

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 256 of 2006

BETWEEN : **AMANSHA KIRAN** daughter of Sindh Kumar of Rakiraki, Fiji, Student by her father and next friend **SINDH KUMAR** son of Suren Markus of Rakiraki, Fiji, School Teacher.

1st PLAINTIFF

AND : **SINDHIKA KIRAN** daughter of Singh Kumar of Rakiraki, Fiji, Student by her father and next friend **SINDH KUMAR** son of Suren Markus of Rakiraki, Fiji, School Teacher.

2nd PLAINTIFF

AND : **SEIVI** and **RITESH** of 27 Ratu Sukuna Road, Suva, Fiji

1st DEFENDANT

AND : **AHMED DEAN** of 27 Ratu Sukuna Road, Suva, Fiji

2nd DEFENDANT

AND : **PENANG SANGAM SCHOOL** a school duly registered under the Education Act (Cap 262) Laws of Fiji having as its controlling authority Then India Sanmarga Ikaya Sangam.

3rd DEFENDANT

AND : **THEN INDIA SANMARGA IKAYA SANGAM** a limited liability company (without use of the word limited in its name) limited by guarantee duly registered under the Companies Ordinance 1913 and having its registered office at Nadi Town.

4th DEFENDANT

AND : **MANIKAM GOUNDER** of Rakiraki, Fiji as the duly
registered Manager of Penang Sangam School.
5th DEFENDANT

AND : **MINISTRY OF LABOUR AND INDUSTRIAL
RELATIONS, NATIONAL OCCUPATIONAL HEALTH
AND SAFETY SERVICE**
6th DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**
7th DEFENDANT

Appearances: Mr S. K Ram for the Plaintiffs
Mr J. Sharma for the First and Second Defendants
Mr Gordon for the Third, Fourth and Fifth Defendants
Mr J. Lewaravu for the Sixth and Seventh Defendants
Date of Hearing: 02 June 2010
Date of Ruling: 31 October 2019

RULING

INTRODUCTION

1. On 08 March 2010, the Office of the Attorney-General filed a Summons pursuant to Order 33 Rule 3 of the High Court Rules 1988 seeking determination of the following preliminary question:

Whether the 6th Defendant is immune from a civil action or civil proceeding pursuant to section 68 of the Health and Safety At Work Act, 1996?

2. Section 68 provides:

Protection against civil and criminal proceedings

68 No action or proceeding, civil or criminal, shall lie or be continued against any Inspector or any other body established by or under this Act, for anything done or omitted in good faith in the exercise or purported exercise of a function of an Inspector or body under this Act.

BACKGROUND

3. The basic facts pleaded in the statement of claim are as follows. On 28 August 2003, the Then India Sanmarga Ikaya Sangam ("TISIS"), through a committee, organized a fundraising carnival at the Penang Sangam School grounds. The school is run by TISIS, and the grounds belong to TISIS. Food stalls and various amusement rides were set up at the carnival.
4. Nine days prior to the start of the carnival, the committee requested the Ministry of Labour Industrial Relations National Occupational Health & Safety Service ("Ministry") to inspect the amusement rides that were to be used. The Ministry obliged, and an inspector was sent for that purpose.
5. On 26 August 2003, the inspector granted approval and gave the all clearance for the Wheel to be used at the carnival. Two days later, on 28 August 2003, the Wheel collapsed at the carnival. Amansha and Sindhika Kiran were enjoying a ride on the Wheel when that happened. Both sustained personal injuries. Through their parents, they sue all the defendants. Against the Ministry, the following is pleaded at paragraph 11 of their claim:
 11. *The sixth Defendant is a government Ministry responsible (amongst other things) for the National Occupational Health and Safety Service and on or about the 26th of August 2003, had approved the use of the said amusement ride to the first and second defendant on the premises of the third defendant.*
6. The Attorney-General's office responds as follows at paragraph 8 of the defence filed on 27 November 2007:
 08. *THAT Paragraph 11 is admitted to the extent that approval for the use of the amusement ride was given on the 26th of August 2003 to the chairman of the Fundraising Committee in response to the request for inspection dated 19th August 2003.*
7. The Attorney-General's office urges this court to determine the section 68 issue as a preliminary point on the following grounds:

- (a) section 68 raises a point of law which, if decided, will be decisive in this case.
- (b) this is an opportunity to dispose the issue which the court should take advantage of
- (c) the immunity provision in section 168 has never before been tested in Court.
- (d) in a claim for negligence, one has to first establish a duty of care and in relation to a claim for breach of statutory duty one has to first identify the relevant statute and then particularize the provisions breached. The plaintiff and the 4th and 5th defendants have failed to identify any relevant legislation that would support their claim as to the applicability or otherwise of the Health and Safety Act.

