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

CIVIL APPEAL NO.ABU0014 OF 2006S
(High Court Civil Action No. 576 of 2005S)

BETWEEN:

VODAFONE FIJI LIMITED

Appellant

AND:

1. THE MINISTER FOR INFORMATION COMMUNICATION AND MEDIA RELATIONS
2. THE ATTORNEY GENERAL OF FIJI

Respondents

Coram: Ward, President
Gallen, JA
Ellis, JA

Hearing: Monday, 24 July 2006, Suva

Counsel: John Logan, (SC) and Bob Lateef for the Appellant
C A Sweeney, (QC) and I Tamata for the Respondents

Date of Judgment: Friday, 28 July 2006, Suva

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal against the decision of Singh J whereby in interlocutory proceedings in the High Court he declined to issue an interim injunction.

[2] We remind ourselves at the outset that the decision of a Judge at first instance in respect of such an application is a discretionary one and an appellate court is normally reluctant to interfere in respect of the exercise of such a decision. We

note that the Judge indicated the views he expressed were provisional and he was clearly right to do so. In this case however, counsel maintained that the reasons given by the Judge for declining to grant the interim injunction sought raise a substantial point of law which it is submitted ought to be determined as having a direct bearing on the outcome of this case and also as precedent authority for similar cases in the future.

[3] At the commencement of his decision the Judge indicated the background as follows:

> ***"By an originating summons (filed ex parte but made inter partes on my orders)" the plaintiff seeks for the purposes of this decision an interim injunction restraining the first defendant from awarding any mobile telephony licence to any person or entity for the operation of mobile cellular telecommunications system within Fiji.***
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> ***The matter was listed for 15 December 2005 when the defendants were ready to argue the matter on the basis of whatever documents were filed. Mr Lateef ran into difficulty, as he did not know what was the basis of defendant's objections. Accordingly the defendants agreed to start their submissions.***
>
> ***The plaintiff's case is this: that in 1989 the Fiji Posts and Telecommunications Ltd (FPTL) was granted an exclusive licence to establish operate and maintain a telecommunication system in Fiji for a period of 25 years commencing 1 January 1990. It further says that in 1993 FPTL assigned to it, with the defendant's consent, the right to establish and operate a mobile cellular telecommunication system in Fiji. Therefore it says it enjoys an exclusive licence to provide such systems in Fiji until 2014 but the first defendant is now threatening to introduce others into the market by granting licences to others."***

[4] The Judge then proceeded to consider whether the provisions of s.15 of the State Proceedings Act Cap 24) had application and considered in some depth the application of the section, and authorities which had a bearing on its interpretation. The Judge at the conclusion of this part of his decision stated "the present claim arises out of an alleged breach of contract and hence would be

covered by s.18(2)(a) of the Crown Proceedings Act. After referring to ***Davidson v. Scottish Ministers*** [2005] UK HL 74 he concluded that s.15 did not cover proceedings on the Crown side but applied to other proceedings. He then considered whether or not the court could make an interim declaration and noted an interim declaration was an order where the court declared with finality the extent of rights, duties or obligations of a party. Not surprisingly he emphasized that such orders were made only after the court had fully heard the parties and the court was able to make conclusive orders.

[5] The Judge then considered the question of whether or not the plaintiff had a licence sufficient to found its case and noted that FPTL, which had been granted the original licence, was not a party to the proceedings. After considering material which suggested that the licence granted to FPTL had been assigned with the approval of the Minister he noted that in making the assignment FPTL appeared to have usurped the powers of the Minister and also noted that the exclusive licence granted to FPTL was limited to a period of 25 years from1989 which plainly did not give a right to grant a sublicence for an indefinite period.

[6] The Judge also considered whether the grant of an exclusive licence was contrary to the freedom of expression provisions of the Constitution.

[7] After considering all these matters the Judge came to the conclusion that the issue of whether or not the plaintiff held some form of exclusive licence was a serious issue to be tried and he further concluded that it would be very difficult to calculate damages if the plaintiff ultimately established its case. He noted that the defendants were unlikely to suffer any losses if the grant of licences was put on hold temporarily pending trial. He concluded however that though he considered the balance of convenience favoured the grant of an interlocutory injunction he considered, under the provisions of s.15 of the Crown Proceedings Act, now the States Proceedings Act, he was unable to make the interim orders sought.

