

"21. (1) No lease of any Crown foreshore land or of any soil under the waters of Fiji shall be made without the express approval of the Minister and such approval shall not be granted unless the Minister declares that such lease does not create a substantial infringement of public rights.

(2) Before such approval is given or declaration made, the substance of the lease together with a sufficient description of the property intended to be comprised therein, shall be inserted by the applicant, with the prior approval of the Director of Lands -

- (a) in two consecutive issues of the ordinary Gazette; and
- (b) twice, within seven days of such first issue, in a newspaper circulating in Fiji,

together with a notice calling upon persons having objections to the making of such lease to send them in writing to the Director of lands not later than thirty days after the date of such second insertion in the Gazette.

(3) All such objections made in accordance with the provisions of subsection (2) shall be considered by the Minister.

22. (1) Every lease of any part of the foreshore or of any soil under the waters of Fiji shall specify the purposes for which such foreshore or soil is required, and shall vest the same in the lessee free and discharged from all public rights and privileges which may have existed or may be claimed in or over every such foreshore so far as is necessary for carrying out the said purposes and shall contain such covenants and provisions as may be approved in each case by the Minister with regard to the construction and use of any works to be made and done upon the premises comprised in the lease and as to the time within which such works shall be commenced and completed.

(2) In the event of the lessee, his executors, administrators, assigns or successors, as the case may be failing at any time during the continuance of the term of the said lease to use the property comprised therein for the purposes so specified as aforesaid then the Director of Lands may declare the lease forfeited and may enter upon and take possession of the premises.

(3) In the event of any alienated or native land abutting upon or adjoining any foreshore leased under the provisions of this Act, the lessee thereof shall pay to the owner of such land compensation for any rights that may be infringed and, in the event of any dispute as to the amount of such compensation, compensation shall be determined in the manner provided in the Crown Acquisition of Lands Act."

Prior to January 1983 Latchan had applied to "develop" the subject area for industrial use by reclamation, and the Director of Lands wrote to the Director General of the Ports Authority of Fiji (PAF) advising that applications had been received and that if granted reclamation would be carried out - not only by Latchan but by other applicants for other areas nearby. Comment was invited.

There then followed a lengthy exchange of correspondence in which PAF objected most vigorously to the proposals pointing out that the area was needed for port expansion, being the only area available for the future needs of Suva for enlarging its port facilities. A reference to the plans supplied to the Court, and one's knowledge of the Suva waterfront confirm that indeed the present Kings Wharf cannot be extended to the south, for it abuts the heart of Suva City. The subject land is just to the north of the present wharfage at the Kings and Walu Bay sites and lies in the path of proposed berthage and cargo handling expansion. PAF advised the Director of Lands that a number of development surveys had reached such a conclusion - and alienation of this particular site would frustrate proper planning - which would however be able to provide industrial subdivision if dovetailed into an overall scheme.

One notes with some surprise a letter from the Director of Lands dated 11th May 1983 that his Department had "not been informed formally" of the PAF's future plans and it was therefore "too late to alter our proposed subdivision". At that date it was tidal mudflats only. It seems that the Department of Lands had planned total reclamations of at least 21 acres along that foreshore and harbour bed close to the heart of the country's largest port, but had done so without consultation with the statutory body set up by Act of Parliament (Ports Authority of Fiji - Cap. 181):-

"To provide for the provision, Maintenance
and Management of Port Services and Facilities."

On the 1st of June and again thereafter Latchan advertised the details of its application, as it was bound to do (Section 21(2) supra) in the Fiji Royal Gazette and in a local newspaper, and objections were called for to be lodged with the Director of Lands.

PAF filed objection and in particular claimed that such a subdivision, if done without PAF approval was in breach of its powers under its Act, and in particular referred to section 11(1)(j).

