IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 62 of 2017

BETWEEN : **AMI CHAND** of Namaka, Nadi, and Businessman.

PLAINTIFF

A N D : **LAND TRANSPORT AUTHORITY** a statutory body having its head office at Valelevu, Nasinu, Suva.

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. S. Ravai for the Plaintiff
Mr. Gabriel Stephens with Ms. E. V. M. Dauvere for the Defendant

Date of Ruling: 30th September 2019

RULING

(Private law action, statutory body, alleged breach of statutory duty and Striking out under Or.18, r.18)

01. The plaintiff sued the defendant authority for alleged negligence on part of the authority in processing his application for transfer of Taxi Permit No. LT 1557 belonged to one Narend Kumar to him. The plaintiff claims that he made the application for transfer in year 2006 and made frequent inquiries at defendant's office on the progress of his application and was informed that his application was in process. The plaintiff finally wrote to the defendant authority through his solicitors and the defendant authority on or about the month of August 2016 informed him that the said Taxi Permit was cancelled in 2012. Therefore, the plaintiff claims that he suffered loss and damages due the negligence of defendant authority in discharging its statutory duty. The plaintiff specifically pleaded that, he had paid a sum of $ 5,000 to secure a Taxi Base in Nadi Town and further incurred loss of income in sum of $ 100,000. He, therefore, sought following reliefs in his writ issued against the defendant authority:

a. *The sum of **$5,000.00 (Five Thousand Dollars)** being monies paid to the Nadi Town Council for the taxi base.*

b. *The sum of **$100,000.00 (One Hundred Thousand Dollars)** being loss of income.*

c. *General damages for unfair and oppressive conduct.*

d. *A Declaration that the Defendant's conduct in purporting to cancel Taxi Permit No. LT 1557 was unfair, unreasonable and in breach of the regulations pertaining to transfer of taxi permits.*

e. *A Declaration that the Plaintiff be granted Taxi Permit No. LT 1557.*

f. *Costs on a Solicitor/client indemnity basis.*

g. *Any other relief which in the opinion of this Honorable Court is just and equitable.*

02. The defendant filed the statement of defence and denied the allegation of the plaintiff and specifically pleaded that, the said Taxi Permit No LT 1557 was submitted to the board for 'show cause' and the board resolved to cancel it for breach of condition by the original holder. Thus the defendant authority pleaded that; the plaintiff should have appealed the decision of the board to the Land Transport Appeals Tribunal, had he been aggrieved by the decision of the board. The plaintiff filed the reply to defence and the pleadings were closed. The parties were at the discovery stage and the defendant filed the instant summons pursuant to Order 18 rule 18 of the High Court Rules, section 48 of the Land Transport Act and the inherent jurisdiction of this court. The summons seeks to strike out plaintiff's action on the following grounds:

(i) It is filed in the wrong forum/jurisdiction;
(ii) It discloses no reasonable cause of action;
(iii) It is scandalous, frivolous, or vexatious or it is otherwise abuse of the process of the court.

03. The summons is supported by an affidavit sworn by Paulini Tora the Regional Manager – Western of the defendant authority. The affidavit contains four documents which are marked as **"A"** to **"D"** respectively. The plaintiff filed his affidavit with 10 documents numerically marked from **1** to **10**, and opposed the summons filed on behalf of the defendant authority. This was followed by an affidavit in reply sworn by Susau Hazelman the Acting Regional Manager – Western of defendant authority. The said affidavit in reply has seven annexures which are also numerically marked from **1** to **7**.

04. At hearing of summons, both counsels made oral submission and filed their legal submission too with the case authorities to support their respective argument.

05. Briefly, the plaintiff's claim is that, though he applied for transfer of Taxi Permit No. LT 1557 which belonged to one Narend Kumar, the defendant authority neglected to discharge the statutory duties and thereby caused damages to him. This is a private law action against the public body created by a statute for alleged breach of its statutory duties. The defendant's stance is that, the said Taxi Permit was under 'show cause' as the original owner breached the permit condition when he sold the same to one Mandraviran Pillay by way of Bill of Sale without the consent of the defendant authority. It was further submitted that, the board acted according to the powers given by the laws and regulations.