8. This court has a discretion to hear preliminary issues on any given civil matterⁱⁱ. I also agree that some direction on this issue is warranted at this interlocutory stage.

ISSUES

9. There are valid reasons why some legislation will provide immunity to public service agencies and officers in the exercise of their normal statutory functions and powers. However, if some injury results to a member of the public as a result of the exercise of a statutory power or function, and the power or function in question was designed to safeguard against the very type of injury sustained, will the immunity cover the public officer still? McHugh J in Webster v Lampard (1993) 177 CLR, at 619 said:

"..... the courts have construed such provisions by reference to general principles rather than by a textual analysis of individual enactments.

10. I approach the "general principles" in this case, first, by considering whether the Inspector did breach a statutory duty and, if so, whether the breach did cause or contribute to the personal injuries. At this interlocutory stage, I assume the facts pleaded in the claim are proved. Second, I then consider the common law position as to whether there is a private law right of action permitted when a statutory duty is breached? Third, I then review some case law on how a statutory immunity such as provided in section 68 has been interpreted in some jurisdictions. Who should bear the onus of proof over the component parts of section 68?

IS THERE A REASONABLE CAUSE THAT A BREACH OF STATUTORY DUTY WAS COMMITTED BY THE INSPECTOR IN THIS CASE?

11. Whether or not there was a breach is a triable issue. On the pleadings, there is a reasonable cause that the Inspector did breach a duty under the Act. There is a concession to this effect in paragraph 3.1 of the A-G's Office written submissions:

The Labour Inspector was invited vide a letter dated 19th August 2003 "to inspect the ferris wheel for OHS compliance". In adhering to the request, the Labour Office was acting in compliance with the duties and requirements of the Health and Safety Act. Therefore, the relevant and applicable legislation in this case is the Health and Safety Act and not the Factory Act as claimed by the Plaintiff. Furthermore, there may be other relevant legislations (sic) applicable in this case such as the Occupiers Liability Act, Local Government Act, Education Act and Gaming Act but in as far as the claim against the Applicant is concerned the relevant legislation is the Health and Safety Act.

12. Had the Inspector not granted approval for the Ferris Wheel, it would not have been used, and it would not have collapsed. He had all the power to grant or not grant clearance in terms of sections 10, 42, 43 and 47 of the Health and Safety At Work Act 1996 (discussion below). Unless an intervening causal factor totally outside the knowledge of the Inspector had occurred following the inspection, it would seem that the inspection process was not carried out to the due diligence required.
13. I accept that the claim pleads no particular statutory provision. However, the case is yet at an interlocutory stage. Given the concessions by the A-G's Office, the plaintiff may still apply to amend their pleadings.

PRIVATE LAW RIGHT OF ACTION / HEALTH & SAFETY AT WORK ACT

14. Section 68, *prima facie*, shields any inspector from exposure to any civil or criminal proceeding for anything done or omitted, in good faith, in the exercise or purported exercise of a function under the Act. The section 68 is worded in the negative averment. Is a private law right to sue a negligent Inspector therefore precluded by section 68?
15. The Inspector in this case, had acted pursuant to his duties under the Health & Safety At Work Act 1996 (see further discussion below). He inspected and gave clearance for the Ferris Wheel which then collapsed two days later. Assuming the Inspector was negligent, is he still immune from a private law claim, by virtue of section 68?
16. The very reason why the Health & Safety At Work Act 1996 exists, why the inspection request was made on 19 August 2003 to the Ministry, and why the Inspector inspected it on 26 August 2003, was to ensure that it was safe to be used.
17. The Act gives power to any Inspector to enter any workplace to examine and inquire and ascertain whether any "plant, substance or thing" complies with the Act. As I

discuss below, the carnival grounds is a "workplace" within the definition of the Act. If the plant, substance or thing examined, in the Inspector's opinion, poses a health or safety risk to any person, the Inspector "may" issue a prohibition notice under section 47.