Section 11 reads:-

"11. (1) Subject to the provisions of
this Act, and in addition to any other
powers imposed upon it by this Act or

by any other written law, the Authority shall have the power -

- (a) to appoint and employ such persons as it may consider necessary for the efficient performance of its functions;
- (b) to enter into any contract, covenant, bond or agreement of any kind whatsoever for the purposes of this Act;
- (c) to authorise any person to carry out any work or perform any act in furtherance of its functions and powers;
- (d) to carry on the business of carriers of passengers or goods by land or sea, stevedores, wharfingers, warehousemen, lightermen, dealers in oil or other kinds of fuel, dealers in stores connected with or required in any of the above-mentioned businesses whether carried on by the Authority or not, and to carry on any other business or activity whatsoever which appears to the Authority to be necessary or advantageous for the discharge of its functions;
- (e) to acquire, hire, procure, construct, erect, manufacture, provide, operate, maintain or repair anything whatsoever required by the Authority for the purposes of this Act;
- (f) to provide services within a port or the approaches to a port -
 - (i) in berthing, towing, mooring, moving, slipping or docking any vessel;
 - (ii) in loading or discharging goods and embarking or disembarking passengers in or from any vessel, including the provision of landing-places;
 - (iii) in providing stevedores and other labour and equipment at wharves and anchorages;
 - (iv) in sorting, weighing, measuring, storing, warehousing or otherwise handling any goods;

- (v) in providing lighterage;
 - (vi) in piloting any vessel;
 - (vii) in supplying fuel, water or telephone services to vessels; or
 - (viii) for rendering assistance to any vessel or recovering property lost, sunk or stranded;
- (g) to appoint, license and regulate weighers and measurers of goods within a port;
- (h) to acquire any undertaking, affording or intending to afford facilities for the loading and discharging or warehousing of goods in a port or for the bunkering of vessels;
- (i) to provide such fire and security services, both within a port and elsewhere, as may be deemed necessary by the Authority for the purpose of extinguishing fires and of preserving life and property;
- (j) to control the erection and use of wharves, docks and any other works, whether above or below the high water mark, within a port or the approaches to a port;
- (k) to reclaim, excavate, enclose or raise any part of any land vested in the Authority;
- (l) to do anything for the purposes of
- (i) improving the skill of the employees of the Authority; or
 - (ii) improving the efficiency of the equipment of the Authority and the manner in which such equipment is operated;
- (m) to provide accommodation and recreational facilities for employees of the Authority and generally to promote their welfare;
- (n) to make to or guarantee loans for employees of the Authority for such purposes as the Authority may approve;
- (o) to establish, control, manage and maintain, or contribute to, any pension scheme or provident fund approved by the Minister responsible for finance for the benefit of its employees or the dependants of deceased employees.

(2) The powers conferred by subsection (1) shall be in addition to and not in derogation from any other powers conferred upon the Authority by this Act or any other written law."

The Suva City Council also filed an objection based on interference with future wharf and freight facilities, and the other affected local body, the Lami Town Council also objected.

On 26th September a meeting was convened of the appropriate administrative heads of PAF, Suva City Council, the Lands Department and the Town Planning Authority. PAF and the City Council renewed their objection to the Latchan application, and to another apparently similar one, and the location and extent of needed port development was emphasised. It was agreed by the meeting that some industrial land would be needed, but that all would need to be planned in a comprehensive way paying particular regard to the requirements of the City and the PAF.

Eight days later on 4th October, 1983 PAF was advised that its objection to the Latchan lease was disallowed by the Minister of Lands on the grounds that:-

"No substantial infringement of Public rights would be created by the proposed development."

On 13th December the Solicitors for PAF wrote to the Director of Lands and to Latchan. The letter repeated the

previous observations about the evils of allowing "non-port use" to intrude in a way which would adversely affect the port and frustrate the surveys made for long term usage. It claimed that the Minister's powers under section 21 of the Crown Lands Act were not unlimited, but must be exercised having regard to the powers and functions of the PAF and other public bodies - particularly those secured by Section 11 of its Act. It warned that work should not be commenced, that legal action would be taken in the Supreme Court and that injunctions would be sought.

An originating application was filed on 13th April, 1984 citing Latchan as 1st Defendant and the Attorney-General as 2nd Defendant. It claimed that the Minister of Lands had acted beyond his powers under Section 21 of the Crown Lands Act and contrary to the refusal by the PAF under its powers and accordingly the 99 year lease granted to Latchan was illegal and subsequent work carried out by Latchan was unlawful.

The remedies sought were:-

"WHEREFORE THE PLAINTIFF CLAIMS:

- (a) For a declaration that the Director of lands has no powers and/or authorities to issue and/or approve a lease to the first Defendant on the subject area without the consent and/or approval of the Plaintiff and/or in the alternative unless the provisions of Sections 21 and 22 of the Crown Lands Act were lawfully complied with.

- (b) (i) That the Minister of Lands acted ultra vires his powers in declaring that the lease granted and/or approved to the First Defendant did not create a substantial infringement of public rights.
- (ii) In any event such a declaration is null and void and of no legal effect.
- (c) That the first Defendant is in breach of the Ports Authority of Fiji Act in carrying out developments and works on the subject area without the consent and/or approval of the Plaintiff first had and obtained and in so carrying out the said works when the Plaintiff expertly refused consent.
- (d) For an order restraining the First Defendant and/or its servants and agents from carrying out any works on the subject area without the consent and/or approval of the Plaintiff first had and obtained.
- (e) For an order that the first Defendant do demolish all the works carried out on the subject area since December, 1983.
- (f) Such further or other relief as to this Honourable Court seems just.
- (g) Damages.
- (h) Costs."

The matter came for hearing before Dyke J. in April 1985. The evidence was comparatively brief, consisting in the main in the production of maps and correspondence. It was demonstrated that PAF had over the years commissioned studies as to future port development, and that the granting of this lease, coupled with foreshore reclamation in the subject area would seriously impede the proposed development.

A senior Lands Department official was a witness and he acknowledged that it had been brought to his notice that the area concerned had been:-

"reserved for future development - as the only area where a new port complex could be attributed (sic)."

He also acknowledged that he knew that in particular it was allocated for bulkout storage (at present in Walu Bay) but the witness said that he did not think he had presented this material to the Minister.

There was some dispute at the hearing as to the status of the subject area - and accordingly we required this evidentiary matter to be clarified. As already mentioned, it appears that the present port area comprises Kings Wharf and the Walu Bay frontage and from there northward it is classified as "port approaches." This has relevance in view of sections 18 and 19 of the PAF Act which read:-

- "18. Notwithstanding the provisions of the Land Transfer Act, all land vested in or belonging to the Crown within a port and all other property of every description vested in or belonging to the Crown within a port shall without further assurance vest in the Authority on the commencement of this Act.
19. (1) There shall be transferred to the Authority to enable it to perform its functions under this Act such other land vested in or belonging to the Crown as the Minister responsible for land matters may from time to time determine and any such land shall, notwithstanding the provisions of the Land Transfer Act, thereupon vest in the Authority without further assurance.
- (2) Upon such transfer, all debts, liabilities and obligations in connection with or appertaining to such land and property shall also be transferred to and vest in the Authority and shall be deemed to have been incurred by the Authority."

It will be noted that Section 18 vests all land in a port (including foreshore) in the PAF, not in the Crown. The subject land is only within port approaches; however being entirely below high water mark it is also gazetted as part of Suva Harbour under the Harbours Act (Cap. 160 - 1973).

In the Supreme Court counsel for PAF provided lengthy written submissions to the following effect:-

That the Crown Lands Act is subject to the PAF Act and the Harbours Act and in particular section 21 is subject to section 11(1)(j) of the PAF Act.

That Section 45 of the Harbours Act is still in force and prohibits any encroachment on the waters of a Harbour without obtaining a license and a permit from the Minister of Transport.

