to the "suspending of execution of a decision to pay money or do any act" in the Privy Council context:

> "25(1) Except so far as the Court below or the Court of Appeal may otherwise direct -
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> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
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> (b) no intermediate act or proceeding shall be invalidated by an appeal. "

Mishra J.A. had some misgivings as to jurisdiction in respect of this particular type of application for stay - for it did not relate to the Rule 6 powers but he did (and we think as a matter of indulgence) consider the merits and he declined to make the order sought. On 2nd May 1984 he said :

> "The appellant contends that the stoppage of the round-the island service will result in great financial loss to him. No immediate stoppage, however, is resulting from this Court's order, there having been no such service in operation since the order of the Supreme Court six or seven months ago".

and further...

> "There is no sudden stoppage of operation under his licence as would have been in the case of O'Driscoll (Supra). 22 NZLR 517. No round-the island service has

> been in operation for several months now and no public inconvenience has resulted. If his application is allowed, he would be operating under a licence declared by two courts to be invalid. That would, in addition, be contrary to the spirit of the order of the full Court extending the injunction referred to earlier until the rehearing of the applications by the Board.
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> I do not, therefore, consider that the order of stay sought by the appellant is one that the interests of justice or the circumstances of the case require."

We come to the present application.

When asked at the commencement of his submissions, Mr. Shankar Counsel for appellant said that this was a fresh application, and not an application under Section 20 of the Court of Appeal Act Cap 12 for reconsideration of the Single Judge's ruling. That is perfectly correct, for Mishra J.A. had not been acting under Court of Appeal Rules, but under the 1970 Privy Council Rules.

Section 20 of the Court of Appeal Act, and Rule 25 of the Rules only apply prior to the Court of Appeal hearing.

For the moment we propose to accept Mr. Shankar's statement that this was a fresh application. If that is how the matter is to be treated then on the application as constituted this Court has no jurisdiction. Rule 6, the special provision dealing with stay of execution, says that the Court's power to suspend is only to be exercised when leave to appeal to the Privy Council is being granted". And leave was granted nine months ago. That would seem to be the end of the matter. But perhaps Mr. Shankar did his cause less than justice when he elected to proceed de novo.

Under rule 5(b) the Single Judge in granting leave also considered the application to stay contained in the same motion dated 4th April 1984. He refused it. Under the proviso to Rule 5 a full Court may review that decision, and we do not think it just that we should stand too precisely on Mr. Shankar's declaration concerning his present application - for these are somewhat unusual matters, and the interests of justice should override technicalities. But it must be understood that after a Court of Appeal judgment the power of stay only arises under Rule 5 and 6, although the general principles are relevant.

We turn therefore to the question of whether a stay should be granted of this Court's order of 30.3.84. Let us look at the general principles concerning stay, for as we have said Rule 25 of the Court of Appeal Rules and Rule 6 of the Privy Council rules are dealing with the same topic - postponement of execution of a Court's decision.

Rule 25 is in identical terms to order 59 Rule 13 of the Supreme Court Rules in England. Extensive notes in the White Book (1967) Vol. 1 @ 770 illustrate the wide variety of cases where a stay may be granted. But no case there referred to postponed the effect of an order such as was made here by Kermode J. and upheld in this Court, in so far as it quashed a determination by an inferior tribunal.

All the cases annotated under Order 59/13, and indeed the wording of the two Rules contemplate delaying some action which would have flowed from the decision. Stay of such action may be granted pending an appeal so that, if successful, the result should not be rendered nugatory. In the absence of a stay, money may be paid over, which given a reversal on appeal might be irrecoverable. An occupier of land might be dispossessed and buildings demolished; accounts might be taken which need not be revealed; the

holder of a patent or the proprietor of a secret process might be required to submit to inspection and so on. All these are positive steps which are encompassed by the words "execution or proceedings" flowing as a consequence of a judgment or in the present context "the paying of money or the doing of an act".

But a quashing of a permit, which should not have been granted, does not set in train any such consequences. Its effect is that a benefit which a party obtained in earlier proceedings was improperly obtained and should not have been brought into being.