06. The question to be decided by this court, is whether the existence of statutory powers can create a duty of care giving private law action against the defendant authority for alleged breach of statutory duties? The statutory bodies are established for variety of purposes of public administration. In order to achieve these purposes, the statutes impose wide range of duties on legal persons such as public authorities, body corporate and agencies, covering a myriad of factual contexts such as public health, public transport, employment, local governance and safety etc. However, the consequences of the breach of these statutory duties are diverse and manifold including, but not limited to, personal injuries, monetary and economic losses arising from property damages and loss of income etc. Unfortunately, the liability of the public bodies towards the members of the public for breach of such statutory powers is still in confusion. The English Court of Appeal in a very old case of **Kent v East Suffolk Rivers Catchment Board** [1940] 1 KB 319 remarked at page 332 that *"[t]he case law as to the duties and liabilities of a statutory body to members of the public is in a state of lamentable obscurity and confusion"*. The same or similar sentiments were made by the House Lords in recent case of **Gorringe v. Calderdale Metropolitan Borough Council** [2004] 2 All ER 326. Lord Steyn at page 330 in paragraph 2 stated;

> *"There are, however, a few remarks that I would wish to make about negligence and statutory duties and powers. This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary"*. (Emphasis added)

07. The common law cases suggest that, the court must be satisfied that the Parliament intended, via the statute to create a private law right to sue any public body for breach of statutory power. Accordingly, mere existence of statutory powers does not create a

private law right of action against the statutory bodies for their breach of statutory powers. A brief examination of duty of care in common law and its development to date in relation statutory powers has now become necessary to decide this matter.

08. The doctrine of duty of care under the English Tort Law was significantly developed in 1932 with the case of **Donoghue v. Stevenson** (1932) AC 562. Lord Atkin in that case established a 'neighbourhood principle' or a general duty that individuals must take reasonable care in their actions or omissions, so as not to cause harm to others proximate to them. Despite the fact that, the plaintiff was unidentified or unknown to the manufacturer in that case, Lord Atkin held that, the type of harm which occurred was foreseeable through the negligence of the defendant – the ginger beer manufacturer. The plaintiff in that case succeeded in establishing that a manufacturer of ginger beer owed her a duty of care, where it had been negligently produced. Lord Atkin articulating the *'neighbourhood principle'* stated at page 580 that;

> *"At present I content myself with pointing out that in English law there must be, and is, some general conception of relatives giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonable to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".*

09. The principle articulated by Lord Atkin in that case could not generally be applied across the board for two reasons; firstly due to the development of new categories of negligence over the period of time and secondly, due to the rise of necessity for its exclusion. The English courts were of the opinion that, the duty of care, as expounded by Lord Atkin, did not have an indiscriminate application to all forms of negligence. This led the English courts to re-think about the principle and to find some justifiable exclusion or some justification for its exclusion. This is clear from the sentiments expressed by Lord Reid in **Home Office v Dorset Yacht Co Ltd** [1970] AC 1004, where His Lordship stated at

page 1027 that, *"the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion"*. The gap was finally filled by **Anns v Merton London Borough Council** [1978] AC 728. Lord Wilberforce established two stage test of duty of care, which is well-known as ***Anns Test***. His Lordship held at pages 751 and 752 as follows;

> *"Through the trilogy of cases in this House – Donoghue v Stevenson [1932] A.C. 562, Hedly Byrne & Co. Ltd. V Heller & Partners Ltd. [1964] - and Dorset Yacht Co. Ltd v Home Office [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighborhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A.C. 1004, per Lord Reid at p. 1027. Examples of this are Hedley Byrne's case [1964] A.C 465 where the class of potential plaintiff was reduced to those shown to have relied upon the correctness of statements made".*

10. The ***Anns'*** two stages test is as follows

    a. A sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage, such that carelessness on the part of the former is likely to cause damage to the latter, and

    b. There are no considerations relevant which may reduce or limit the scope of any imposed duty.

11. The proximity and the foreseeability are on the first stage and the policy consideration which limits the liability is on the second stage as per ***Anns Test***. Unlike the principle expounded in **Donoghue v. Stevenson** (supra), the ***Anns Test*** recognizes the possible exclusion to the common law duty of care towards those who are proximate. However, the ***Anns Test*** too received criticism for combining the test for proximity of relationship with foreseeability of harm. It was further criticized that, Lord Atkin's neighbourhood

principle emphasized a need for both a proximate relationship, as well as a foreseeability of harm, but the ***Anns Test*** did not make such a clear distinction. Then the House of Lords in **Caparo Industries plc v. Dickman** [1990] 2 AC 605, at 632-633 summarized the test for the duty of care in three folds namely (a) the harm which occurred must be a reasonable foreseeable result of the defendant's conduct; (b) a sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage and (c) it is fair, just and reasonable to impose liability. **Caparo Industries plc v Dickman** (supra) has, contrary to ***Anns Test,*** made clear distinction between the foreseeability and the proximity, whilst making the third ingredient as reasonableness and fairness as opposed to the policy consideration in ***Anns Test***.