18. In Land Transport Authority v Lal [2012] FJSC 23; CBV0019.2008 (23 October 2012), the Fiji Supreme Court reviewed, amongst others, some cases on whether a private law right of action is sustainable where personal injury has resulted from a breach of statutory duty.
19. Generally, where a statute enacted or prohibited something for the benefit of a person, that person was said to have a remedy only under the same statute. Accordingly, unless a very good reason was shown, the courts were reluctant to find a private right of action. Where the statute imposed an obligation to take steps for the safety of others, and a breach of that had led to injuries, the courts have read into the statute a private right to sue. This was applied particularly to statutes concerned with industrial safety. In some other cases, absent any contrary legislative intention, the courts have recognized a private law right (i) where the statute was concerned with protecting an interest recognized by common law, or, if the policy of the statute was to protect some private right (e.g. where the statute imposed a duty to take measures for the protection of others). At the end of the day, it is a matter of statutory construction.
20. The Health & Safety At Work Act 1996 imposes an obligation on employers to take steps to ensure that workers and non-workers alike are not exposed to any health or safety risk arising from the conduct of their (employers') undertaking. The duty of the Inspector is to ensure employers comply with these. While I say yet again that this remains a triable issue, it would appear based on the pleadings that the Inspector in this case failed in that duty which resulted in an unsafe Ferris Wheel being used. I am of the view that a private law right of action is permissible for the supposed breach in the circumstances of this case.

HOW THE IMMUNITY DEFENCE HAS BEEN INTERPRETED?

21. The A-G's Office submits that the onus is on the plaintiffs to prove, at the outset, that they have a case against the Ministry because the language of section 68 is expressed in the negative averment. The argument is that the plaintiffs must have all the facts and/or evidence against the Ministry available before filing the claim in Court and that

the pleadings must identify proof of any act or omission done in bad faith. Otherwise, the plaintiffs are precluded from bringing an action against the Ministry.

22. Is the onus on the plaintiffs to establish lack of good faith or is it on the defendant Ministry to prove good faith? If the onus is on the plaintiffs, must they then adduce evidence of bad faith to establish that the immunity does not work? Is negligence relevant at all in the equation?
23. The general rule is that a pleading must contain facts, not evidence. Pleadings are proved when the Judge accepts as truth the supportive evidence is adduced at trial. I reject the submission that the plaintiffs must have conclusive evidence against the Ministry available before they can file a claim. In any event, the factual concessions by the AG's office would suggest that there is a reasonable cause of action against the Ministry. At this interlocutory stage, that is all I am prepared to say.
24. The only issues are the ones raised by section 68, first, whether the Inspector in this case had acted "in good faith" and, second, whether he acted in exercise of a function under the Act. I consider these further below after I deal with the question – who bears the onus?

Onus

25. I also reject the suggestion that the onus is on the plaintiffs to prove that the Inspector had not acted in good faith or had acted in bad faith. Immunity is pleaded by the party that relies on it. It is incumbent upon that party to establish that the immunity should apply. In other words, the party that pleads the section 68 immunity must establish that he acted in good faith. Bolen J in Barrett & Ors v South Australia & Anor (1994) 63 SASR 208 said that the onus is on he who relies on the protection to show that they are entitled to the protection and accordingly, refused to strike out the claim.
 4. I add that I agree with the reasoning of Duggan J on "onus of proof" in relation to the immunity given by s29(1). The onus is, in my opinion, on the appellants to show that they are entitled to the protection of s29(1). That in itself is sufficient to reject the application to strike out the statement of claim.
26. Milhouse J said the onus is not on the respondent to show that the appellant did not act in good faith. Rather, it is on the appellant to show that he acted in good faith:

8. I must disagree, though, with his conclusion that an onus rests on the respondents to prove that the appellants did not act "in good faith". In my view s29 (1) gives a defence to a director, (in this case), to shew that he acted in good faith. It is for the Director to prove: the section is a shield. I agree with the reasoning of Duggan J.

