IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0071 OF 1998S
(High Court Civil Action No. 0343 of 1998S)

BETWEEN:

PORTS AUTHORITY OF FIJI

Appellant

AND:

CAPTAIN MALCOM PECKHAM
NAUTICAL PILOTS (FIJI) LIMITED

Respondents

Coram: The Hon. Justice Jai Ram Reddy, President
The Rt. Hon Justice Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Justice Sir David Tompkins, Justice of Appeal

Hearing: Wednesday, 17 May 2000, Suva

Counsel: Mr. J. R. F. Fardell, Mr R. K. Naidu and
Ms Ma'ata Sakiti for the Appellant
Mr. Peter Howard for the Respondents

Date of Judgment: Thursday, 6 July 2000

JUDGMENT OF THE COURT

The appellant is a statutory corporation constituted under the Ports Authority of Fiji Act (Cap 181), enacted in 1975. Among its functions are the following, taken from Section 10 of the Act:

(a) to provide and maintain adequate and efficient port services and facilities in ports or approaches to ports;

(b) to regulate and control navigation within ports and the approaches to ports; and

(c) to co-ordinate all activities of or within ports.

In this Act, unless the context requires otherwise the term "ports" means places declared to be a port under section 3. Under that section the Minister, after consultation with the appellant, may declare any place to be a port within the meaning of the Act. The ports of Suva, Lautoka and Levuka, and the approaches to those ports, are declared ports within the meaning of this section. Other Fijian ports are not under the appellant's control.

The second respondent (NPF) was incorporated in 1996 to provide pilotage services to ships arriving at and leaving ports and harbours in Fiji. Its members and employees include a number of licensed pilots, the first respondent, Captain Peckham, among them. In late 1997 and early 1998 NPF informed the Director of Marine, shipping companies and agents and other interested parties of the incorporation of the company, and of the availability of the licensed pilots, who were named in the correspondence, for pilotage services. Previously, the first respondent, and some of the second respondent's other pilots, had been employed by the appellant, while one or more had been self-employed "freelance" pilots. After the formation of NPF, the appellant formulated a policy that when pilot services were requested, it would give automatic first preference to its own pilots, and call on the "private pilots" (meaning or including those employed by the second respondent) only when unable to provide pilots from its own resources.

In March 1998 the appellant notified shipping companies that all pilotage in Suva, Levuka and Lautoka would now be the responsibility of Ports Terminal Ltd. In Captain Peckham's affidavit (see para 19) this company is stated to be a subsidiary of the appellant, but in the appellant's affidavit this is denied. As we understand the position, this company now performs those functions previously carried out by the appellant which broadly may be described as commercial or trading. There is evidence of several instances where ships about to berth in Fiji ports, or their agents, requested the services of a pilot employed by NPF, only to be told this would not be allowed. In one case the agents were informed that if Port Terminal Ltd's pilot was not accepted, no berth would be provided.

On 23 June 1998 a document described as "Notification PM 3/98" was issued under the signature of the Port Master, reading:

Pilotage of vessels within declared port boundaries

Shipping Companies are advised that with immediate effect all pilotage within the declared port boundary under the Ports Authority of Fiji shall be undertaken by Maritime & Ports Authority of Fiji/Ports Terminal Ltd pilots irrespective of whether any other pilotage arrangements have been made by vessel agents.

Some shipping companies expressed dissatisfaction, in strong terms, with this arrangement and its consequences. In one letter a shipowner maintained that the appellant's pilots lacked sufficient experience to handle a particular ship, and stated that if necessary it would hire an NPF pilot as well. In July 1998 the respondents commenced proceedings seeking an injunction to restrain the appellant from enforcing the directive evidenced by the Notification, and various incidental orders which it is unnecessary to set out in full. The grounds of the respondents' application were that the appellant's conduct was wrongful, unfair and unlawful; and specifically, in breach of the Fair Trading Decree 1992 and the Public Enterprise Act 1996.

In an affidavit in opposition to the application, an officer of the appellant deposed that for the greater part of its existence, for the ports under its control the appellant either provided its own piloting services, or allowed "private" pilots to perform these services, that is, pilots who although duly licensed, were not employees of the appellant. In Suva, which was by far the busiest port, use of private pilots was rare, as the appellant had a full complement of its own. However, the appellant had been led to address pilotage issues by certain recent events, namely the restructuring of the appellant and the obligations arising under its new charter, and secondly the departure of the first respondent and other former employees and the formation of an alternative pilotage service.

