

34/82

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CASE FOR THE APPELLANT

Record

10 1. This is an appeal by the Attorney General of Fiji ("the Appellant") from an order dated the 5th August 1981 of the Fiji Court of Appeal dismissing with costs to the Director of Public Prosecutions of Fiji ("the Respondent") in that Court the Appellant's appeal from an order dated the 10th April 1981 of the Supreme Court of Fiji whereby the said Supreme Court by a majority decision made an order declaring :

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20 that the notice assigning responsibility to the Attorney General under Section 76(1) of the Constitution (of Fiji) in relation to the Office of the Director of Public Prosecution is unconstitutional.

30 2. This case concerns the validity or otherwise of part of certain directions in writing given on the 28th January 1981 by the Governor-General of Fiji ("the Governor-General") in exercise of the powers conferred upon him by subsection (1) of Section 76 of the Constitution of Fiji ("the Constitution") and acting in accordance with the advice of the Prime Minister of Fiji ("the Prime Minister"). By the said directions the Governor-General assigned to the Attorney-General of Fiji ("the Attorney General") responsibility for the conduct of the business of the Government specified in Column 1 of the Schedule to his said directions and responsibility for the administration of the Ministry and department of the Government specified in Column 2 of that Schedule. Under

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p.144 11. 8 and 9 Column 1 of that Schedule were included "Criminal law and procedure" and "Evidence". Under Column p.144 1.16 2 of that Schedule was included "Office of the Director of Public Prosecutions (subject to section p.144 11.17- 85 of the Constitution)". It is the validity or 19 otherwise of those parts of the said directions which arises for consideration.

3. The main issue which arises on this appeal is whether the said parts of the said directions are constitutional and lawful. This issue is referred to hereafter as "the Main Issue". 10

4. A subsidiary issue which arises on this appeal is whether Mr. Sailosi Kepa, the holder of the Office of Director of Public Prosecutions at all material times is and was entitled to bring the present proceedings against the Crown in the name of "the Director of Public Prosecutions". Where it is necessary to draw a distinction between the Office of Director of Public Prosecutions and Mr. Sailosi Kepa, the expressions "the Director of Public Prosecutions" and "Mr. Kepa" are used respectively in this Case. This issue is hereinafter referred to as "the Subsidiary Issue". 20

5. Further contentions were advanced in the Courts below by the Appellant but, as hereinafter appears such further contentions are not pursued in this appeal by the Appellant.

6. The facts leading up to the commencement of these proceedings are as follows : 30

(1) On the 10th October 1970 Fiji became independent by virtue of the Fiji Independence Act 1970 and upon that date the Constitution of Fiji came into effect (see Fiji Independence Order 1970 dated 30th September 1970. Section 4(1)). The Constitution is the supreme law of Fiji (Section 2 of the Constitution).

(2) Under the Constitution there is established a Parliament consisting of Her Majesty the Queen, a House of Representatives and a Senate. (Chapter V of the Constitution). Her Majesty's representative in Fiji is the Governor-General (Chapter IV *ibid*). Members of the House of Representatives are elected (Chapter V Part 2 *ibid*) whereas members of the Senate are appointed by the Governor-General acting on the advice of certain named persons or bodies (Chapter V Part 3 *ibid*). 40

(3) The executive authority of Fiji is vested in Her Majesty and (subject to the Constitution) may be exercised on her behalf by the Governor-

General (Section 72(1) *ibid*). There are to be a Prime Minister, an Attorney-General and such other offices of Ministers of the Government as may be established by the Governor-General acting in accordance with the advice of the Prime Minister. The Governor General appoints as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House. The Governor-General appoints all other Ministers acting in accordance with the advice of the Prime Minister (Section 73 *ibid*).

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(4) The position of Attorney General requires special mention. His appointment as a Minister of the Crown is specifically provided for by Section 73. He must be a person entitled to practice as a barrister and solicitor in Fiji (Section 73 (3) proviso (a)). He is entitled to attend and take part in proceedings in either House of Parliament whether or not a member of that House or of either House although he may not vote in a House of which he is not a member (Section 60 Without prejudice to the assignment of any other responsibility to him under Section 76(1) (as to which see below) he is to be the principal legal adviser to the Government (Section 76 (2) Civil proceedings by the Crown are to be instituted by the Attorney-General and civil proceedings against the Crown are to be instituted against the Attorney-General (Crown Proceedings Act, Cap. 24 of 1978 Edition of Laws of Fiji Section 12)).

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(5) The assignment of responsibilities to particular Ministers is dealt with by Section 76 (1) which provides:

"The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government".

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(6) Where any Minister has been charged with responsibility for the administration of any department of the Government he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister shall be under the supervision of a

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Permanent Secretary or of some other supervising officer whose office shall be a public office (Section 82).

(7) The Constitution also provides for certain other offices including that of Director of Public Prosecutions, whose office is a public office (Section 85 (1)). The power to make appointments to the office of Director of Public Prosecutions vests in the Judicial and Legal Services Commission (Section 85(1)), a body established by Section 101 of the Constitution. 10

(8) The Director of Public Prosecutions has power in any case in which he considers it desirable to do so

(a) to institute and undertake criminal proceedings before any court of law (not being a Court established by a disciplinary law)

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and 20

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority. (Section 85(4)).

