IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 11D OF 2006S

BETWEEN : THE STATE V. MINISTER FOR COMMERCE, BUSINESS DEVELOPMENT & INVESTMENT

EX-PARTE: WENDY'S INDUSTRIAL COMPANY LTD.

APPLICANT

Counsel for the Applicant	:	G. O'Driscoll	: O'Driscoll & Seruvatu
Counsel for the Respondent	:	L. Daunivalu	: Attorney-General's Chambers
Date of Decision	:	12 May, 2006	
Time of Decision	:	9.30 a.m.	

DECISION

This is an application for leave to move for judicial review and a stay of the decision of the Minister of Commerce, Business Development and Investment of 10 February 2006 affirming the cancellation of the Applicant's Foreign Investment Registration Certificate ("FIRC No. 1378").

The Applicant is a private limited liability company incorporated under our laws on 10 April 2002. There are only 2 shareholders, both Chinese nationals, one Guang Lai Zhang with 80 per cent share and the balance held by Dong Mei Liu. The majority shareholder also acts as the Company's Managing Director.

The Company, immediately prior to its incorporation, had lodged its application with the Fiji Trade and Investment Bureau ("FTIB") to set up business of processing health food products from wheat in the country. On 19 February 2002, FTIB approved the project and FIRC No. 1378 was issued to the Company. The Certificate specifically stipulated ***"designation of area of investment and description of trade, business or manufacture"*** was ***"to process health food products from wheat"*** with the terms and conditions attached in the form of letter of even date. These include conditions (iii) and (ix) which reads as follows:

> ***"(iii) This approval and the certificate have been granted based on the information you have submitted. If the information is incorrect or is false or is misleading Government reserves its right to review approval or withdraw the certificate and levy fines.***
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> *(iv)* . . .
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> *(v)* . . .
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> *(vi)* . . .
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> *(vii)*
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> *(viii)*
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> ***(ix) you should re-apply to the Chief Executive in the prescribed form for a variation of***
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> > ***(a) the business carried out by the company, or***
> >
> > ***(b) any other term and condition of the certificate . . . ."***

FTIB's letter further confirmed that the authorised capital of the Company of $200,000.00 included paid up equity cash contribution of $80,000.00 by the shareholders, which was to be transferred into the Fiji account of the Company. The Company also stated in its proposal that it would employ a total of 10 locals at the initial stage of the operation and 28 when ***"at normal operational levels."***

On 9 July 2003, hardly four (4) months into its operations, the Applicant's Managing Director wrote to FTIB requesting permission to expand its line of business ***"to include processing of all Chinese foods,"*** which the company, the Court presumes, was already engaged in, as it states in the same letter that ***"Our feedbacks from supermarket sales are showing speedy increase – copies of their orders are attached for your reference."*** In addition, the Company informed FTIB that it would import more equipment from China, apply for work permits for ***"four specialist food technicians,"*** and apply to set up a chain of stores to sell its expanded line of business products. Details in diagrammatic forms of the new products and management structure accompanied the letter. On 30 July 2003, the Company followed up its earlier letter with more details.

On 29 August, 2003, FTIB Chief Executive rejected the Company's request for expansion of its business in the clearest of terms. The letter states as follows:

> ***"I refer to your application dated 30 July 2003 regarding the above-mentioned project. Since the proposed project (Retail shop and Chinese foods) falls under the reserved list of Foreign Investment Act, foreign participation in such investment is not allowed."***

On the question of work permits for 4 specialist food technicians from China, FTIB responded that:

> ***"As the Company is currently processing the products, it is expected that the locals be trained to do the processing. This does not justify employing a food technician from China."***

Finally in declining its application, FTIB noted that the Company does not appear to be wholly in the business of health food from wheat and requested the Company for proof that the products it is manufacturing fall into the permitted category under its Certificate.

No further exchange between the Company and FTIB was made until 15 April 2005 when a progress report was submitted by the Company. The report stated that it was operating from Sports City Complex (Shop 17), Laucala Bay; that it was presently employing 3 locals on a full time basis; that it has so far invested $50,000.00; and that it sought work permits for 2 chefs from China after failing to obtain suitable local candidates following advertisement in the local media.

A factory visit was conducted by FTIB officials on 23 August, 2005. The report of the visit confirmed that the Company doing more than processing health food of wheat origin; it was carrying on a full-blown Chinese restaurant business selling all and sundries. Photographic evidence substantiating the report was also obtained. The Company, the report noted, was operating under ***"Royal Foods"*** title.

On 25 August, 2005 FTIB wrote to the Managing Director of the Company to advise the Bureau's intention to cancel its Certificate on the ground that it had breached the conditions of its Certificate. In particular, the fact that the Company had without authority expanded its activities to restaurant business and operating under ***"Royal Foods"*** name which was also unregistered. Nevertheless in accordance with *Section 13 (2) of the Foreign Investment (Amendment) Act 2004, the Company* was given 15 working days to make representation and respond to the allegations. On 9 September, 2005 the Company responded to the FTIB letter with clarifications and explanations. On 20 October, 2005 FTIB after having considered the Company's response, confirmed its decision to cancel the Company's Certificate and copied its decision to relevant government agencies.

The powers of the FTIB to cancel a Foreign Investment Certificate is contained in Section 13 of the Foreign Investment Act 1999 (***"the Act"***). The grounds for cancellation includes breach of the terms or conditions of the Certificate.