12. The ***Anns Test***, despite the local criticism it received, had influenced the English courts to inquire whether statutory body owes a duty to care based on proximity and foreseeability at the first stage and at the second stage whether the policy consideration has negated or limited the said duty of care, when it comes to statutory powers. The latest example of this is the case of **Gorringe v. Calderdale Metropolitan Borough Council** (supra). The facts of the case well summarized in the speech of Lord Hoffman as follows;

> *On 15 July 1996, on a country road in Yorkshire, Mrs Denise Gorringe drove her car head-on into a bus. It was hidden behind a sharp crest in the road until just before she reached the top. When she first caught sight of it, a curve on the far side may have given her the impression that it was actually on her side of the road. At any rate, she slammed on the brakes and at 50 miles an hour the wheels locked and the car skidded into the path of the bus. Mrs Gorringe suffered brain injuries severely affecting various bodily functions including speech and movement.*
>
> *On the face of it, the accident was her own fault. It was certainly not the fault of the bus driver. He was driving with proper care when Mrs Gorringe skidded into him. But she claims in these proceedings that it was the fault of the local authority, the Calderdale Metropolitan Borough Council. She says that the council caused the accident by failing to give her proper warning of the danger involved in driving fast when you could not see what was coming. In particular, the Council should have painted the word "SLOW" on the road surface at some point before the crest. There had been such a marking in the past, but it disappeared, probably when the road was mended seven or eight years before.*
>
> *When the case was before the Court of Appeal [2002] RTR 446, Potter LJ said (at para 93) that it would have been "no more than a warning of the need to do that which should have been obvious to her in any event as she drove up from the dip." Nevertheless, he was willing to hold that the Council's omission to provide such a warning meant that the accident was partly its fault. The judge (Mr Roger Thorn QC, sitting as a deputy judge) had gone even further. He said that it was entirely the fault of the Council. In the absence of such a warning, Mrs Gorringe could not be blamed for driving too fast. But May LJ and Sir Murray Stuart-Smith disagreed. They said that the Council was not in breach of any duty to Mrs*

Gorringe and that she was entirely responsible. Her action was dismissed and she appealed to the House of Lords.

13. In that case, the counsel for the appellant argued that, common law duty has been created by (or in parallel with) section 39 (2) and (3) of the Road Traffic Act 1988 (UK Act). The said subsections are as follows;

> *(2) Each local authority must prepare and carry out a programme of measures designed to promote road safety. ...*
>
> *(3) Without prejudice to the generality of sub-section (2) above, in pursuance of their duty under that sub-section each local authority –*
>
> *(a) must carry out studies into accidents arising out of the use of vehicles on roads...within their area,*
>
> *(b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for which they are the highway authority...and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads.*

14. Lord Hoffmann having considered the above provisions stated at pages 334 and 335 that;

> *"These provisions, with their repeated use of the word "must", impose statutory duties. But they are typical public law duties expressed in the widest and most general terms: compare section 1(1) of the National Health Service Act 1977: "It is the Secretary of State's duty to continue the promotion...of a comprehensive health service ... ". No one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty. They are enforceable, so far as they are justiciable at all, only in proceedings for judicial review".* (Emphasis added)

15. His Lordship further held at page 335

> *"Since the existence of these statutory powers is the only basis upon which a common law duty was claimed to exist, it seemed to me relevant to ask whether, in conferring such powers, Parliament could be taken to have intended to create such a duty. If a statute actually imposes a duty, it is well settled that the question of whether it was intended to give rise to a*

private right of action depends upon the construction of the statute: see Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] 1 AC 58, 159, 168-171. If the statute does not create a private right of action, it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care". (Emphasis added)

16. In the same case, concurring with Lord Hoffmann, Lord Steyn stated at page 330 that;

> *"..in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy? An assimilation of the two enquiries will sometimes produce wrong results".*

17. Lord Hoffman in that case went on the basis whether the Parliament could be taken to have intended to create such a duty. According to His Lordship when a statute actually imposes a duty, it is well settled that the question whether it was intended to give rise to a private right of action depends on construction of the particular statute. In the meantime, Lord Steyn has gone on the basis to consider whether the statute has excluded the private law remedy. However, the House of Lords unanimously dismissing the appeal was of the opinion that, the existence of the broad public duty on the public authority does not generate a common law duty of care leading to private law right of action. Accordingly, a common law duty of care could not be imposed upon a public authority based, solely, on existence of statutory duty.