(9) The powers referred to in paragraphs (b) and (c) of Section 85(4) are vested in the Director of Public Prosecutions to the exclusion of any other person or authority (Section 85(6)). Further, in the exercise of the powers conferred upon him by Section 85 the Director of Public Prosecutions is not to "be subject to the direction or control of any other person or authority". (Section 85(7)). 30

(10) The Director of Public Prosecutions has an establishment in which a number of legal officers and other personnel are employed. The costs of the establishment, including the staff, office accommodation, furniture and equipment and monies necessary to enable the establishment to perform its duties is provided out of monies voted by Parliament. 40

p.90 11.21-25 (11) Mr. Sailosi Kepa was appointed Director of Public Prosecutions with effect from the 16th November 1980.

p.112 1.14 - (12) Between independence in 1970 and 1981 no

directions pursuant to Section 76(1) of the Constitution had been given by the Governor-General.

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p.113 1.11

(13) During that period the Attorney-General had responded to Parliamentary questions relating to the Office of the Director of Public Prosecutions and sought to argue, both in Parliament and in Cabinet the case for monies necessary for the purposes of that Office.

p.20 11.50-54
p.93 11.8-13
and p.114
1.39 - v.115
1.28

10 (14) On the 28th January 1981, the Governor-General, acting on the advice of the Prime Minister, gave directions in writing pursuant to Section 76(1) of the Constitution, to all 18 Ministers (including the Prime Minister) assigning to each of them responsibility for the conduct of particular business of the Government and responsibility for the administration of particular Ministries and departments of the Government. In each case the business and Ministries and
20 departments for which each such Minister was accordingly to be responsible was scheduled to the directions given and subjected to such limitations or qualifications as were therein specified.

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p.137 1.18

(15) On the 6th February 1981 all of these directions were published in the Fiji Royal Gazette (No. 7 of Vol. 108) although there is and was in fact no constitutional or other statutory requirement that they should be so published.

30 (16) The directions to the Attorney-General (the notice of which bore the number 168 in the Fiji Royal Gazette) included assignment of responsibility as set out in paragraph 2 of this Case.

p.137 11.24-
28 and pp.
143-145

40 (17) In a speech to Parliament the Prime Minister had explained that the decision had been taken in 1980 to issue directions pursuant to Section 76(1) so as to define more accurately and clearly the various areas of Government business, which had become increasingly complex, which fell within the area of responsibility of each Minister. The Appellant does not understand this to be challenged by the Respondent.

p.111 1.34 -
p.115

50 (18) The Court of Appeal accepted that the Attorney-General would be particularly careful to ensure that such general direction and control as he would exercise over the office of the Director of Public Prosecutions would do nothing to impede, embarrass or influence the Director of Public Prosecutions in the exercise of his exclusive and protected powers.

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Record
pp.1-8 1.11 7. On the 5th March 1981 Notice of Motion was issued by Mr. Kupa naming "the Director of Public Prosecutions" as Plaintiff and the Appellant as Respondent seeking

p.2 11-22-35 (a) an order under Section 97(1) of the Constitution of Fiji declaring unconstitutional and/or invalid "the following portion of a purported order in the Fiji Royal Gazette of the 6th February 1981" namely "That part of the said order appearing in Column 1 of the Schedule thereto which purports to assign to the Attorney-General responsibility for the "business" of criminal law and procedure and evidence and that part appearing in Column 2 of the Schedule thereto which purports to assign to the Attorney-General responsibility for the administration of the Director of Public Prosecutions' office". 10

p.4 11.40-45 (b) alternatively, an order "comprehensively delimiting the scope of such purported order should the same, contrary to the Plaintiff's submission, be held to be valid and/or constitutional since the effective functioning of the Plaintiff's office requires proper legal clarification". 20

p.2 1.36 - 8. Eleven grounds were stated in support of
p.4 1.38 the primary application but they may be summarised as follows:

(1) That supervision by the Attorney-General, a political appointee, of the independent office of Director of Public Prosecutions is incompatible with the integrity and independence of the Director of Public Prosecutions as guaranteed by the Constitution and with the exercise by him of the powers exclusively reserved to him by Section 11.39-49, p.485 of the Constitution (Grounds 1, 6, 7, 8, 10, 11.1-10, 11. 11). 30
21-32 and 11.33-38

(2) That the office of the Director of Public Prosecutions is not a "department of the Government", nor does it carry on "business of the Government" within the meaning of Section 76 (1) of the Constitution nor are matters of "Criminal law and procedure" and "evidence" "business of the Government" within the meaning of the said Section and that, accordingly, these were not matters for which responsibility could be assigned to a Minister pursuant to the said Section (Grounds 3, 4 and 5). 40

p.3 11.12-16, 11.17-22 and 11.23-28 (3) That, if otherwise valid, the assignment is unconstitutional and/or invalid for uncertainty

in that the ambit of Ministerial responsibility is not adequately delimited (Ground 9).