27. Duggan J said:

6. The appellants argue that the section requires the respondents.. to prove that the appellants are not entitled to its benefit. In particular .. that the respondents carry the onus of proving that the appellant directors did not act in good faith. Put another way, say the appellants, the respondents must prove that the appellants acted in bad faith. They then argue that none of the allegations in the statement of claim, if proved, would establish bad faith. It follows, so it is said, that as there is nothing pleaded which would disentitle the appellants to the immunity provided for in s29, then the whole of the statement of claim must be struck out.

20. This brings me to the question of onus. The discussion thus far has proceeded on the assumption that the onus is, as the learned judge found, on the respondents to prove that the appellants were not entitled to the protection of s29. If this assumption as to onus is incorrect and the onus is on the appellants to bring themselves within s29, then the case for striking out the statement of claim falls to the ground. The appellants cannot complain of the failure to plead material facts in the statement of claim on this issue if it is not an essential element to establish primary liability.

25. In my view it is consistent with this authority to hold that the grounds for the exclusion of liability by virtue of s29 of the State Bank of South Australia Act must be proved by the party seeking to invoke the defence, in this case the appellants.

What Is "Good Faith"?

28. This is the first limb under section 68.

29. Ordinarily, "good faith" is a state of mind. Denning LJ in Central Estates (Belgravia) Ltd v Woolgar [1971] 3 All ER 647 at 649, would explain the said state of mind thus:

"To my mind, under this Act, a claim is made in good faith when it is made honestly and with no ulterior motive...(so as) to avoid the just consequences of misdeeds or failures"

30. Assuming the Inspector honestly believed with no ulterior motive, that the Ferris Wheel was safe. However, he had overlooked some defects in the assembly features of the Wheel which any suitably qualified Inspector inspecting with the due diligence required, would have been alerted to. Would our Inspector still be protected by section 68?

31. In Mid-Density Developments Pty Ltd v Rockdale Municipal Council (1993) 116 ALR 460ⁱⁱⁱ, a case where the immunity granted by section 582A of the Local Government Act 1919 (NSW)^{iv} was raised in defence, the Court said *good faith* in some contexts is a subjective assessment, so that a public officer will still have acted in good faith, if he acted honestly, *albeit*, carelessly:

27. "Good faith" in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest, *albeit* careless. See, for example, Smith v Morrison (1974) 1 WLR 659. (Abstinence from inquiry which amounts to a willful shutting of the eyes may be a circumstance from which dishonesty may be inferred: Jones v Gordon (1877) 2 App Cas 616 at 625, The English and Scottish Mercantile Investment Company, Limited v Brunton (1892) 2 QB 700 at 707-8, The Zamora No. 2 (1921) 1 AC 801 at 803, 812.)

32. The Court then turned to consider the argument that there is an objective element about the concept of "good faith":

27. "..... On the other hand, "good faith" may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence. This, counsel urged, was what was required by the present statutory context. The appellant then submitted that there was a plain absence of good faith in this sense on the part of the respondent.

28. In Siano v Helvering 13 F Supp 776 at 780 (1936), Clark J said that the words "good faith" or their Latin equivalent appear frequently in the law and are capable of, and have received, what he described as "two divergent meanings". The first was the broad or subjective view which defines them as describing an actual state of mind, irrespective of its producing causes. The other construed the words objectively by the introduction of such concepts as an absence of reasonable caution and diligence. In the instant case, the Court had under consideration a regulation promulgated by the Commissioner of Internal Revenue which used the expression "failure in good faith to observe and comply with the requirements of all Internal Revenue and other laws relating to any operations under his permit". The appellant asserted that he had never heard of a particular tax which he had failed to pay. The Court said (at 781):

"The government could and perhaps for the completeness of the record should have introduced evidence of the fame (or notoriety, as we said before) of the tax. Even in the absence of such evidence, we think the permittee was under a duty to make inquiry. We place that upon two factors: The nature of taxes, and the lapse of time. Three years and a tax universal to his trade call, in our opinion, for some curiosity. No attempt to satisfy that curiosity smacks to us too much of the ostrich and proportionately too little of good faith."