18. Like in **Gorringe** (supra) The House of Lord had another opportunity in **Stovin v. Wise** [1996] AC 923 to discuss the issue whether statutory duty gives a private law cause of action against a public authority created by a statute. The facts of the case are that;

> *The Plaintiff, riding a motor cycle along a road in December 1988, collided with a motor vehicle being driven by the defendant out of a junction. The plaintiff was seriously injured. Although the junction was not a busy one, it was known by the county council, as the highway authority, to be dangerous because the road users' view was restricted by a bank on adjoining land. Accidents had occurred there on at least three previous occasions. In January 1988, after a site meeting a divisional surveyor of the council accepted that a visibility problem existed and recommended removal of part of the bank. The council accepted the recommendation providing the owner of the land agreed. The owner made no response to the council's proposal before the plaintiff's accident notwithstanding a further site meeting where the council and owner's representatives were present.*

The plaintiff's claim against the defendant for damages for his personal injuries was settled but the defendant joined the council as third party, alleging negligence and breach of statutory duty. The judge held that the council was not in breach of statutory duty since the land was not part of the highway, but that it was in breach of its common law duty of care and it was 30 percent. The Court of Appeal dismissed the council's appeal. The council then appealed to the House of Lords.

19. The House of Lords, having extensively considered the ***Anns' Test*** and policy consideration, delivered the majority judgment in that case and held at pages 952 and 953 that;

> *"Whether a statutory duty gives rise to a private cause of action is a question of construction: see Regg v Deputy Governor of Parkhurst Prison, Ex Parte Hague [1992] 1 A.C. 58. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne- Wilkinson said in X-(Minors) v Bedfordshire County Council [1995] 2 A.C. 633, 739c in relation to the duty of care owed by a public authority performing statutory functions:*
>
> > *"the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done."*
>
> *The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care".* (Emphasis added)

20. The above decision of the House of Lords clearly expounds that, the liability of a statutory body in common law for breach of statutory duty depends on construction of the statute which requires examination of the policy of the statute and a determination whether the statute intended to confer such right of action for compensation. The House of Lords further stated that, the policy of the statue is the crucial factor and if the policy

of the statute is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care. The majority reasoning in **Stovin** (supra) was applied in **Capital & Counties PLC v. Hampshire County Council** [1997] QB 1004 to fire authorities, which have a general public law duty under section 1 of the Fire Services Act 1947, to make provision for efficient fire-fighting services. The Court of Appeal held that, this did not create a common law duty. Stuart-Smith LJ (giving the judgment of the Court of Appeal) said (at p 1030):

> *"In our judgment the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable."*

21. In **O'Rourke v. Camden London Borough Council** [1998] AC 188 a homeless person sued for damages on the ground that the council had failed in its statutory duty to provide him with accommodation. The action was struck out on the ground that the statute did not create a private law right of action. In a speech with which all other members of the House concurred, Lord Hoffman said at page 193:

> *"the [Housing] Act [1985] is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done."* (Emphasis added)

22. The other common law jurisdictions such as Australia and Singapore are not exception to the position taken by the English court on the question in hand. The primary reason is the influence made by ***Anns Test*** on the duty of care under the common law. There are several examples of cases where the courts in Australia and Singapore adopted the same approaches. In **Graham Barclay Oysters Pty Ltd v Ryan** [2002] HCA 54; 211 CLR 540; 194 ALR 337; 77 ALJR 183(5 December 2002) the High Court of Australia stated that, the legislative intention must be examined to determine whether a public authority has breached a common law duty by failing to exercise a statutory power. The court held that;

"In determining whether a public authority has breached a common law duty by failing to exercise a statutory power, it is essential to examine the words and policy of the legislation. That is because the legislation may indicate that the legislature has legislated to cover the field and excluded all common law duties of care. In other cases, the imposition of a common law duty may be inconsistent with or undermine the effectiveness of the duties imposed by a statute. In some cases, the circumstances of the case- for example, active intervention by the authority or reliance by the plaintiff – may establish a duty of care. But the legislation may give the authority such a wide discretion to exercise the power in question that the tribunal of fact cannot find that the failure to exercise the power constituted a breach of the duty".

23. The Court of Appeal of Singapore in **Tan Juay Pah v. Kimly Construction Pte Ltd** [2012] 2 SLR 549 set the guidelines for ascertaining the common law duty of care for breach of statutory duty and said that;

"[T]he party seeking to establish that a private right of action exists for a breach of statutory duty must show that Parliament, in imposing the statutory duty in question to protect the members of a class, intended those members to have such a right of action. Here, it must also be borne in mind that such right is not immediately established just because a statute is intended to protect a particular class of persons. Ordinarily, something more is required to demonstrate a statutory intention to confer a private right of action. In matters where the statute's objective is to protect the public in general, exceptionally clear language will be required before an intention to confer a private remedy for a breach of statutory duty can be established". (Emphasis added)

