IN THE FIJI COURT OF APPEAL

Civil Appeal No. 78/85

BETWEEN: R. V. WESTERN DIVISIONAL LIQUOR TRIBUNAL — Appellant

a n d

MANSUKH LAL PALA — Respondent

S.P. Sharma and S. Anand for Appellant
G.P. Lala for the Respondent

Date of Hearing: 12th March, 1986.

Delivery of Judgment: 21. 3. 86

JUDGMENT OF THE COURT

O'Regan, J.A.

On 18th April, 1985, the Western Divisional Liquor Tribunal refused an application for an off-licence made pursuant to Part IX of the Liquor Act (Cap. 292), by the respondent, in respect of premises situated at Navuka, Nadi. The decision was a majority one, the Chairman Mr. S. Anand having dissented from the decision on the other two members who along with him had heard the application.

On 30th May, 1985 the respondent was granted leave by Supreme Court to apply for a Judicial review of the decision of the Tribunal. The relief sought was first a writ of certiorari quashing the decision; secondly, a writ of mandamus directing the Tribunal to grant the off-licence it had sought, and thirdly, a declaration that it had acted arbitrarily and/or unreasonably; that it had not exercised

its discretion judicially; that it had placed undue weight on the evidence before it and that there had been a breach of natural justice.

The application was heard by Kearsley J. on 2nd July 1985 and in a judgment delivered on 9th August 1985 he held that the applications, as presented, should be refused. However he went on to consider section 6 (6) of the Liquor Act and after holding that there had been non-compliance with one of its provisions ordered that the decision be quashed and directed that the authority rehear the application in accordance with law.

Section 6 (6) provides:

> "A Tribunal shall cause proper records of its proceedings to be kept which shall include a sufficient note of any evidence given or legal submissions made and the reasons for any decisions".

The only aspect of the subsection which concerned the learned Judge was the requirements that the Tribunal should "cause proper records of its proceedings to be kept which shall include a sufficient note of any evidence given". That aspect of the matter had formed no part of the appellant's case. However, Mr. S.P. Sharma, counsel for the Attorney-General, in his submissions had brought the subsection to notice. He contended that it had been breached in that reasons had not been given for the decision and he submitted that in those circumstances the decision should be quashed unless a subsequent explanation from the tribunal is forthcoming. The learned Judge did not deal with that submission but his failure so to do was not advanced as a ground of appeal to this Court. We think it appropriate, however, to draw the attention of this and like tribunals obliged by statute to give reasons, to the decisions in re Poyser & Mills arbitration

(1964) 2 QB 467 (particularly p. 478) and in Iveagh (Earl) v. Minister of Housing and Local Government (1964) 1 Q.B. 395.

The present appeal was brought by the Attorney-General on the grounds that the learned Judge erred in law and in fact in holding that the Tribunal failed to cause a sufficient note to be taken of any evidence given.

The respondent did not appeal but gave notice that whilst he sought "to uphold the verdict given and judgment directed for the respondent/applicant upon the trial of the action" he desired to contend that the verdict and judgment should be affirmed on the grounds;

> 1. THAT the learned Judge erred in law and in fact in not accepting the submission of the Respondent/Applicant and ruling that the Tribunal had failed to take into account the evidence before it as to the reasonable requirement of the neighbourhood and the demands for liquor to be supplied in the particular area bearing in mind that some seven hundred (700) residents in the vicinity of the proposed liquor outlet had given their express approval at the desire and the need of the off-licence in the area.
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> 2. THAT the learned Judge erred in law and in fact in failing to hold that the Tribunal acted arbitrarily and/or unreasonably.
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> 3. THAT the learned trial Judge misdirected himself on the meaning and effect of section 20 of the liquor Act.

This notice was given pursuant to Rule 19 (2) of the Court of Appeal Rules which provide:

> "A respondent who desires to contend on the appeal that the decision should be affirmed on grounds other than those relied upon by the court shall give notice to that effect specifying the grounds of the contention".