The effect of the charter was to divide the assets and operations of the appellant into a commercial arm, Ports Terminal Ltd, and a regulatory arm, the appellant, now called the Marine and Ports Authority of Fiji (MPAF). The issues for MPAF included the promotion of commercial competition while at the same time ensuring that general safety and appropriate standards of service were maintained. In respect of pilotage, and other services to ships, MPAF believed that competition was best promoted by engaging a single service provider, after a competitive bidding process. There were a number of considerations for MPAF including equipment, availability of service, training and so on. Pending the formulation of policy and the making of decisions, no formal framework had been established but the deponent stated that "it had never been MPAF's intention to prevent [the second respondent] from providing pilotage services in any MPAF-controlled port". However, because of its statutory responsibility the MPAF expected the provider of such services to do so "on MPAF's terms" whereas in the appellant's perception the second respondent has taken the view that it was legally entitled to operate in MPAF-controlled ports without MPAF supervision or control, which was unacceptable to MPAF. If permitted, in the contention of the officer of the appellant making the affidavit, the result would be that all manner of services could be "peddled" within MPAF–controlled ports, of differing standards and quality, with MPAF powerless to control them. MPAF envisaged calling for tenders for pilotage services. The deponent confirmed that MPAF had directed that only licensed pilots acceptable to MPAF were permitted to pilot vessels in port areas under its supervision. It justified this in terms of its duty and power to regulate and control navigation within those ports.

In an affidavit in reply the first respondent pointed out that whereas under section 11 of the Ports Authority of Fiji Act, the appellant had power to provide pilotage services, the section did not address its power to control pilotage services provided by other pilots. The latter power could be provided by Regulations made under section 63, but no such Regulations had been enacted. In the respondents' contention the "level playing field" principles contained in the Public Enterprise Act and in the appellant's reorganisation charter suggested that the appellant would need to be able to advance strong reasons for excluding other pilots from providing pilotage services in competition with Ports

Terminal Ltd. In the absence of such regulations the appellant had no power to restrain the second respondent from providing pilotage services. The affidavit also stated that the appellant had never had a formal system for approving pilots in its ports, that being, in the respondents' contention, the responsibility of the Marine Board. In particular reference was made to section 189 of the Marine Act 1986 under which the Board has power to request the Minister to cause an inquiry to be held if of opinion that a pilot is unfit to discharge his duties, or has been seriously negligent in the discharge of his duties. Under subsection (2), if an inquiry is instituted, the Board may suspend the pilot pending the outcome. The appellant, the deponent contended, had no power to prevent a licensed pilot from providing services. The affidavit also made the point that if it was to be inferred that the appellant was not satisfied that the second respondent's pilots were competent, this would be surprising given their previous employment by the appellant.

Following the filing of the affidavits summarised above, the Maritime and Ports Authority of Fiji (Pilotage) Regulations 1998 (the Regulations) were made, in purported exercise of the powers contained in section 63 of the Ports Authority of Fiji Act. In his judgment the Judge went straight to the effect of the Regulations, mindful of the contention advanced by the first respondent in one of his affidavits, to the effect that if the MPAF wished to control the activities of the second respondent, that could only be achieved by regulations under the section cited. Of particular relevance is regulation 2 which provides:

> *(1) The master of any vessel must not give the vessel in pilotage charge for any compulsory pilotage area to any pilot under Section 185 of the Maritime* (sic) *Act 1986 other than –*
>
> *(a) a pilot employed or nominated by a Government Commercial Company which has the function of providing pilotage in that area;*
>
> *(b) if there is no person to whom paragraph (a) applies, a pilot who is employed or nominated by the*

Authority for the purpose of providing pilotage in that area.

(2) Sub-regulation (1) does not apply in respect of any compulsory pilotage area whenever there is in force for that area a contract entered into following the tender process specified in these regulations.