24. The above analysis reveals that, the duty of care in English common law was established with the introduction of *'neighbourhood principle'* by Lord Atkin in **Donoghue** in 1932. However, its inflexibility to suit the different types of negligence and failure to cater the emerging categories of negligence had encouraged the English courts to develop the principle and to apply it with necessary changes to the emerging trends. This finally ended with the ***Anns Test*** which was later fine-tuned in **Caparo**. Accordingly, the foreseeability, proximity and the policy consideration are the ingredients for the duty of care to be established in English tort law. When applying the third ingredient with respect to the statutory duty on the public authorities, the **Gorringe** and **Stovin** clearly established the law that, mere existence of statutory powers does not give private law right to sue for breach. The question, whether the statute intended to give rise to a private right of action or not, depends on construction of the statute. But the policy of the statute

is nevertheless a crucial factor. The Australian courts too urged the necessity to examine the words and the policy of the statute. The Singapore courts on the other hand, unlike the English or Australian courts, set a high threshold which requires an *'exceptionally clear language'* to show existence of Parliamentary intention to confer a private right of action for breach of statutory duty.

25. Ascertaining the policy of the statute through a proper construction is the task that is shouldered on the courts. There is no hard and fast rule which guides the courts to discharge this duty. However, it is not necessary to bring the facts of a particular case within the facts of a previous case, in which a duty of care had already been held to exist. In **Gorringe**, Lord Steyn stated that, basic question is whether the statute excludes a private law remedy or not. Thus, the exclusion clause in a statute is the clear reflection of intention of the statute that it negated the private law right. In such a situation, the task of the court to ascertain the policy of the statute would easily be discharged. The ***Anns Test*** too requires at the second stage to consider whether a particular statute has any exclusion clause. The crucial question is, therefore, whether the absence of such exclusion implies the existence of private law right to sue a particular public body, because some statute may not expressly exclude such private law action. I am fortified by my view that, the absence of exclusion does not necessarily imply existence of such right for the following reasons. Firstly, it is the policy of the statute that is crucial as stated in **Stovin**. Secondly, though Lord Steyn stated that, *"the basic question is whether the statute excludes private law remedy"*, His Lordship did not mean that is the only question to be determined. The reason is that, His Lordship fully concurred with Lord Hoffmann in both **Stovin** and **Gorringe** where Lord Hoffmann emphasized to consider the policy of a statute and to decide the question through a proper construction of the statute. Thirdly, Lord Steyn emphasized to consider the background of the statute when deciding the private law remedy. Fourthly, the exclusion clause may be one of the canons to ascertain the intention of the statute, but not a sole tool for this purpose.

26. Some legislation in Fiji, like Fiji Road Authority Act expressly excludes the private law remedy for breach of statutory duty (see: section 38 A of the Fiji Road Authority Act 2012). However, there is no such express provision in Land Transport Act 1998 and the absence of exclusion does not necessarily imply the existence of such right for the reasons given above. As such it becomes necessary to examine the policy of the Land Transport Act 1998 to determine whether the Parliament intended to give rise to a private right of action for breach of any statutory duty casted on the defendant authority.

27. Generally, examination of legislative history plays a vital role in determining the policy and intention of a statute when there is a major transformation in the governing law. In this case too it may help determine the underlying policy and the principle of Land Transport Act 1998. The law, that governed road traffic management and control of transport before enacting the present Land Transport Act, was Traffic Act Cap 176. It

was passed to consolidate and amend the law relating to traffic and the control of transport and was in force till 1998. The Act established Central Traffic Authority and Principal Licensing Authority. The Transport Control Board established under the repealed Traffic Ordinance continued to function under the Traffic Act Cap 176 and it was responsible for taking all administrative decisions in relation to issuance, suspension, revocation, cancellation and transfer of licenses. Some instances, the decisions of the board were final and in some other instances the Act provided for appeal to the Minister in charge of Transport [see: sections 13 A, 68 and 90 of the Traffic Act and sections 10 and 11 of the Traffic (use of taxi meters regulations)]. In cases where section 25 of the Traffic Act and section 14 of Traffic Regulation apply, the appeal against any decision taken under the those two sections were heard by the magistrate. Apart from that, most of the decisions were taken and the appeals from those decisions were heard by the Board and the Minister in charge of transport. It was an "administrative decision making process" under the Traffic Act Cap 176, with less intervention by the judicial officer – the magistrate as said above.