On the present application Mr. Shankar was pressed by members of the Court as to the nature of the remedy which he sought. It seems that he wished the Court to authorise his client to continue to operate the Double Circular route, as it did for a period after the grant of the licence, which has since been impugned.

Ex parte Frethey in re O'Driscoll's Application 22 NZLR 517 (Court of Appeal) was cited as authority for the proposition that an order of a Court quashing the determination of an inferior licensing tribunal can be stayed. That proposition states the effect of the decision too boldly. The case needs to be read in conjunction with an earlier decision of the same court reported in 21 NZLR 317.

There had been a motion in the Supreme Court for certiorari to quash a decision of a licensing committee granting a hotel license. It was alleged that there had been bias on the part of the Chairman of the Licensing Committee by reason of financial transactions between him and the licensee. In the Supreme Court Connolly J. refused the motion, and the applicant appealed. The Court of

Appeal allowed the appeal (21 NZLR 317) delivering judgment on 7th April 1902. On the same day, and presumeably immediately upon delivery of the judgment in Court, the same Counsel for the licensee moved for leave to appeal to the privy Council - which was granted - and as part of that application asked that the Court's order on the appeal should lie in the office of the Court pending the determination of the appeal to the Privy Council. This was also agreed to.

From the judgments of the Court of Appeal Judges it can be seen that the procedure which would otherwise have been followed would have been to refer the matter back to the Supreme Court with directions. See per Denniston J @ 523. He went on to say however that "I have no doubt that the court has power to order the issue of the certiorari to be suspended". The other judges also referred to the step being taken as a "stay" - but it was achieved by the Court directing that its own judgment be not entered, but "lie unsealed in Court until further order of the Court" - Stout C.J. @ p. 519.

It should be noted that up until that time there had been no quashing.

In our view a different situation arises here. Unlike the O'Driscoll case, where Connolly J. at first instance had refused to grant certiorari, Kermode J. did so several months before this Court (Gould V.P. presiding) looked at the matter on 22 November 1983. That being so it seems on principle that no steps could then be taken to revive the quashed license. In Hancock v. Prison Commissioners (1959) 3 All E.R. 513 Winn J. approved a statement that "to quash" means "to render null and void and wholly set aside as though it had never been".

Far from assisting Mr. Shankar's argument, we conclude that O'Driscoll's case is against him. It is apparent from the procedure which the learned Judges adopted, of directing that their own order lie in Court, that they were of the opinion that an order quashing an earlier determination extinguishes it entirely. And in the present case that occurred when Kermode J's judgment was entered.

We must deal therefore with Mr. Shankar's further submission that this Court (Gould V.P. presiding) on 22 November 1983 held that it had power to stay. It is true that after dismissing O'Driscoll's case the Court said that it was satisfied it had power to deal with the Supreme Court order. But it proceeded on other grounds to decline the relief sought - in particular it acted on the cancellation by the Board of the earlier licenses, done with the concurrence of the applicants at the time when it granted the temporary licenses. We think that the observations as to the power to stay in the circumstances where a quashing order has already been entered must be treated as obiter dicta. The point being now directly in issue we hold that there is no such power.

There would however be an alternative way by which some relief could have been granted.

It will be remembered that on 9th September, 1983, immediately after Kermode J's decision had been delivered, the Board granted temporary licenses to Latchan to continue the Double Circular service. On a motion for certiorari Rooney J. quashed those licenses, saying that the Board had deliberately

acted to render nugatory this Court's decision of 30.3.84. In so doing he also issued injunctions to prohibit the Board from reissuing, or Latchan from applying for, further temporary licenses. In the judgment of this Court on 30.3.84 those orders were varied to limit the injunctions until the determination of the rehearing of the applications by the Board. It would be within the power of the Court now to further vary or dissolve those injunctions to allow applications for further temporary licenses to issue. But no such application has been made and in all the circumstances and in particular for the reasons given by the Court on 22 November 1983 and by Mishra J.A. as the Single Judge on 2nd May 1984 it seems unlikely that any such indulgence would be granted.

Appeal dismissed with costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal