IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 39 OF 1993
(High Court Judicial Review No. 7 of 1989)

BETWEEN

PACIFIC TRANSPORT LIMITED — APPELLANT

-and-

SUNBEAM TRANSPORT LIMITED
K R LATCHAN BROS LIMITED
CITY TRANSPORT LIMITED
TRANSPORT CONTROL BOARD — RESPONDENTS

Mr. F.S. Lateef for the Appellant
Mr. H. Nagin for the 1st Respondent
Mr. G. P. Shankar for the 2nd and 3rd Respondents
Mr. A. Rabo for the 4th Respondent

Date and Place of Hearing : 10th November, 1994, Suva
Date of Delivery of Judgment : 17th November, 1994

JUDGMENT

The appeal in these proceedings is against a Judgment of Fatiaki J. dismissing with costs an application for judicial review of several decisions of the Transport Control Board (to which we shall refer as "the Board") granting licences to the first three respondents. Although judicial review was sought on a number of grounds, the appeal is concerned with one only of those grounds, that is to say the ground that "the Transport Control Board under the chairmanship of Mr Parmanandam was biased

in favour of City Transport and acted in bad faith".

The grounds of the appeal are as follows:

"1. *THAT the learned Trial Judge erred in law when he when he held that there was no merit in the Appellant's complaint of bias and that the claim cannot be sustained.*

2. *THAT the learned Trial Judge erred in law when he completely failed to consider the fact that the Chairman of the Tribunal sat as Judge in respect of exactly the same application of City Transport in which he had earlier acted as Counsel before a differently constituted Tribunal.*

3. *THAT the learned Trial Judge erred in law in ruling that its discretion to grant Certiorari would have been refused even if there was some merit in the Appellant's complaint as the discretion of the Court is not unfettered.*

4. *THAT the learned Trial Judge erred in law and in fact when he ruled that there was an obligation on the Appellant to object to the Chairman and provide an opportunity to the Chairman of yielding to any objection when the objection was already in place.*

5. *THAT the learned Trial Judge erred in law and in fact when he implied that there was a waiver by the Appellant in not objecting to the Chairman sitting on the Tribunal.*

6. *THAT the learned Trial Judge erred in law when he held that Mr Parmanandam did not fall in any of the categories of persons described by Lord Denning M.R. in Metropolitan Properties v Lennon (sic).*

7. *THAT in all the circumstances of the case, the learned Trial Judge did not properly exercise his discretion and erred in law in not quashing the Respondent Board's decision dated 3rd November 1988."*

The licences granted to two of the respondents (to which we shall refer as **"Latchan" and "City"**) were in respect of applications which they had made in December 1982 and January 1983. The applications were to operate passenger bus services on a circular route round Viti Levu from Suva via the Queens Road and the Kings Road. Similar applications had been lodged in December 1982 and January 1983 by the appellant (to which we shall refer as **"Pacific"**) and by another bus company, Victory Transport Service (to which we shall refer as **"Victory"**). Victory later withdrew its application; it was not a party to the judicial review proceedings in the High Court and is not a party to these proceedings. On the same day in 1988 that the Board granted the licences to Latchan and City, it rejected the applications of the appellant and the first respondent (to which we shall refer as **"Sunbeam"**). But on that day it granted a licence to Sunbeam for a circular route service from Lautoka and a licence to the appellant for a licence for a Ba-Lautoka-Suva-Lautoka-Ba route service.

The Transport Control Board had previously granted the application by Latchan in April 1983 and had rejected the other four applications. Pacific and Sunbeam had then applied for judicial review and in September 1983 the Supreme Court had quashed the Board's decision and ordered it to rehear all five applications. Latchan had appealed to this Court and the Privy Council unsuccessfully. After the Privy Council had given its decision in July 1986 the matter was set down again for rehearing by the Board but was not heard until late in 1988.

In July 1988 Mr Vijaya Parmanandam was appointed to be the Chairman of the Board. On 9,10 and 11 March 1983 he had appeared before the Board to represent City when its application for the circular route service was being heard by the Board. At one time he had been a shareholder and director of City. In October 1988, before the applications had been reheard by the Board, Latchan objected by letter to Mr Parmanandam taking part in the deliberations and decisions of the Board in respect of the five applications because in 1983 he had represented City in respect of its application. Latchan also objected by the same letter to another member of the Board, Mr Anil Tikaram, taking part in its deliberations and decisions on the ground that he had earlier acted as solicitor for Pacific in several matters including an appeal in 1987. Mr Parmanandam and Mr Tikaram decided on the basis set out hereunder that it would not be improper for them to take part in the deliberations and decisions of the Board in respect of the applications. Soon afterwards Victory withdrew its application. The Board then granted licences for the circular route service from Suva to City and Latchan, for the circular route service from Lautoka to Sunbeam and for the Ba-Lautoka-Suva-Lautoka-Ba route service to Pacific.

We consider that the fourth and fifth grounds need to be considered first, as, if we decide in favour of the respondents, it will be immaterial what conclusion we reach on the other grounds. The evidence in the proceedings in the High Court included an affidavit sworn by Mr Parmanandam on 10 April 1989.

Paragraph 8 of that affidavit read:

> *"I refer to paragraph 24 of such said affidavit and say that when the meeting commenced on the 31st day of October 1988, your deponent drew the attention of the meeting to the aforesaid letter of K.R. Latchan Bros Limited and advised the meeting that before your deponent would make a decision on the objection he would invite all Counsel and parties present to see if any other Counsel or party had a similar objection. After ascertaining that there was no other objections either to your deponent or Mr. Anil Tikaram your deponent and Mr. Tikaram decided that they would carry on participating in the meeting. To avoid any doubt Counsel appearing for the Applicant herein did not make any objections to any member of the Board who sat on that day despite the "invitation to so do".*

Those facts were not disputed by any evidence presented in the High Court by Pacific. The record of the meeting maintained by staff of the Board, although more brief, is not inconsistent with paragraph 8 of Mr Parmanandam's affidavit.

Another document in evidence in the High Court was the letter by which Latchan's solicitors made their objection to Mr Parmanandam and Mr Tikaram taking part in the deliberations and decisions of the Board on Latchan's application. In it the solicitors referred expressly to the facts which were the basis of Pacific's application for judicial review on the grounds of bias. In paragraph 8 of Mr Parmanandam's affidavit he stated that he "drew the attention of the meeting" to the letter and

invited **"all Counsel and parties present to see if any other Counsel or party had a similar objection".** That was clear evidence that Pacific's representative at the meeting (Mr Lateef, who represented Pacific in these proceedings) was made aware of those facts. The record shows that Mr Lateef took part in the proceedings of the Board in spite of having that knowledge. There was, therefore, ample evidence to support a conclusion that Pacific, by its representative at the meeting, acquiesced in Mr Parmanandam's taking part in the deliberations and the decisions of the Board in respect of the applications of Sunbeam, Latchan, City and itself. Equally it accepted Mr Tikaram's sitting on the Board when he had acted for it. Mr Lateef informed us from the bar table that he had not been aware that Mr Parmanandam had previously been a shareholder and director of City; but there was no evidence before us of that. There was, however, the affidavit sworn by General Manager of Pacific in support of the section 53 application where that fact was stated without any indication that the deponent had acquired his knowledge of it only after the Board's meeting.

The effect of such acquiescence on the acquiescing person's right to obtain judicial review for bias has been the subject of consideration by the courts in England and other common law jurisdictions since at least 1888 when failure to object to a magistrate sitting to hear a case was said to amount to waiver of any objection to his doing so on the ground of bias (R v Cumberland Justices (1888) 58 L.T.491. A most helpful discussion

of the cases is contained in the judgment of McInerney J. in R v Lilydale Magistrates' Court; Ex parte Ciccone [1973] V.R.122 at 131 to 136. He noted that there was dispute whether the loss of the right to have judicial review granted was to be treated as a question of waiver or of election or something else. At page 133 he said:-

> *"Is the question to be expressed as whether the applicant has intentionally elected not to object to the magistrate's continuing with the hearing, or as whether the applicant knowing that he had a right to object to the magistrate's continuing to sit, waived that right? Is it a question of whether the applicant (by his counsel) knowing of the facts giving him the right to object to the magistrate's sitting, has lost that right to object simply by virtue of having (by his conduct in going on with the case down to judgment) done something which is inconsistent with the present assertion of that right? Is the matter to be tested by asking whether the applicant, with knowledge of the facts, has gone on with the case, nursing a secret intention to save this objection for later if needed? Or is the case one where the applicant can be regarded as having been under a duty of fairness to the magistrate or his opponent to take the objection at once, on peril of being shut out thereafter?"*

His Honour noted that support could be found in the cases for each of those views and expressed doubt whether any one of the tests propounded in the various cases should be regarded as the exclusive test. The test to be applied in any case depended on its circumstances.

There have been differing decisions by the courts on whether

breach of the requirements of natural justice renders a decision void or voidable. In Durayappah v Fernando [1967] A.C.337 the Privy Council held that it made the decision voidable. In Ridge v Baldwin [1964] A.C.40 the Lords of Appeal were divided on the question . In Anisminic Ltd. v Foreign Compensation Commission [1969] 2 A.C.147 the House of Lords decided that the breach in that case rendered the order void. Writers of text-books have discussed the effect of acquiescence in a situation that would otherwise involve a breach of natural justice by reason of bias. Some have found difficulty with the concept of waiver preventing a decision being void if it was made in a situation of likelihood of bias.

Mr Lateef referred to the judgment of Kirby P. in S.& M. Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd. (1988) 12 NSWLR 358, where at page 373 his Honour said :-

> *"The entitlement to a judge who is manifestly impartial is not simply a private right which may be waived. It inheres in the public as well as to the individual litigant. It is not for the individual litigant to waive the public's rights".*

However, it is to be noted that in that case the allegation of bias was made against a Supreme Court judge in respect of the trial of an action in the Supreme Court of New South Wales. We do not understand his Honour as intending his comment to apply to every administrative decision-maker, or even to every such decision-maker in respect of a quasi-judicial decision. More

important, however, as Mr Shankar pointed out to us, Kirby P.'s next words were :-

> *"Nevertheless, in certain circumstances, a litigant may be held to have waived the right to be heard to complain, by reason of conduct, such as knowingly waiving an objection to the participation of a judge."*

The question was subsequently discussed by the High Court of Australia in Vakauta v Kelly (1989) 167 CLR 568. At page 586 Toohey J. said :-

> *"But, the respondent argued, if there was ostensible bias on the part of the trial judge during the hearing of the action, the appellant waived any right to complain of that bias by reason of counsel's failure to do otherwise than draw the attention of the trial judge to what he had said on the previous day. The questions thus raised are - can there be waiver of ostensible bias and, if there can, was there waiver in the present case? In Re Alley; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation this Court left the first question open. In Watson the majority said:*
>
> > *".....the rule that a judge may not sit to hear a case if it might reasonably be considered that he could not bring a fair and unprejudiced mind to the decision applies to every court in Australia, subject only to the exceptions (statutory authority, necessity and waiver), mentioned by Isaacs J. in Dickason v. Edwards none of which has any application to the present case."*
>
> *In Dickason v. Edwards, which was concerned with expulsion from a friendly society following adjudication by a tribunal of that society, Isaacs J. said:*
>
> > *"But in any event it is clear that in the case of a public tribunal the party affected may, if he has knowledge, waive the objection to disqualification."*

In S. & M. Motor Repairs v. Caltex Oil, Kirby P. commented:

> *"The entitlement to a judge who is manifestly impartial is not simply a private right which may be waived. It inheres in the public as well as to the individual litigant. It is not for the individual litigant to waive the public's rights."*

Nevertheless, his Honour went on to say that "in certain circumstances, a litigant may be held to have waived the right to be heard to complain, by reason of conduct, such as knowingly waiving an objection to the participation of a judge." And, later in his judgment, Kirby P. held that there had been no waiver in the instant case.

In his judgment in the Court of Appeal, McHugh J.A. referred to a number of authorities where waiver was held to be available in the case of a claim for disqualification for bias."

We consider it important not to lose sight of the fact that bias is simply one way in which the requirements of natural justice may be breached. If there is acquiescence in the participation of a person in the process of adjudication in circumstances which would give rise to likelihood of bias, that acquiescence, in our view, will generally have the effect of preventing that participation being a breach of natural justice. Certainly, as we have stated above, the courts have found no difficulty in finding in many cases that acquiescence has prevented the person acquiescing from obtaining judicial review. We are satisfied that Fatiaki J. did not err in law in deciding that it had that effect in respect of Pacific's application to the High Court.

The fourth and fifth grounds of the appeal must be decided

in the respondent's favour. No useful purpose, therefore, would be served by our considering whether His Lordship applied the correct test in deciding that there was no bias or whether he correctly decided so. Our rejection of the fourth and fifth grounds of appeal means that the appeal must be dismissed and costs awarded against the appellant.

Decision

Appeal dismissed.

Appellant to pay the respondents their costs of the appeal proceedings.

.....
Sir Mari Kapi
Judge of Appeal

.....
Mr Justice Ian R. Thompson
Judge of Appeal

.....
Mr Justice P. Hillyer
Judge of Appeal