28. However, the Land Transport Act 1998 was brought to establish the Land Transport Authority, to regulate the registration and use of vehicles, the licensing of drivers of vehicles and the enforcement of traffic laws. It repealed the Traffic Act Cap 176 and streamlined the administration of road traffic and the connected matters therewith. The fundamental feature is that, the Land Transport Authority was established as a body corporate with perpetual succession and a common seal as per section 6 (2) of the Land Transport Act 1998. It may enter into contracts and sue and be sued in its corporate name and shall have the power to acquire, hold and dispose of property both real and personal and generally do all such acts and things that are necessary for or incidental to the performance of its functions under the Land Transport Act or any other written law. Previously, the Authority was more like a department under the respective ministry. However, it has become a corporate body and or independent body with separate legal personality. It may sue and be sued in its corporate name.

29. Another notable feature of the Land Transport Act is the establishment of Land Transport Appeals Tribunal. The Part III (sections 40 to 48 – both inclusive) of the Act deals with establishment, jurisdiction and procedure of the Tribunal. Section 40 (2) provides that, the function of the Tribunal is to hear and determine appeals against decisions of the Authority relating to (a) licensing of drivers under section 56 and (b) any matter requiring a decision of the Authority under Part VI of the Act and any other matter prescribed by the Minister by regulations. It must be noted here that, the Part VI of the Act deals with the public service vehicle licensing, i.e. licensing a motor vehicle that is being used for the carriage of passengers for hire, reward or other consideration. The section 48 provides that, a decision of the Tribunal shall be subject to an appeal, only on points of law, to the High Court. This shows a major transformation of policy from the previous Traffic Act to present Land Transport Act, i.e. the administrative decisions taken by the authority in

relation to licensing of public service vehicle are now vetted by the a judicial forum – the Land Transport Appeals Tribunal and thereafter by the High Court on the limited ground of question of law as opposed to the previous regime which was purely administrative and managerial under the repealed Traffic Act.

30. The Part VI of the Land Transport Act and the regulations made thereunder deal with powers, functions and procedure to be adopted by the Authority in relation to licensing public service vehicles. As a result, any act or omission of the Authority in relation to powers and functions conferred by the Land Transfer Act to be appealed to and be determined by Land Transport Appeal Tribunal and thereafter by the High Court only on the question of law. The policy of the Land Transport Act is now clear that, the Authority, being the separate legal personality may sue or be sued in its corporate name; however, its act or omission in relation to licensing drivers under section 56, any matter requiring the decision of Authority and other matters prescribed by the Minister under section 41 (1) (b) will only be challenged in Land Transport Appeal Tribunal and no private action is available for those matters coming under the jurisdiction of the Tribunal. In other words, though the private law actions available against the Authority in general as per section 6 (2) of the Act, it is excluded in matters falling within the jurisdiction of the Land Transport Appeal Tribunal.

31. The matter complained of by the plaintiff in this case is the decision of the authority to cancel the Taxi Permit No. 1557 belonged to Narend Kumar and failure to transfer it to the plaintiff. The plaintiff seeks a declaration that the conduct of Authority in cancelling the said Permit was illegal and unreasonable. The decision of the Authority to cancel the said Permit falls under Part VI of the Land Transport Act and therefore, it should be challenged in the Land Transport Appeals Tribunal and thereafter in the High Court on question of law. Thus, private law action is not available to obtain a declaration against cancellation of that Taxi Permit.

32. The affidavits and the documents tendered by the parties to the court shows that, the said Taxi Permit 1557 was originally issued in 1979 and after several transfers, one Narend Kumar became the holder. Thereafter one Madraviran Pillay applied for transfer of the Permit to himself by his application dated 29.01.2002 approximately 4 years before the alleged application of the plaintiff. The Authority accordingly advertised the same and called for written representation from the public. In the meantime, an investigation by the Authority revealed that, Narend Kumar gave Power of Attorney to Madraviran Pillay to deal with the Taxi business and by Bill of Sale he (Narend Kumar) sold the same to Madraviran Pillay. Though the plaintiff claimed that, he applied for transfer of the same to himself, the defendant's counsel argued that, the defendant authority could not have accepted the second application made by the plaintiff for transfer when the first application was pending. This is corroborated by the averment of the plaintiff in paragraph 5 of his affidavit where he states that his application for transfer was returned

by the defendant authority with the remark that 'Permit No. LT 1557 has been sold to one Madraviran Pillay'. Accordingly, the defendant authority placed the said Permit for show cause and both the plaintiff and Madraviran Pillay were invited for hearing. The defendant authority then cancelled the said Permit in the presence of both the plaintiff and Madraviran Pillay. The annexure marked **"C"** of the affidavit of defendant authority is Board Minutes which shows that, the plaintiff and Madraviran Pillay were present at "Show Cause hearing" and the authority finally cancelled the Permit for breach of condition of the license by Narend Kumar.