For several distinct reasons the Judge concluded that the Regulations had no effect on the outcome of the case. First, he held that the Regulations did not have retrospective effect. He invoked Section 22 of the Interpretation Act (Cap 7) and the presumption that legislation does not affect accrued rights. Secondly, he said that the Regulations related, throughout, to "compulsory pilotage areas", and no such areas had yet been specified, as contemplated by section 184 of the Marine Act 1986. Thirdly, the Judge referred to section 185 of the Act and the qualification required to be held by a pilot, namely that he was licensed; and held that in effect, the Regulations purported to amend the section by adding a further qualification, namely that the pilot to be engaged must be employed or nominated by the appellant for the area in question. He held that this was beyond the regulation-making power vested in the appellant. Fourth, the Judge entertained grave doubts, as he put it, regarding the validity of regulation 2, which he said had the effect of prohibiting an activity where the regulatory power was for "providing, regulating and controlling" the operation of pilotage services. In this respect he cited the well-known decision of the Privy Council in *Municipal Corporation of Toronto v Virgo* [1896] AC 88. Further, the Judge said, the Ports Authority of Fiji Act did not contain any power authorising the appellant to "nominate" pilots in a declared port or its approaches. He cited *Parkes v Mayor Alderman and Burgesses of Bournemouth* (1902) 86 LT 449, concerning a by-law which reserved to a Corporation the right to refuse any person the right to sell articles on a beach except under an agreement with the Corporation. Pointing out that the agreement was not subject to scrutiny and that the Corporation thus reserved to itself the right to exclude any particular person, the Court declared the by-law to be invalid. In the present case the Judge concluded that in so far as regulation 2 purported to

impose a total restriction or prohibition this was beyond the powers conferred on the appellant under section 63(1)(t). He accordingly quashed the regulation.

Next, the Judge turned to the Notification issued on 23 June 1998. For the respondents it had been submitted that the licensing of pilots and the regulation of their conduct was governed by the Marine Board pursuant to the Marine Act, and that the appellant had power only to make regulations that were not inconsistent with the Act. On this basis the respondents argued that the notification was beyond the powers of the appellant. Counsel for the appellant, on the other hand, supported the Notification by reference to section 10(b) of the Ports Authority of Fiji Act, under which one of the appellant's functions was stated as being "to regulate and control navigation within ports and the approaches to ports." Counsel for the appellant argued that the manner in which that function was exercised was entirely a matter for the appellant. The Judge did not accept that submission. He considered that although the appellant's function had been defined in the terms set out, to justify the means used the Authority had to be empowered to carry the function out in the particular manner. The Notification amounted to subsidiary legislation, and had not been published in the *Gazette* as required by section 21 of the Interpretation Act (cap 7). Further, the Judge held that for the reasons he had given in dealing with the Pilotage Regulations, the terms of the Notification were beyond the powers of the appellant. Additionally, the Judge was of opinion that the Notification represented an unreasonable restraint of trade. He pointed to the fact that under Regulation 14 of the Marine (Pilotage) Regulations 1990, a pilotage licence ceased to be valid in respect of a pilotage area, if the holder did not carry out pilotage duties in that area for a period exceeding 24 months. The Judge also stated that in terms of the leading case of *Kruse v Johnson* [1898] 2 QB 91, the Notification was an "oppressive or gratuitous interference" with the rights of ship's Masters in selecting pilots, and with the rights of licensed pilots to practice their calling.

Next the Judge dealt with the appellant's contention that the case was solely about the Authority's powers under its own legislation, and that the Marine Act was irrelevant. In particular he considered section 3(2) of that Act, providing:

Unless a contrary intention appears –

(a) this Act does not apply in a declared port or an approach to a declared port insofar as it is inconsistent with the Ports Authority of Fiji Act; and

(b) nothing in this Act derogates from a duty imposed or a power granted by or under the Ports Authority of Fiji Act.

As the Judge said, on its face this provision gave precedence to the Ports Authority of Fiji Act. On an examination of Part X of the Marine Act, dealing with pilotage, and the powers and duties of the appellant in regard to the provision of pilotage services within the ports under its control, he did not see anything necessarily inconsistent between the two Acts. However, in his view the appellant had no power, express or implied, to vet, license, approve or discipline any pilot who had been duly licensed to undertake pilotage duties for any designated pilotage area. Nor, the Judge held, could the appellant claim a power under section 11(1)(f)(vi) of its Act to exclude or prohibit a pilot, by means of a "Notification", from carrying out pilotage duties in an area for which he was duly licensed. He was satisfied that justice required that Masters needing pilotage services in a declared port, or its approaches, should be able to engage the pilot of the Master's choice, and that pilots duly licensed by the Marine Board to act as pilots in such ports and approaches should be able to exercise their calling as authorised by their licences, without unreasonable restraint. Accordingly, he granted the respondents the injunction they claimed, the formal Order being in these terms:

....restraining [the appellant] its servants and agents for restricting, prohibiting or otherwise interfering, whether directly or indirectly, with the [first respondent] and other pilots employed by the [second respondent] from piloting

vessels entering and/or leaving a "port" and approaches thereto as declared under the PAF Act.