See also Lucas v Dicker (1880) 6 QBD 84 at 88, In re Dalton (A Bankrupt) (1963) Ch 336 at 354-5, and Rumsey v R. (1984) 5 WWR 585 at 592-3. These cases illustrate that, in a

particular statutory context, a criterion of "good faith" may go beyond personal honesty and the absence of malice, and may require some other quality of the state of mind or knowledge of the relevant actor. An example in this Court is Wilde v Spratt (1986) 13 FCR 284 at 292, where para. 135 (4) (b) of the Bankruptcy Act 1966 was in issue; cf Official Trustee in Bankruptcy v Mitchell [1992] FCA 521; (1992) 38 FCR 364 at 371.

33. The court concluded, that whilst "good faith" may have a narrow meaning in different other branches of the law, he preferred the broader interpretation for section 582A.

29. The concept of "good faith" as understood in various fields of the general law provides further examples. For example, an administrative decision may involve an improper exercise of power on the footing that it is unreasonable in the *Wednesbury* sense, without there being *mala fides*. Likewise, the whole doctrine of constructive notice which was developed in equity as appendant to the *bona fide* purchaser principle, operates by reference to what would have come to the knowledge of the purchaser if he had conducted his activities in the ordinary way; see Consul Development Pty Limited v DPC Estates Pty Limited [1975] HCA 8; (1975) 132 CLR 373 at 412-3.

30. In the present case, it will be wrong to assume that when used in the relevant legislation the phrase "anything done or omitted to be done in good faith" (in sub-s. 582A (1) of the Local Government Act) and "in respect of any advice provided in good faith" (in sub-s. 149 (6) of the E.P.A. Act) operate to leave the respondent liable only in respect of dishonesty.

34. In Barrett & Ors v South Australia (supra), the South Australian Supreme Court had to consider the meaning of "good faith" in terms of section 29(1) of the State Bank of South Australia Act^v. Bolen J said it is arguable that the protection under this section does not extend to gross negligence or cases where there had been no real attempt by the officer to fulfill his statutory duties. In such cases, the officer cannot be said to have acted in "good faith, even though, he or she has not acted in bad faith:

.. it is reasonably arguable that the protection given by s29(1) of the State Bank of South Australia Act 1983 does not extend to cases of gross negligence or to cases where there was no real attempt by a director to fulfill the duty of care and diligence imposed on him by his position. For example, the protection given by the section may not extend to a director who acts without dishonesty but as a mere rubber stamp.

2. I think it possible for a director to act without bad faith yet not "in good faith".

35. He then concluded that whether or not the protection given by section 29(1) applies in any given case is a triable issue.

3. *The question whether protection can be extended is no doubt one of law. The application or not of the possible protection will depend on the facts. I think the whole issue should go to trial. Had it been possible to say as a matter of law that s29(1) must give protection against the consequences even of gross negligence or mere rubber stamping then, of course, no trial would have been necessary. But for the reasons given by Duggan J, with which I respectfully agree, it is not possible so to say.*

36. Milhouse J also agreed that the issue is a triable one:

6. *Whether or not the respondents be justified in their complaints that the appellants did not act in good faith will be a matter for the trial judge after he has heard the evidence.*

7. *It would be quite wrong at this stage to give to the phrase "in good faith" a precise, narrow meaning, certainly not one which meant that the appellants did not have to justify their actions as being "in good faith". The point is most certainly arguable: the action should go to trial. Perry J was quite right in his conclusion on this point.*

"In The Exercise Or Purported Exercise Of A Function Under The Health & Safety At Work Act 1996"

37. This is the second limb under section 68.

38. In Webster v Lampard (1993) 177 CLR, a police officer, amidst some ongoing issues between a landlord and a tenant, assisted the former in the eviction of the latter. The officer had pressured the tenants to give up possession by threatening them with arrest and a charge of trespass. The tenants instituted proceedings against both the landlord and the police officer. Against the latter, it is alleged that he "acted in contumelious disregard of the rights of the plaintiffs". The officer pleaded section 47A of the Limitation Act, 1935 (WA)^{vi} and also on section 138 of the Police Act 1892 (WA)^{vii}. Both sections are similarly worded in the negative averment as section 68 of Fiji's Act in question here.