The decision of FTIB to cancel a certificate is not final but subject to review by the Minister responsible, in this instance, the Minister for Commerce, Business

Development and Investment. Section 15 of the Act sets out the procedure of appeal to the Minister. First, the investor or aggrieved party is required, if he intends to appeal the FTIB decision, should lodge his appeal within 28 days after the decision is made. The Minister after having sought and received through his Chief Executive the FTIB reasons for the cancellation and along with the grounds of appeal by the investor, is required after due consideration within 7 days thereafter, *decide either to affirm, vary or set aside the said decision.*

In this case, the Minister, having received the Company s appeal in conformity with S.15 (2), and after having complied with other requirements of the said section, decided in his letter to the Applicant of 10 February, 2006, to affirm the FTIB decision to cancel the Certificate. It is this decision by the Minister that the Applicant now seeks the Court to review.

Opposition to Leave

The Respondent opposes the application for leave for the following reasons:

(1) The Applicant has no arguable case and in particular:

(i) the Minister s decision of 10 February 2006 was *exercised in accordance with the provisions of the Act;*

(ii) there was no illegality in the manner the decision was was made; and

(iii) the application goes to the merit of the decision.

(2) There was no breach of natural justice or abuse of discretion given that:

(i) the Applicant's appeal was properly considered by the Minister after taking all the relevant matter into account; and

(ii) the Minister had complied with the requirements of the Act.

For the Applicant, Counsel argues that in making his decision, the Minister had failed to take into account the Company's submissions and support, including the Fiji Chamber of Commerce letter of support. He had also taken into account irrelevant matters including allegation which had been denied by the Applicant Company. In summary, the Minister's decision was both arbitrary and unreasonable.

The thrust of the Applicant's submission is that while it denies all the allegations of breach of Certificate conditions levelled at it, where they may have occurred, they did so because of some misunderstanding between the Company and the FTIB, or at any rate the non-conformity was due to FTIB's refusal to the Company's requests to enlarge its business and operations and additional technical skill from China. Thus in the first instance, it denied totally that it was operating a restaurant business, and that ***"Royal Foods"*** name went to the product, and did not represent a change of the Company's name. Second, the Applicant claims that its original application to the FTIB was to establish business for a wider line of products but that the FTIB's Certificate limited it to ***"process food products from wheat."*** This, according to the Applicant was a misunderstanding. Thirdly, where the Company had fallen short of its projected outcome including manpower needs especially the employment of locals, this was the direct result of the refusal by FTIB to the request by the Company for expansion of business.

It is abundantly clear from the evidence before this Court that the Company was authorised by the FTIB to begin its operations in Fiji along a special and particular line of business activity namely, ***"to process health food products from wheat."*** There is no room for doubt as to the defined activities, nor is there any possibility

for misunderstanding as claimed by the Applicant. The Company got its Certificate and did not question the scope of activity that was given it. It is equally obvious that the Company did not wish to remain in the health food from wheat business for long, as it asked FTIB for expansion of business into other areas of business and products barely 3 months after it started. It was informed in no uncertain terms by FTIB that new business activities suggested by the Company fell under the category of ***"reserved activities"*** under Section 5 of the Act, which is not open at all to any foreign investor. This is to be contrasted to ***"restricted activities"*** under Section 6 which allows the Minister some discretion.

There is no doubt, in my view that, notwithstanding the unequivocal refusal of FTIB to allow the Applicant to indulge in other forms of business activities outside its Certificate, it continued with those activities. Already it was supplying the supermarkets of all forms of Chinese food which were not wheat based or processed as health foods. There is no evidence that following the FTIB refusal, that the Company desist from such practice. The FTIB inspection of the Applicant's premises and the report with the photographs of the layout, confirms the use of part of the premises as serving and eating area consistent with the conclusion of the report, of a restaurant business. It is not, as the Applicant argues, a misunderstanding. It is a fact to be concluded by this Court from the evidence. The FTIB officials were there to witness when non-wheat based Chinese food were ordered, cooked, sold and consumed on the premises.

The Applicant also argued that the Minister failed to take into consideration support from the Fiji Chamber of Commerce. There is in fact no evidence that this is so. In any case, the support letter only goes to the volume of trade in which the Applicant is involved. It does not lend any assistance to the allegations of specific breaches made against it.

There are other anomalies, including failure to deliver on its business plan to invest $150,000.00; the late registration under the FNPF Act; and its non registration with

the Inland Revenue for tax purposes, that amount in the end to breaches of both the Certificate Conditions and/or the laws of the land. I note as an exception that the use of the words ***"Royal Foods"*** does not of itself mean that it automatically amounted to a change in the Company name.

I am satisfied given the findings above that the Minister's action under the circumstances, was neither arbitrary nor unreasonable. The Minister had, in his letter of 10 February 2006 to the Applicant, explained that he had come to his decision ***"after careful consideration"*** of all the relevant matters obtained both from FTIB and the written appeal from the Company. Even if the issue of the use of ***"Royal Foods"*** were decided in favour of the Applicant, there were other breaches so fundamental that they of their own would have been sufficient for FTIB and the Minister to act as they did.

In the end the Applicant has failed to establish a prima facie Case on merit or that it has an arguable case to persuade the Court to grant leave to the Applicant to move for judicial review.

Leave is refused.

F. Jitoko
JUDGE

At Suva

12 May 2006