In argument before us counsel for the appellant put his submissions on two bases. First, he contended that the Judge was wrong in proceeding on the footing that the second respondent had to pass regulations to exercise its powers to control ship traffic in a declared port. The appellant's case was that the same effect could be achieved by notification. By way of alternative, under the second heading he contended that regulation 2 was valid.

It is convenient to start with the second contention. As a preliminary matter, we refer to the Judge's point about retrospectivity. Obviously, if the regulation is valid and effective, the result is to restrict the first respondent and other pilots employed by the second respondent from piloting vessels in certain ports; precisely which ports, we will discuss shortly. Thus in respect of any such ports the effective impact of the injunction is to prohibit the appellant from enforcing the regulation. Having regard to this consequence, it seems to us the question whether the regulations had or could have retrospective effect is of no relevance to an application for an injunction which if granted necessarily affects future conduct.

We turn to the question of the area affected by regulation 2. Three separate designations are relevant. The Marine Act draws a distinction between pilotage areas, and compulsory pilotage areas. Under section 183 the Minister, after consulting the Marine Board, may declare an area of Fiji waters a pilotage area. In terms of s 188 the Minister may determine the maximum number of pilotage licences to be issued for such an area. Subject to that maximum, the Marine Board may in respect of any pilotage area, issue a pilotage licence in respect of any area to a person who satisfies the Board of his qualifications (subsection (2)). The licence is to specify the area in respect of which it is issued (subsection (3)), being valid only in respect of that area (subsection (4)). The ports of Suva, Lautoka and Levuka and some other areas (seven altogether, so we were told from the Bar) have been declared pilotage areas under section 183.

In regard to *compulsory* pilotage areas, under section 184 the Minister after consulting the Board may declare that pilotage is compulsory in respect of the whole or any part of a pilotage area. Thus to bring an area to the status of a compulsory pilotage area, two distinct steps are required, first the declaration of an area as a pilotage area, secondly, the declaration of that area, or a defined part of it, as a compulsory pilotage area. It is common ground that no areas have been designated as compulsory pilotage areas.

We referred to the third and separate form of designation at the commencement of this judgment, namely declared ports under section 3(2) of the Marine Act. That section has the effect of giving jurisdiction to the Ports Authority of Fiji Act in respect of declared ports and the approaches to such ports. "Declared ports", a defined terms, does not refer to declarations under sections 183 or 184. It means any place, and any navigable river or channel leading into such place, declared to be a port under section 3 of the Ports Authority of Fiji Act.

Returning to the Regulations, in terms of regulation 2(1) the restriction applies only to pilotage within a "compulsory pilotage area". Counsel for the appellant accepted that the term was inappropriate. Counsel urged that the error was such an obvious one that we should read the regulation as if it had been correctly drafted.

We are unable to accept this line of argument. Of course there are cases – *Montgomery v Gerber* [1907] VLR 107, cited to the High Court, is an example – where a description which, if taken literally, would take subordinate legislation outside the scope of the regulatory power, may be read down because the intent is obvious. Here, however, accurate definition of the area to which the regulation applies is one of its fundamental components. The correct choice of term is not immediately apparent, a point rather glossed over in argument. At first sight it might be thought to be pilotage areas, but since the appellant does not have control over all the declared pilotage areas, that cannot be right either. It seems that in argument before the Judge, the appellant submitted that the

appropriate definition would be "ports and the approaches thereto within the control of the appellant"; but that might or might not include areas which are not pilotage areas. Pilots can only operate in the pilotage areas for which they have been licensed. The intent would seem to be, pilotage areas within declared ports. As noted earlier, in addition to the three main ports under the appellant's jurisdiction there are other pilotage areas where ships call and, presumably, require pilotage services. It would be unjust and unreasonable to expect ship's Masters to have to make a judgment on whether the regulation should be construed in a way different from that which it bore on its face, especially bearing in mind that the putative meaning might impose a liability on them while the stated meaning did not. We are satisfied that regulation 2 should be construed as it reads, that is, as applicable only to compulsory pilotage areas. There being none at the moment, regulation 2 cannot assist the appellant on the outcome of the appeal.