39. Mason CJ, Deane and Dawson JJ commented on a line of cases^{viii} in which the courts had been called upon to interpret "course of duty" provisions. They said at 605:

"Through the judgments in those cases there runs a 'clear conception of (a person) intending and trying to do his (or her) duty but laboring under some misapprehension of fact or of law' Trobridge v Hardy (1955), 94 CLR at 160. Even in the absence of any explicit qualifying adjective such as 'intended' (as in s47A of the Limitation Act) or 'purported', the defence under such statutory provisions is not confined to the case where the defendant's conduct was actually

justified as being in pursuance or execution of some statutory provision or discharge of some public duty or office See, e.g. Greenway v Hurd 4 TR 553 at 555, per Lord Kenyon CJ (100 ER 1171 at 1172-73) (and other cases referred to in footnote.) If it were, the protection which such provisions provide to those acting bona fide in the course of public duty would be illusory. Subject to an important qualification, it usually suffices for the purposes of such a provision that the person invoking the defence genuinely but mistakenly believed that he or she was acting within the limits of the authority expressly or impliedly conferred by the relevant statutory provision or office. The qualification is that, notwithstanding such a genuine but mistaken belief, the defence under such protective provisions is not available to defeat a plaintiff's otherwise well-founded claim if it appears that the defendant was, in fact, 'actuated solely or predominantly by a wrong or indirect motive' Trobridge v Hardy at 162, per Kitto J, as for instance the satisfaction of personal malice or the gaining of some other benefit or objective 'entirely outside statutory justification' G. Scammell and Nephew Ltd. v Hurley at 429, per Scrutton LJ; and see, generally, Trobridge v Hardy at 175, per Taylor J, such as a corrupt benefit."

40. McHugh J at 619 said:

Thus, it is a cardinal rule of construction of such provisions that they are to be construed as giving protection 'not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment' Little v The Commonwealth (1947) 75 CLR 94 at 108. It is also a principle of construction of such provisions that a defendant who has no intention of exercising a power for the purpose for which it was conferred or who has no honest belief in a state of facts which would have excused the wrongful act is not entitled to the benefit of a statutory immunity from liability (1947) 75 CLR at 108-112."

(my emphasis)

THE RELEVANT PROVISIONS OF THE HEALTH & SAFETY AT WORK ACT 1996

41. The Act was enacted to, *inter alia*, reform the laws relating to the health and safety of workers, and other people at work or affected by the work of other people and provide clear objectives, obligations and functions covering every workplace. The roles of employers and inspectors are set out clearly in the Act^x.
42. Under section 5(3)(a) of the Act, a reference to "function" is a reference to a power and duty. Under section 5(3)(b), a reference to the phrase exercise of a function, where the function is a *duty*, includes the performance of the duty^x.

43. Section 5 of the Act defines “workplace” to mean “any place whether or not in a building or structure where workers work”.
44. This broadens the definition of “workplace” beyond the four corners of a building to any location, whether on site or off site, whether inside a building or outside a building, whether on land, water or in the air, where work is carried out. Both the carnival ground and the particular spot where the Ferris Wheel was *in situ* would qualify as a “workplace” under this robust definition.
45. Section 9 defines the duties of an employer to workers and section 10 extends the same duty even to non-workers.
46. Section 10(1) imposes a duty on every employer to ensure that non-workers at his or her workplace are not exposed to any health or safety risk arising from the conduct of his undertaking. This imposes a duty on the people running the carnival as well as the operators of the Ferris Wheel with respect to members of the public at the carnival.
47. Sections 42 and 43 set out the functions and powers of an Inspector^{xi} respectively. Section 43(1)(a),(b) and (c)^{xii} provide that an Inspector may, for the purpose of the Act, enter any workplace to examine any “plant, substance or thing” necessary to ascertain whether the thing complies with the Act.