(our emphasis)

Ground 3 was not argued by Mr. Lala. Grounds 2 and 3 were advanced not on the basis of upholding the decision fo the Supreme Court to quash the decision of the Tribunal and order a rehearing but rather in support of an order for mandamus directing the Tribunal to issue a licence to the respondent. In reality, then, those grounds were argued as if the respondent had also appeal, which, he had not.

Turning to the appeal before us, we set out the material upon which the learned Judge based his decision and his reasons for taking the course he did. He said:

> "Now, Mr. Pala has deposed, in paragraph 7 of his affidavit sworn on 1st May, 1985, that 3 witnesses gave evidence and no attempt at refutation has been made. So I must take it that 3 witnesses did in fact give evidence.
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> A file has been submitted to this court, with the concurrence of all counsel, as the record of the relevant proceedings before the Tribunal. In that file is a photocopy, only partly legible of somewhat scrappy notes handwritten by the chairman. To that photocopy is appended a supplementary note signed by the chairman which reads:
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> > "Photocopy of notes taken for my <u>personal use</u> during the hearing. Full notes of the proceedings are taken by the secretary".
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> Those notes taken by the chairman for his "personal use" refer to the evidence of only 2 witnesses, namely Jone Qoro and someone whose name appears to be Ainul Khan. It seems that the Tribunal's secretary took notes of the latter witness's evidence only. So in my view, it must be said that the Tribunal failed to cause "a sufficient note of any evidence given" to be made in accordance with the mandatory requirement of Section 6 (6).
>
> What, in law, is the consequence of that failure? My research has not revealed any judicial decision as to the consequences of failing to record the evidence. There is, however, the well established general principle that "procedural safeguards, which are so often

> imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them - see Wade's Administrative Law, 5th Ed., p.220. According to my understanding, a tribunal which fails to comply with a mandatory requirement that it cause a sufficient record to be made of the evidence it hears in relation to a question has no jurisdiction to determine that question. It seems to me that the only course open to me is to quash, by order of certiorari, the Tribunal's decision not grant the off-licence to Mr. Pala and to direct the Tribunal, by order of mandamus, to rehear the application in accordance with law, after proper notice of the rehearing has been given to the applicant and all objectors".

The evidence heard by the Tribunal was from objectors to the grant of the licence sought by the respondent. S.20 of the Liquor Act deals with the rights of objectors to far as it is relevant, it provides:

> "objections to the grant...of any licence...may be made in writing to the Board, either in writing or in a person or both in writing and in person to a tribunal (by).
>
> a) ...any three or more residents of the Division in which the licenced premises are...intended to be situated.

One of the witnesses referred to in the judgment of the learned Judge was Jone Qoro. The record shows that on 21 March 1985 he and three other persons made a written objection. One of those three other persons was Jone Nabou to whom we shall later refer.

The learned Judge in the course of his judgment had occasion to refer to two other written objections which formed part of the record. He did not refer to the one to which Qoro and Nabou were parties.

Another witness referred to by the Judge was one Ainul Khan. The note of his evidence discloses that he lived

in Kennedy Avenue and it has reference to 54 to 60 residents having signed a petition. And of the objections referred to in the judgment - "a document dated 19th March 1985 also signed by 55 residents" - begins "we the undersigned residents of Kennedy Avenue and Narewa...". The note of evidence records that in answer to a question by Mr. Lala during his cross-examination the witness said he had got the petition signed. The probability is that the petition of 19th March 1985 was the petition obtained by the witness and its contents should be read along with his oral evidence.

Mr. Sharma submitted that the notes of the chairman of the Tribunal clearly contain notes of the evidence of Nabou, Qoro and Ainul Khan in that order. Mr. Lala did not contest that submission.

Our own perusal of the notes and a typewritten note of Mr. Khan's evidence confirms that Mr. Sharma is undoubtedly correct. And it is clear that Mr. Lala cross-examined each of them while the Trial Judge contended that only two gave evidence.

Each of the witnesses exercised the right allowed by section 20, that is to object "both in writing and in person".