We note that the same difficulty arises with respect to the tender process established by regulation 3; again, this is defined by reference to compulsory pilotage areas. However, by itself our conclusion about the area to which the Regulations apply does not mean that they are invalid, merely that at the moment, and until such time (if ever) as compulsory pilotage areas are declared, the Regulations are ineffective. As noted, the Judge went further, holding that regulation 2 was ultra vires, an issue to which we shall revert.

Turning to the appellant's first contention, it is clear that the powers of licensing and disciplining pilots rest with the Marine Board. As to the respective jurisdictions of the Board and the appellant in regard to declared ports however, we agree with the Judge that the effect of section 3(2) of the Marine Act is to confer precedence on the appellant. Thus in terms of the appellant's functions under section 10 of the Ports Authority of Fiji Act, referred to earlier in this judgment, the appellant is charged with providing and maintaining adequate and efficient port services, co-ordinating all activities within ports, and most significantly, regulating and controlling all activities of, or within, ports; shipping movements of course being an important component of the last-mentioned function. Section 40 should also be noted. Within a port, or the approaches to a port, the

Port Master (who is appointed by the appellant) has power to direct where any vessel shall be berthed, moored or anchored, and generally to regulate the movements of ships. Finally, section 63 enables the appellant, with the approval of the Minister, to make regulations for the maintenance, control and management of any port and its approaches, and generally for giving effect to and carrying out the purposes of the Act. Among the particular powers conferred (see subsection (1)(t)) is providing, operating and controlling pilotage services.

The functions and powers just summarised could not be carried out effectively without the appellant having adequate means of control over pilotage services. Proper provision of such services is not simply a matter of ensuring the presence of one or more pilots duly licensed and qualified to operate in the area in question. Licensing a pilot as fit to serve as such in a designated area, and any question about the pilot's continuing ability so to act, are matters reserved for the jurisdiction of the Marine Board. But the appellant, faced with responsibility of supervising the safe and efficient day to day functioning of a port, has to have regard to a variety of considerations such as, for example, the consistency of the services provided, the safety record (whether of an individual pilot, or of a company employing pilots), the availability of the pilot or pilots, the continued viability of the company, and the availability of appropriate pilot boats. It follows inevitably, in our judgment, that the legislation has conferred on the appellant the power of controlling the provision of pilotage services within a declared port area.

It also follows that we cannot completely agree with the Judge when he said the Ports Authority of Fiji Act did not expressly or impliedly empower the appellant to "vet, license, approve or even discipline" any duly licensed pilot. The powers to license and discipline, clearly enough, have been entrusted to the Marine Board; and to the extent that the licensing process involves vetting or approval, the remainder of the proposition is correct too. But for the reasons we have given we cannot accept the unspoken corollary, that the appellant has no control over pilotage activities in the declared port areas.

Clearly, one available method of exercising such control would be by the enactment of regulations under section 63, and specifically, subsection (1)(t). As stated however, it is our conclusion that the legislation has conferred on the appellant the responsibility for control of pilotage services in declared ports, not merely the means of assuming such control through subordinate legislation if the appellant so chose. While there are obvious advantages, such as certainty and public availability, in promulgating its requirements by subordinate legislation, the appellant can also achieve the function of exercising control by other means of notification, such as those adopted in this case prior to the enactment of the Regulations in August 1998.

The remaining issue is whether the method adopted (the "Notification") is open to challenge on other grounds. The Notification stated baldly that with immediate effect, only pilots employed by the appellant, or by a named company, would be allowed to undertake pilotage. There was no procedure by which other pilots could apply for pilotage engagements, or even obtain consideration of their claim to be allowed to perform such work. The Notification did not contain any provision under which its requirements might expire, either in terms of effluxion of time, or the happening of some specified event, or the institution of any process allowing the pilots presently excluded, an opportunity of future participation in the provision of pilotage services. In short, by means of the Notification the appellant discriminated, in an arbitrary way, in favour of pilots employed by the appellant itself, or by a company associated with the appellant, and against those who were not so employed. Since in most instances the excluded pilots had previously been employed by the appellant it is difficult to find credibility in any contention that the appellant lacked confidence in their ability.