That, as an alternative argument, the Minister of Lands had no grounds upon which he could have held that there would be no substantial interference with public rights.

That the publication of notices calling for objection had not been strictly complied with as to date and hence the entire procedure failed in limine.

The main grounds will be discussed in greater detail, but we think it appropriate to say that we agree with the view of Dyke J. on the last issue concerning publication of notices that there had been substantial compliance - See : London and Clydeside Estates Ltd. v. Aberdeen D.C. (1979) 3 All E.R. 876 per Lord Hailsham @ 883. The slip was a trifling one and we propose to spend no more time on it for all the relevant parties saw the notices, realized their import and took appropriate action forthwith.

Essentially the case for Latchan was that the PAF did not have the power of prohibition to the extent it claimed under section 11 of its Act, and that the overriding provisions were in section 21 of Crown Lands Act - which procedures had been complied with.

Dyke J. held for PAF. He favoured the contention that section 11(1)(j) did empower the PAF to control this reclamation as "a work" and that it could require the Minister not to grant a lease for the express purpose of reclamation of foreshore and waters within port approaches.

His decision:

- (1) Declared Latchan to be in breach of the PAF Act in carrying out the work without PAF consent.

- (2) Restrained Latchan from further work without consent.
- (3) Ordered that Latchan demolish all work done on site since December 1983.

From this decision Latchan has appealed, and the Attorney-General representing the Minister of Lands has been granted leave to join as an additional appellant. As with the case of one of PAF's submissions we also dispose of a preliminary point taken by counsel for Latchan before we move on to the main substance of the argument.

It was argued that the form of PAF's original proceedings was an abuse of process as it ought to have come before the court by way of Application for Judicial Review. This is based on the recent view expressed Gillick v. Western Norfolk Health Authority (1985) 3 W.L.R. 830. Although this course may sometimes commend itself to the Court it will not always be the case. Counsel failed to give a complete quotation from the relevant part of the judgment. We commence with an extract from the speech of Lord Scarman at p. 847:-

" The second question is as to the propriety of proceeding in this case by ordinary civil action. Should not Mrs. Gillick have proceeded by way of judicial review under R.S.C., Ord. 53? No point was taken at trial or in the Court of Appeal against Mrs. Gillick that she should have proceeded not by issuing a writ, but by applying for judicial review.

Woolf J. did, however, mention the matter only to hold that there was a relevant precedent for proceeding by writ in this House's decision in Royal College of Nursing of the United Kingdom v. Department of Health and Social Security (1981) A.C. 800.

The point having been brought to the attention of the House I think it desirable to consider it if only because of the later decision of the House in O'Reilly v. Mackman (1983) 2 A.C. 237, 285D, where Lord Diplock, with whose opinion their other Lordships (Lord Fraser of Tullybelton, Lord Keith of Kinkel, Lord Bridge of Harwick and Lord Brightman) agreed, laid down a rule in these terms:

"Now that those disadvantages (i.e. those previously associated with prerogative order procedure) to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."
(Emphasis supplied.).

If there be in the present case an abuse of the process of the court, the House cannot overlook it, even if the parties are prepared to do so, and even though the writ in this case was issued before the decision of the House in O'Reilly's case (1983) 2 A.C. 237."

And a little later, Lord Scarman continued:-

It is unnecessary to embark upon an analysis of the newly fledged distinction in English law between public and private

law, for I do not see Mrs. Gillick's claim as falling under the embargo imposed by O'Reilly's case (1983) 2 A.C. 237. If I should be wrong in this view, I would nevertheless think that the private law content of her claim was so great as to make her case an exception to the general rule. Lord Diplock, at p. 285F, recognised that the general rule which he was laying down admitted of exceptions including cases:

"where the invalidity of [the public authority's] decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons."

Both these exceptions can be said to apply in the present case. Like Lord Diplock, I think that procedural problems in the field of public law must be left to be decided on a case to case basis."