Powers of Inspectors

- 43(1) *An Inspector may, for the purposes of this Act –*
 - (a) *enter any workplace at any time that the performance of his or her functions under this Act requires such entry;*
 - (b) *when entering any workplace, take with him or her such equipment and materials as he or she considers appropriate;*
 - (c) *conduct such examination and inquiry including the examination of any plant, substance or thing, as he or she considers necessary to ascertain whether there has been compliance with this Act;*
48. Under section 47^{xiii}, an inspector may issue a prohibition notice on any activity if, in his opinion, there is occurring or may occur an act which involves an immediate threat or risk to the health or safety of a person.
49. Such prohibition notice, if issued, will be to the person who the Inspector reasonably believes has control over the act or the activity and it will be in place until the Inspector

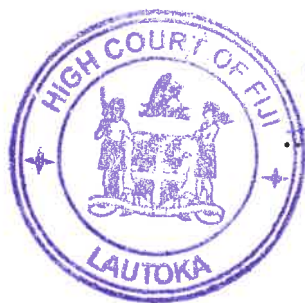
certifies in writing that the immediate threat or risk has been removed or, in his or her opinion, the act will not occur.

Inspector may issue prohibition notice

47(1) *Where an Inspector is of the opinion that at a workplace there is occurring or may occur an act which involves or involve an immediate threat or risk to the health or safety of a person, the Inspector may issue to the person who has or he or she reasonably believe has control over the act or the activity in which the act may occur a prohibition notice prohibiting the continuation of the act or the carrying out of the activity until, the Inspector certifies in writing that the immediate threat or risk has been removed or, in his or her opinion, the act will not occur.*

COMMENTS

50. I would say that the onus is on the Ministry which claims the section 68 immunity to establish that it is entitled to the immunity. I also say that this is a triable issue. On the facts as pleaded, and on the concessions made by the A-G's office, there is a reasonable cause of action against the Ministry.
51. To attract the immunity, the Attorney-General's office would have to establish that the act or omission for which the civil proceeding is brought was:
- (i) done or omitted in good faith.
 - (ii) in the exercise or purported exercise of a function under the Health & Safety At work Act 1996.
52. I gather that the other parties have almost settled this matter save for the Attorney-General's office. The matter must proceed to trial on whether or not the section 68 protection applies in this case. Parties to bear their own costs.



[Handwritten signature in blue ink]

Anare Tuilevuka
Judge
Lautoka

ⁱ The A-G submits as follows:

In the case of Carl- Zeiss- Stiftung v Herbert Smith & Co [1968] 2 ALL ER 1002 CA, the Court confirmed the principle highlighted in Everett v Ribbands [1952] 1 ALL E.R 823 that:

"where there is a point of law which, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards".

ⁱⁱ (see Huong-Lee v Air Fiji Ltd [2003] FJHC 28; Buanasolo v Khan [2008] FJHC 272; Hampshire CC v Shonleigh Nominees Ltd [1970] 2 All ER 144, 150).

ⁱⁱⁱ See <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1993/408.html>.

^{iv} Section 582A provides:

582A (1) A council shall not incur any liability in respect of -
(a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding; or
(b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.

^v Section 29(1) of the State Bank of South Australia Act provides:-

"...No liability attaches to a Director or other officer of the Bank for an act or omission done or made, in good faith, and in carrying out, or purporting to carry out, the duties of his office."

^{vi} This section provides:

"no action shall be brought against any person ... for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority."

^{vii} Section 138 of the Police Act, 1892 (WA) which provides:

"No action shall lie against any ... Officer of Police, Policeman, (or) Constable ... on account of any act, matter, or thing done ... in carrying the provisions of (the Police Act into effect again(st) any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice."

^{viii} He cited Hamilton v Halesworth (1937), 58 CLR 369 at 377; Little v The Commonwealth (1947), 75 CLR 94 at 108; Trobridge v Hardy (1955), 94 CLR 147 at 156-8; Marshall v Watson (1972), 124 CLR 640 at 651, or in 'pursuance', 'execution, or 'discharge' of some public duty or office See, e.g. Theobald v Crichmore (1818), 1 B and Ald 227 at 229 (106 ER 83 at 84); Selmes v Judge (1871), LR 6 QB 724 at 727-8; Newell v Starkie (1919), 83 JP 113 at 116-7; G. Scammell and Nephew Ltd. v Hurley (1929) 1 KB 419 at 427; Hamilton v Halesworth (1937), 58 CLR at 374.