33. As discussed above, the Land Transport Appeals Tribunal has the jurisdiction to examine the correctness and reasonableness of the process followed by the defendant authority in cancelling the Permit. This court has no jurisdiction to exercise such power. However, it would be appropriate to discuss the same for the purpose of completeness and to demonstrate rationale of this ruling. Land Transport (Public Service Vehicles) Regulations 2000 provide for the grounds and procedure for transfer of a permit. Accordingly, a permit may be transferred for several reasons mentioned therein which includes migration of permit holder. Before transferring a permit, the Authority must be satisfied that the person nominated in an application is a fit and proper person to hold a permit and that adequate provision will be made for the observance of any condition or restriction imposed in respect of the permit. The section 11 of Land Transport (Public Service Vehicles) Regulations 2000 provides for the ground of transfer and reads as follows:

Transfer of permits

11-(1) Subject to sub-regulation (2), the Authority may, upon application being made, transfer a permit for any unexpired term of the permit if-

a) The holder of the permit has died or become bankrupt, insane, permanently incapacitated or terminally ill;

b) The holder of the permit leaves the Fiji Islands for the purpose of taking up permanent residence in another country;

c) The holder of the permit has reached 60 years and wishes to retire from conducting the business involving the permit and proposes to transfer the permit to-

(i) an immediate family member; or

(ii) a person or company with whom the permit holder has an existing business relationship involving the permit; or

d) in the special circumstances of the case, the Authority considers it reasonable to do so.

(2) Before transferring a permit, the Authority must be satisfied that the person nominated in an application under sub- regulation (1) is a fit and proper person to hold a permit and that adequate provision will be made for the observance of any condition or restriction imposed in respect of the permit.

34. Though the Regulations allow the transfer of permit as mentioned above, they impose certain additional responsibilities on the permit holder not to appoint an agent to deal with the permit without the prior consent of the Authority. The Regulations require the holder to surrender and or transfer the permit if he or she intends to migrate. The section 17 of the Regulations lays down other responsibilities and reads that:

Other responsibilities of permit holders

17 -(1) The holder of a permit must not appoint an agent or representative for the purpose of exercising any the right in the permit nor cause or allow an agent or representative to exercise any right under it except with the prior consent of the Authority.

(2) The holder of a permit who intends to leave the Fiji Islands for more than 3 months must obtain, prior to departure, the consent of the Authority to a person nominated by the holder to act as his or her agent during the absence.

(3) The holder of a permit who intends to leave the Fiji Islands to take up permanent residence in another country must, prior to departure-

(a) surrender the permit to the Authority; or

(b) with the approval of the Authority, transfer the permit to another person.

35. In the meantime, if any of the conditions of a permit is breached by the holder, the Regulations authorize the Authority to cancel or vary or suspend any permit. This is provided in section 12 of the Regulation and it reads as follows:

Authority may cancel, vary or suspend

12-(1) The Authority may cancel, vary or suspend a permit if a condition subject to which the permit was granted has not been complied with and the Authority is satisfied that the breach is serious, frequent or causes inconvenience or danger to the public.

*(2) **The Authority must, before cancelling, varying or suspending a permit, give the holder of the permit an opportunity to be heard.*** (Emphasis added)

36. It is evident from the above regulation that, though the Authority has power to cancel or vary or suspend any permit for breach of condition, it cannot do it arbitrarily. The Authority is mandatorily required to follow the principles of natural justice and ensure the holder is given an opportunity to be heard before such decision is taken. Even after such decision has been made after hearing a permit holder, the Regulations further provide for the right to appeal such decision in three stages. First is the right given to a holder or a person aggrieved by such decision to apply to the Authority to review its own decision. The second is the right to appeal to the Tribunal. These two opportunities are provided in section 18 of the Regulations and it is as follows:

Appeals against decisions of the Authority

18- (1) A person aggrieved by a decision of an officer acting under delegation of the Authority to refuse to issue or renew or to vary, suspend or cancel a permit under this Part may request that the decision be reconsidered by the Authority and on receipt of the request the Authority must reconsider the matter at the next convenient meeting.