That has been the situation here - no such submission was put in the Supreme Court and the case was argued on the presently constituted proceedings without objection - and it also has a strong ingredient of a claim against a private party for mandatory orders, which made this type of proceeding not inappropriate.

The problem then is the relationship and effect of the provisions of Sections 21 and 22 of Crown Lands Act with Section 11 of PAF Act. If the submissions on behalf of the appellant are correct then the Minister of Lands may grant leases which vest the leasehold interest of foreshore land or soil under the sea (and within gazetted Harbours) in lessees free and discharged from all public rights and

privileges, and may approve the execution of any works thereon, and indeed, as is claimed in written submissions by Latchan, may require such work - including reclamation - to be carried out within a specified time. Taken to extremes the Minister, on this argument, could authorize the entire reclamation of the approaches to Suva Port (which are largely co-extensive with Suva Harbour) and the statutory body set up by Parliament to maintain and manage the port would not be able to exercise the power (however narrowly it is interpreted) conferred by Section 11(1) of its Act to restrict such incursion.

It is apparent that the two statutes are in conflict in this area and only one can prevail. One must therefore look to the principle of statutory interpretation that in case of conflict incapable of reconciliation a special statute prevails over a general one, especially if the special powers are created later in time. But one endeavours to construe inconsistencies in a way which will allow the general power to govern the generality of cases, without extending to special circumstances for which express provision is made. It is not impossible to harmonise the concept of the Minister of Lands having general authority over hundreds of miles of foreshore in the 300 Fijian islands, with tighter control in a more appropriate authority in commercial ports or harbours.

Some submissions were made as to the construction of section 11(1)(j):-

" to control the erection and use of wharves docks and any other works, whether above or below the high water mark within a port or the approaches to a port."

It was argued that wharves and docks are a genus governing what nature of activity is encompassed by "any other works". These later are wide words, capable of covering many matters, but even on a limited approach, read in the context, we think that restraint on changing the nature of the foreshore and surrounding areas in a way inimical to port welfare is the purpose of the section, and a reclamation providing an earth or asphalt working surface for vehicular or building purpose is of the same genus as a wharf with a wooden or concrete deck. Equally we reject the submission that the word "control" can only mean "regulate" - in the sense of limiting dimensions and the like. Taken in the context of the Act, a wharf, dock or other work may be totally inappropriate in a given area, and accordingly the Authority must be taken to have the power to prohibit. We therefore conclude, on this issue that although the Minister of Lands has power to grant leases on port approach foreshore or harbour bed he may not do so contrary to the wishes of the authority which has been given controlling powers. Approval was specifically refused in this instance and hence the grant of lease was illegal.

We are also of the view that Section 45 of the Harbours Act, appears to put the appellant's case in an impossible dilemma. Section 64 of the PAF Act provides that most provisions of the Harbours Act (including section 45) "to

the extent that they are inconsistent with the provisions of the (PAF) Act" shall cease to apply to a port or to the approaches to a port. If the view already expressed as to Section 11(1)(j) is wrong and does not confer power to prohibit works such as wharf building or reclaiming land, then we can see, and Mr. Shankar for the appellant conceded, no other provision inconsistent with section 45 of the Harbours Act. That section makes it an offence to erect or construct a wharf in any harbour or encroach in any way on the waters of the harbour without a license and permit from the Minister of Transport. We are thus returned to the apparent conflict of the powers of the Minister of Lands to grant foreshore leases throughout Fiji - a general provision - and the control vested in the Minister of Transport in the limited and special cases of harbours. We repeat the view expressed earlier that the special provision must prevail over the general. There are many miles of foreshore where the Minister of Lands rights are untrammelled - there are a few Harbours - and here there are additional control powers in another Minister who has not granted a license or permit.

For sake of completeness we deal with the other major submission, advanced on behalf of PAF in the Supreme Court, that the Minister of Lands acted ultra vires when he declared there was no substantial infringement of public rights. Dyke J. did not feel it necessary to deal with this matter in his judgment, but counsel for Respondent gave notice under Rule 19 of intention to advance the matter in this Court.