^{ix} See long title to the Act.

^x The section defines "function" as such:

- (3) A reference in this Act to—
(a) a function includes a reference to a power, authority and duty; and
(b) the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

^{xi} Section 42 provides:

42 The functions of the Inspector are—

- (a) to encourage employers and workers to consult with each other about safe or healthy work practices in the workplace;
(b) to advise and assist employers and workers on health and safety matters generally and particularly in the performance of the health and safety obligations under this or any other Act and advise them of the assistance available to them in carrying out their obligations;
(c) to provide information, advice, education and training to employer and worker group and Government departments and authorities on matters to which this Act relates;

- (d) to promote a coordinated and integrated approach by Government authorities to inspection responsibilities in health and safety;
- (e) to assist in formulating policies and strategies relating to health and safety matters;
- (f) to assist in developing national health and safety regulations, standards and codes of practice for the deliberation, where appropriate, of the Board;
- (g) to assist the Board in the performance of its functions under this Act;
- (h) to facilitate the monitoring, collecting and analysing of national data on compensable injuries or diseases or other relevant data in Fiji for the purposes of reviewing the effectiveness of implementing policies and standards and recommending appropriate priorities;
- (i) to enforce compliance with this Act and regulations required by or under this Act to be observed;
- (j) to prosecute persons for offences against this Act or the regulations; and
- (k) such other functions imposed on it by this or any other Act.

^{xii} Section 43(1)(a),(b) and (c) provide:

43(1) An Inspector may, for the purposes of this Act—

- (a) enter any workplace at any time that the performance of his or her functions under this Act requires such entry;
- (b) when entering any workplace, take with him or her such equipment and materials as he or she considers appropriate;
- (c) conduct such examination and inquiry including the examination of any plant, substance or thing, as he or she considers necessary to ascertain whether there has been compliance with this Act;

^{xiii} Section 47 provides:

Inspector may issue prohibition notice

47(1) Where an Inspector is of the opinion that at a workplace there is occurring or may occur an act which involves or involve an immediate threat or risk to the health or safety of a person, the Inspector may issue to the person who has or he or she reasonably believe has control over the act or the activity in which the act may occur a prohibition notice prohibiting the continuation of the act or the carrying out of the activity until, the Inspector certifies in writing that the immediate threat or risk has been removed or, in his or her opinion, the act will not occur.

(2) A prohibition notice shall—

- (a) state that the Inspector is of the opinion that in the workplace there is occurring or may occur an act which involves or will involve an immediate threat or risk to the health or safety of a person;
- (b) state the reasons for that opinion;
- (c) specify the act which in the inspector's opinion, involves or will involve the risk and the matters which give or will give rise to the risk; and
- (d) where in the Inspector's opinion the act involves or will involve a contravention or likely contravention of this Act, specify the relevant provision and state the reasons for that opinion.

(3) A person—

(a) to whom a prohibition notice is issued and in relation to which an appeal has not been made under section 51; and

(b) who contravenes or fails to comply with it,

shall be guilty of an offence against this Act and shall be liable to a fine of not more than \$20,000 in the case of a corporation or \$10,000 in any other case.

(4) Where an appeal has been made under section 51, against a prohibition notice, the Inspector shall not certify under subsection (1) until after the appeal is withdrawn or decided.

(5) Where an Inspector issues a prohibition notice in respect of an act relating to the use of any plant at a workplace, the Inspector may place a mark on the plant, or any part of the plant, to indicate that the plant, or the part so marked, is not to be used until the Inspector certifies, under subsection (1), in respect of the act in respect of which the prohibition notice was issued.

(6) A person who—

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- (a)uses any plant, or a part of any plant, on which a mark has been placed; or
 - (b)without the permission of the Inspector, removes, obliterates or otherwise interferes with a mark placed on any plant, or a part of any plant, under subsection (5),

shall be guilty of an offence against this Act and shall be liable to a fine of not more than \$20,000 in the case of a corporation or \$10,000 in any other case.