The situation does not fall comfortably within the principle in *Virgo*. As the Judge recognised it is not a case of total prohibition of an activity, whether in a defined area (as in *Virgo)* or otherwise; the Notification purports to regulate, rather than prevent, the provision of pilotage services. The concept illustrated by another case cited in the judgment, *Kruse v Johnson* [1898] 2 QB 91, is more closely in point. As stated in the well-known passage in the judgment of Lord Russell of Killowen CJ at 99, the Courts

will guard against the exercise of statutory powers in a partial way discriminating unfairly against some class or sector. In *Re City of Montreal and Arcade Amusements Inc* (1985) 18 DLR (4th) 161 the Supreme Court of Canada declared a city by-law to be ultra vires and void where it prohibited minors from entering amusement halls, or using amusement machines. Citing *Kruse v Johnson* the Court referred to the rule that the power to make by-laws did not include a power of enacting discriminatory provisions unless the enabling legislation provided the contrary, stating that this principle had been observed in British and Canadian public law "from time immemorial". See also Wade & Forsyth, *Administrative Law* (7th Ed, 1994) at 381 and 879 – 880. In the respects we have noted, the course taken by the appellant, by means of the Notification, infringed this principle, and we agree with the Judge that the Notification ought to be regarded as an unreasonable and ultra vires attempt to exercise the powers of controlling pilotage conferred on the appellant by the legislation. It cannot be saved by the Regulations, since for the reasons given they are presently without practical effect.

Counsel for the appellant submitted that the Court should decline to interfere, on grounds analogous to those leading to the striking-out of an application for judicial review in *Mercury Energy Ltd v Electricity Corporation of NZ Ltd* [1994] 2 NZLR 385. In delivering the judgment of the Privy Council Lord Templeman said:

> **It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. (391)**

We do not see an analogy. At issue here is not any decision to enter into a commercial contract for services, but the proper exercise of a statutory corporation's power to regulate a particular activity; plainly, a justiciable issue.

We are not to be taken as saying that an appropriate scheme involving a tender process would necessarily be open to the same criticism. A fair, open and non-

discriminatory tender procedure, to be held promptly and repeated regularly at appropriate intervals, might not be open to challenge on the ground just upheld. However, the regulations as framed fail to meet these criteria, quite aside from the flaw regarding the areas to which they apply. They require the appellant to conduct a tender process, but only "from time to time". In the face of such a vague direction, regulation 2 discriminates unfairly against pilots not employed by the appellant or its associated company by excluding them from an opportunity even to bid for pilotage work for some undefined period. We agree with the Judge that such a regulation is beyond the powers of the appellant.

In order to settle these issues we think it desirable to say that we are unable to agree with certain further propositions relied on by the Judge. As noted earlier he was of the view that the effect of the Notification was an oppressive and gratuitous interference with the rights of Masters to select the pilots they wish to have to pilot their ships, and with the rights of licensed pilots to practise their calling. We consider the latter proposition is subject to the statutory duties and powers of the appellant, as already set out. That being so we do not see scope for any legal basis on which Masters can claim an overriding right to select pilots of their own choice. Likewise we are unable to accept that the regulation purported to amend s 185 of the Marine Act (Master required to engage a licensed pilot). Finally, we do not agree with the reasoning based on regulation 14 of the Marine (Pilotage) Regulations 1990, which provides that a pilot's licence ceases to be valid for a pilotage area covered by the licence, if the holder does not carry out the duties of a pilot in that area for a period exceeding 24 months. The issue of a licence renders the holder eligible for pilotage work in the area to which it applies, but does not oblige anyone to provide employment. The possibility that the holder will not obtain any employment or engagements is an occupational risk shared by most callings.

We also refer briefly to the question whether the appellant's conduct has been shown to be in breach of the Fair Trading Decree 1990. Although not discussed in the High Court judgment, an argument based on section 27 of that legislation was among the grounds advanced by the respondents before that Court. The reliance on Section 27

was misconceived since that provision relates only to contracts, arrangements or understandings. Section 33 ("misuse of market power") might seem more promising, but in *Warman International Ltd v Envirotech Australia Ltd* (1986) 11 FCR 478, a case on the equivalent section of the Trade Practices Act 1974 (Cth) the Federal Court of Australia held, at 502, that to exercise in good faith an extraneous legal right, though the effect may be to lessen or even eliminate competition, is to take advantage of that right, not of market power.

Although in some respects our reasoning has followed a different route, our conclusion is the same as that reached in the High Court. The appeal is dismissed.

Result

1. Appeal dismissed.

2. Costs in favour of the respondent of $ 800.00 with disbursements (if any) as approved by the Registrar of this Court.

Justice Jai Ram Reddy
President

Sir Thomas Eichelbaum
Justice of Appeal

Sir David Tompkins
Justice of Appeal

FIJI COURT OF APPEAL

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Messrs Peter Howard and Associates, Suva for the Respondents