[8] Having declined to make the orders sought, he concluded by saying that it would be unwise for the defendant, while the proceedings were pending, to grant any further licences, and given that the matter was of significant national importance, he directed that the plaintiff file and serve a full statement of claim within 14 days of the judgment and that the matter proceed thence strictly according to the time frames in the High Court Rules 1988, in particular order 18 Rules 2,3 and 19 and Order 25 Rule 1.

[9] In arguing the matter before us counsel for both the appellants and respondents relied upon correspondence suggesting on the one hand that the respondent had no committed policy to grant additional competitive licences and was open to discussion and on the other that there was an intention to open the field to providers other than the plaintiff.

[10] It was also not disputed that the material upon which both appellants and respondents relied emanated from a person who was previously the Minister of State responsible for such matters but who was no longer the Minister nor even a member of Parliament. It was also accepted that the Government, following an intervening election was a new Government not that of which the first defendant had been a Minister. There was no suggestion that the Court could take into account any material which would suggest one way or the other what attitude the present Government or the holder of the equivalent post in the present Government had towards the question at issue.

[11] Counsel not surprisingly in view of the Judges conclusion on the effect of s.15 of the State Proceedings Act, largely argued the matter before us on the two conflicting lines of authority which culminated in the House of Lords decisions in on the one hand ***Factortame Ltd. v. Secretary of State for Transport*** [1990] 1 A.C. 85 hand and on the other in re ***M v. The Home Office*** 1994 1 AC 377. Both considered the effect of the English Crown Proceedings Act 1947 and arrived at diametrically opposite conclusions. A substantial number of other authorities

were referred to us including the Fiji case of ***Fiji Television Limited v. The Minister for Information Broadcasting Television Communication*** [1997] 43 FLR 164 where interlocutory orders were granted and effectively the views in ***M v. The Home Office*** were followed.

[12] Both counsel referred to a number of other decisions in various related jurisdictions, but each sought to distinguish those authorities which favoured the other side. Counsel for the appellant placed considerable reliance on the New Zealand Privy Council case of ***Tamaki v. Baker*** [1901] AC 561 but in that case the order sought was against the Commissioner of Crown Lands rather than the Minister.

[13] The arguments and analysis presented were detailed and given in depth. In each case they presented a logical chain of reasoning leading to the conclusion on which counsel relied. Unfortunately like the authorities themselves the conclusions were incompatible. Counsel invited us to make a choice which might put the dispute to rest at least in Fiji. Unfortunately we do not see this case at its present stage as appropriate to do so.

[14] While there are expressions of principle in most of the authorities to which we were referred, as well as reasons being given for following one line of authority rather than another, it is also apparent that every case is to some extent coloured by the factual situation out of which it arises.

[15] That brings us to a specific problem in this case. The appellant relied upon material emanating from the previous Minister in the previous Government. There is nothing to indicate one way or another what is likely to be the view or the action of the present incumbent of the equivalent ministry, nor is there any material to suggest that the present Government would necessarily follow policies which may or may not have been adopted by its predecessor.

[16] It is clear that what the Court is faced with at this stage is a kind of speculation. The present proceedings do not provide an adequate vehicle to determine a point which is at present theoretical.

[17] In addition there is the practical problem that at this stage the plaintiff has not obtained a licence from the Minister and the question of whether or not any assignment by FPTL can be regarded as giving rise to a licence for the purposes of the appropriate statutory provisions has not been argued or determined and in addition is dependent on the provision of factual material which is not available to us. It should not be forgotten that the only factual assertions before the Judge in the High Court came from the affidavit filed in support of the application, there being at that stage no affidavit from the respondents.

[18] We consider that to attempt to determine which of the competing lines of authority ought to apply in Fiji is at present premature and open to considerable risk that when the basic facts are established by the substantive proceedings they may not justify the issue of the orders sought.

[19] In our view the Judge was right when he indicated that the substantive proceedings ought to be dealt with before the question of remedies was decided, and in the circumstances ought to be decided as soon as possible.

[20] We note and endorse the view of the Judge that the proceedings should be dealt with expeditiously in terms of the rules and we note also and endorse his comment that the respondents ought to bear in mind the undesirability of taking decisions which might be affected by the ultimate outcome of the proceedings before the court.

[21] The appeal will therefore be dismissed but without arriving at any decision as to whether or not injunctive relief in the circumstances of this case can as a matter of law issue against the respondent.

[22] Respondents are entitled to costs which we fix at the sum of $750 in respect of each respondent together with disbursements to be fixed by the Registrar.

Ward, President

Gallen, JA

Ellis, JA

Solicitors:

Lateef and Lateef Lawyers, Suva for the Appellant
Office of the Attorney General Chambers, Suva for the Respondents

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