Section 7 of the Act makes provision that

> "subject to the provisions of an Act, a Tribunal shall have power,....
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> a) .....
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> b) .....
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> c) to admit any evidence, whether written or oral and whether or not such evidence would be admissible in civil or criminal proceedings".

Accordingly, the material contained in the written objections to which Nabou and Qoro on the one hand and Ainul Khan on the other were parties, was admissible and those persons having given oral evidence it is more probable than not that the material contained in their objections was considered by the Tribunal. The learned Judge was clearly of that opinion for, in considering the question whether there was material before the Tribunal on which it properly could have based its decision, he himself referred to passages from two of the written objections.

Having regard then to the provisions of section 7, the record of the evidence before the Tribunal was not only the notes of the chairman and, in the case of Ainul Khan the typewritten notes made by the chairman's secretary but also the written material in the objections which was supplemented and confirmed by the oral evidence of the three witnesses who attended the hearing.

Whilst we agree with the observations of the learned judge's comments as to the legibility of the notes kept by the chairman, we think it beyond peradventure that a sufficient note was taken of the oral evidence of each of the witnesses and are of the opinion that when such is considered along with the written objections which the witnesses were supporting, there was no breach of subsection (6) of section 6 of the Act. Accordingly, the orders made by the learned Judge cannot stand.

The question next arises as to what should now be done.

Prior to making the orders he did make, the learned Judge after reminding himself that he was not hearing and deciding an appeal against the decision of the Tribinal, held first that the decision of the Tribunal, in effect, upheld

objections made on the grounds "that the reasonable requirements of the neighbourhood do not justify the grant of such a licence" (section 52 (2) (e)) and secondly that "there was material properly before the Tribunal on which it could validly have based, and presumably did base, that decision". The note which the Tribunal was, by S. 6(6), required to keep and did keep of the legal submissions made, records that Mr. H.C. Sharma, Counsel for the objectors, directed attention to Section 51(2) (e) and that he reminded the Tribunal of a large number of licenced liquor outlets in the neighbourhood and submitted that, accordingly, the reasonable requirements of the neighbourhood did not justify the grant of the licence sought.

Before both the court below and this court Mr. Lala first laid stress upon the large number of people who had supported the application and secondly submitted that none of the evidence before the Tribunal related to any of the several heads of objections permitted by section 51 (2) of the Act.

The measure of support and the number of supporters the respondent had were not matters relevant to the proceedings before the learned Judge and are not matters relevant to the proceedings before us. As to the second matter we think that the learned Judge was right in holding, as he did, that there was material referable to an objection pursuant to Section 51 (2) (e) before the Tribunal and that it was material upon which it could properly have reached the decision which it made.

Being of that opinion, we think our proper course is to exercise the powers provided by Rule 22 (4) of the Court of Appeal Rules and make the appropriate order in this Court rather than remitting the case to the Supreme Court for the order to be made there.

We accordingly order that the appeal be allowed and the respondent's application for judicial review in the Supreme Court be dismissed, with costs in that court which are to be taxed if not agreed upon. We make no order for costs in this court.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 79 of 1985

Between:

ABDUL KADIR f/n Rahim Buksh — Appellant

- and -

NATIVE LAND TRUST BOARD — Respondent

Mr. A.K. Narayan for the Appellant
Miss A. Rogan for the Respondent

Date of Hearing: 7th July, 1986
Delivery of Judgment: 18th July, 1986

JUDGMENT OF THE COURT

Holland, J.A.

The appellant appeals against the judgment of Kearsley J. declining to make an order in favour of the appellant that the respondent renew a Native Lease Number 13813 and to make ancillary declarations.

The matters in issue on appeal were reduced to a narrow compass. It is common ground that the appellant has been in occupation since 1940 of a block of land comprising 2 acres and 1 rood. The latest lease of the land was for a period of 10 years from 1st January 1970. Upon the expiry of that lease, or just prior thereto, the appellant applied for a renewal but this application was declined on the basis that the land being less than 2½