As long ago as 1948 in Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 223 it was said that a Minister exercising executive function must direct himself properly in law and must direct his attention to the matters which he is obliged to consider. And in Padfield v. Minister of Agriculture Fisheries and Food (1968) A.C. 997 Ministerial discretion was required to be exercised on lawful grounds taking into account relevant matters.

Although in that, and in the many cases which have followed since, attention has been focused on the need to pay regard to the policy of the particular Act which bestowed the power of decision, (i.e. the Crown Lands Act) we think it equally clear that a Minister must pay regard to the overall provisions of all the laws of the country touching on the issue before him. So in dealing with foreshore land within port approaches or harbours he is obliged to consider the policy of the law, as laid down by Parliament in legislation dealing with those places.

Here the Minister said merely that there would be no substantial interference with public rights. In the face of the specific objections by the guardian of public rights in that area that there was substantial interference this was in effect a failure to give reasons. We again refer to Padfield's case. At page 1053 Lord Pearce said:-

"I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the Court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

No reason having been given for coming to a conclusion on the crucial question of public rights which is so contrary to all the circumstances presented to his advisers, a Court is entitled to assess the information known or which ought to have been known and regarded. (Fiordland Venison Ltd v. Minister of Agriculture and Fisheries (1978) 2 N.Z.L.R. 341 at 354):-

In particular one notes:

1. No regard was paid to three commissioned reports on the needs of appropriate utilisation of the area.
2. The Director of Lands, prior to the decision being taken said that the scheme of the authority was "too late" to be taken into consideration.
3. The two bodies primarily charged with protection of public interest in the area demonstrated in the clearest way the damage that it would suffer at the hands of a private development.

4. There was evidence that some substantial material on this issue had not been presented to the Minister by his adviser.

5. There had been recognition by the Acting Departmental head, at the meeting of 26 September 1983, of the need for long term port development and he had expressed agreement with the Director General of the PAF that (inter alia) the proposed site was the most suitable for a new wharf complex.

Although Courts in review cases must remember that they are not to substitute their views on merit or justification, nevertheless the powers of judicial control extends to an examination of the grounds upon which a decision purports to be based.

The decision taken appears to have been not only unreasonable but inexplicable when viewed in terms of the Minister's statutory obligation.

We have earlier determined that the Respondent authority had power to oppose the granting of this lease and such opposition, if raised, would limit the Minister's power. For the reasons just expounded we would also hold the Minister's decision was invalid as based on insufficient or inappropriate grounds; or made with complete disregard for relevant considerations.

In the Supreme Court:-

- (a) declaration was made that the development work was in breach of the PAF Act and that declaration is confirmed on the ground that the Minister's grant of lease was invalid.
- (b) the appellant was restrained from carrying out work - although the reclamation has been completed further work could occur and this restraint is confirmed.
- (c) The appellant was ordered to demolish all the works carried out since December 1983.

We have given consideration to whether this order is too draconian for it would involve great expense on the first appellant who believed it was acting with approval of one Minister if not of the Authority. The remedy, as with others, is of course discretionary and it has been submitted that although injunction proceedings were threatened in December 1983, they were not commenced until April 1984, by which time some of the work had been done. Nevertheless we think the discretion was properly exercised and the order should stand. If it does not then the judgment would be a brutum fulmen. Latchan indeed would have lost his lease. But as the land is within the port approaches area but not the port, it would, with its greatly increased value still vest in the Crown enabling it to profit by its wrong doing - and the PAF having won the battle would have lost the war, for its

port approach has been illegally encroached upon to a most substantial extent.

The appeal is dismissed with costs to be taxed if not agreed, and to be paid in equal parts by the (now) two Respondents.

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AOH

Ch. Wright
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Vice-President

[Signature]
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Judge of Appeal

A. D. Holland
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Judge of Appeal