(2) A person who is aggrieved by a decision of the Authority under sub-regulation (1) may appeal to the Tribunal. (Emphasis added)

37. The third opportunity given to a permit holder or a person aggrieved by a decision of the Authority is the right to appeal the decision of the Tribunal to the High Court, of course on limited ground of question of law. This right is provided in section 48 of the Land Transport Act 1998. Accordingly, the policy of the Land Transport Act is that, though the Authority may sue and be sued in its name, the private law action, for the matters falling within the jurisdiction of Land Transport Appeals Tribunal, is excluded. Instead of the private law action for those matters, the Land Transport Act specifically provides for three-fold remedy for a permit holder or an aggrieved person. The decision to cancel the Permit No. LT 1557 was taken by the Board in its meeting held on 29.11.2012. Both the plaintiff and other applicant Madraviran Pillay were present in the said meeting and the Board found that, Narendra Kumar breached the condition by not informing the Authority when he appointed Madraviran Pillay through a Power of Attorney to deal with the Permit and entered into Bill of Sale in relation to the said Permit. The Board then decided to cancel the same. If the plaintiff was aggrieved by this decision, he should have requested the Board to review it in its next meeting and thereafter appealed to the Tribunal if the review was not satisfactory for him. He could have further appealed to High Court as provided by section 48 of the Land Transport Act. However, the plaintiff failed to do so. Thus no cause of action exists for the plaintiff to sue the Authority on that

basis as he failed to seek specific remedy provided for him by the Land Transport Act 1998. The cause of action against the Authority is obviously unsustainable for the above mentioned reasons.

38. It was held in **Ratumaiyale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

> *"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95.*

39. Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, explained the instances where the proceedings are considered to be vexatious and said at 491 that:

> *1. Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*
>
> *2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
>
> *3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.* (Emphasis added).

40. The plaintiff stated in paragraph 5 of his statement of claim that, only on or about the month of August 2016 he was informed of cancellation of the Permit LT 1557. He further stated in the particulars of negligence in paragraph 7 that, the Authority failed to allow him an opportunity to address the defendant before cancelling the subject Permit. By these pleadings, the plaintiff tries to show that he has a cause of action. However, these are not only the baseless claims, but also contrary to his own document and the document tendered by the defendant authority in this case. The document marked as **"AC 6"** and tendered by the plaintiff with his affidavit is self-explanatory that, he was invited for the "show cause hearing". The annexure **"C"** in supporting affidavit filed on behalf of the defendant authority clearly shows that, both the plaintiff and Madraviran Pillay were present in the meeting. It further shows that, the Board heard both of them and finally decided to cancel the subject Permit for breach of condition by the original holder – Narend Kumar. The plaintiff again in paragraph 16 of his affidavit states that, the

defendant did not give satisfactory reply for his application and therefore he applied for new permit in 2015. This shows that, the plaintiff is not truthful in his affidavit, because he was heard and the decision was taken in his presence. Thus, he tries to somehow demonstrate a cause of action which is not available for him by operation of law as the law provides separate and comprehensive remedies for him. It is clear from the conduct of the plaintiff that, he deliberately failed to invoke the special jurisdiction given by the law and try to circumvent it by bringing this action. In fact, the plaintiff applied for new Taxi Permit on 22.05.2015 and he was informed by the Authority on 20.07.2015 about the freeze imposed by the Cabinet in March 2011. The plaintiff was further advised to apply when the freeze is uplifted. Thus, he instituted this action in 2017 having known all what happened as discussed above. It is obviously an abuse of process and he (the plaintiff) is trying to abuse the legal machinery which is meant for doing justice. The plaintiff cannot bring the action as and when he wishes, when the law specifically provides for procedure for the situation faced by him.

41. In the case of **Goldsmith v Sperrings Ltd [1977] 2 All ER 566,** Lord Denning said as follows at 574:

> *"In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer".*

42. For the reasons mentioned above, I am firm on my view that, this is a plain and obvious case where the cause of action is plainly unsustainable and it is frivolous, vexatious and abuse of process. His Lordship the former Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

> *"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."*

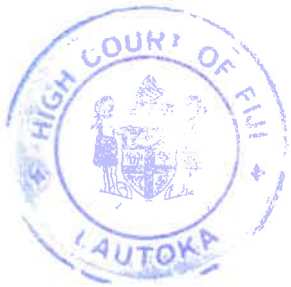
43. The above examination concludes that, though the defendant authority is a corporate body that may sue and be sued in its name, the policy of the Land Transport Act 1998 is to exclude the private law action for matters falling within the jurisdiction of Land

Transport Appeals Tribunal. Even I am mistaken in this view; there is no breach of any statutory duty by the defendant authority, which can give rise to a cause of action to the plaintiff, because the defendant authority followed the process according to law and regulations in deciding to cancel the subject Taxi Permit. Thus there is no room for any claim of such breach. It follows that, this court should summarily intervene in this matter and strike out the plaintiff's action with the reasonable amount of cost for the defendant for defending this matter to date, having properly exercised the statutory duties casted on it by the statute.

44. In result, I make the following orders,

a. The plaintiff's action is struck out, and

b. The plaintiff should pay a summarily assessed cost of $ 1000 to the defendant authority within a month from today.



U.L Mohamed Azhar
Master of the High Court

At Lautoka
30.09.2019