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p.4 11.11-20

(4) That the decision to issue the directions was based upon a fundamental misunderstanding of the legal effect of the Constitution, namely:-

(a) that it was a requirement that the Office of the Director of Public Prosecutions should be subject to Ministerial responsibility and control

10 (b) that the Constitution was essentially concerned with the issue of Ministerial responsibility. (Ground 2).

p.2 1.47-
p.3 1.11
p.10 1.29 -
p.13 1.8

9. At a hearing on the 13th March 1981 the Supreme Court of Fiji, sitting by 3 judges, Tuivaga C.J., Mishra and Williams J.J., considered three preliminary issues raised by the Appellant. The only one of those issues relevant to the present appeal was whether Mr. Kepa was entitled to commence these proceedings in the name of his office.

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10. The said Court ruled on the said issue that "the Director of Public Prosecutions has, in respect of the application, the right to be heard."

p.12 11.36-
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11. The main case was heard by the said three Judges sitting as the Supreme Court of Fiji on the 20th March 1981. No oral evidence was heard but the Court had before it a number of affidavits some of which are printed in the Record herein.

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p.90-145

30 12. On the 10th April 1981 reserved judgment was given and by a majority (Mishra J dissenting) the Court made the declaration set out in paragraph 1 of this Case.

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p.48 1.19 -
p.49 1.12

40 13. On the Main Issue, the majority opinion of Tuivaga C.J. and Williams J. was that the directions were unconstitutional in so far as they related to the Office of the Director of Public Prosecutions, on the grounds, as summarised by the Court of Appeal that the Office of the Director of Public Prosecutions was not a department of the Government within the meaning of Section 76 (1) of the Constitution, (and that therefore responsibility for it could not be assigned pursuant to the said sub-section) and that in any event the assignment was complete, not partial, and was contrary to Section 85(7) of the Constitution.

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<p><u>Record</u> pp.40 1.21- p.48 1.17</p> <p>p.45 1.1- p.46 1.16</p> <p>p.44 11.35- 50</p> <p>p.46 1.36 - p.47 1.8</p> <p>p.47 11.26- 30</p> <p>pp.49-51</p> <p>p.50 11.37- 42 and p.50 1.45 - p.51 1.10</p> <p>pp.51-53</p> <p>p.53 1.18</p> <p>p.53 1.19 pp.53-87 pp.87-88</p> <p>p.77 1.44 - p.78 1.30</p>	<p>14. On the <u>Main Issue</u>, the dissenting opinion of Mishra J. was that the assignment did not contravene the provisions of Section 85 of the Constitution and was, therefore, not invalid on grounds which may be summarised as follows: that the office of the Director of Public Prosecutions was a "department of the Government" within the meaning of the said sub-section 76(1) that, whilst an assignment purporting to be in absolute terms would be unconstitutional as conflicting with Section 85(7), the assignment in question was not in absolute terms and did not purport to give the Attorney-General responsibility for matters forbidden to him by Section 85 that there was, outside the powers conferred by Section 85(4) and the functions necessarily incidental to a proper exercise of those powers, a substantial area of administrative activity requiring Cabinet consideration and parliamentary approval over which general control and direction might be exercised without violating Section 85 of the Constitution; and that, as to the alternative declaration sought, the Court had no power to direct that the assignment be worded differently.</p> <p>15. On the 21st May 1981 the Appellant gave Notice of Appeal to the Fiji Court of Appeal from the said decision of the Supreme Court of Fiji. Of the 5 grounds of appeal therein stated only grounds 3 and 5 arise on this appeal.</p> <p>16. The Respondent by Notice raised as additional grounds why the judgment below should be affirmed the grounds summarised at paragraph 8 (3) and (4) above, alternatively sought a declaration in the terms prayed for in the alternative in his original Notice of Motion as set out at paragraph 7(b) above.</p> <p>17. The appeal was heard on the 23rd and 24th July 1981 by the Fiji Court of Appeal (Gould V-P, Sprint and Chilwell JJA). On the 5th August 1981 the reserved judgment of the Court was delivered by Chilwell J.A. dismissing the Appellant's appeal with costs to the Respondent in that Court.</p> <p>18. On the <u>Main Issue</u> the Court of Appeal held in summary</p> <p>(1) that the Office of the Director of Public Prosecutions was a "business of the Government" within the meaning of Section 76(1) of the Constitution, whether or not it was also a "department of the Government" within the meaning of the said sub-section</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p> <p>50</p>
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(2) that, accordingly, assignment in respect of the office of the Director of Public Prosecutions was permissible provided the assignment did not encroach on the powers conferred on the Director of Public Prosecutions by Section 85 or functions necessarily incidental to the exercise of those powers and that whilst the directions had sought, by the words "subject to Section 85 of the Constitution" to comply with Section 85(7) thereof, the wording did not sufficiently preserve the severance between those areas where the Director of Public Prosecutions may not be subject to ministerial control and direction and those areas of the administration of his office which could properly be the subject of an assignment of ministerial responsibility.

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p.83 1.19

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19. On the Subsidiary Issue the Court of Appeal agreed with the Supreme Court on its ruling on this matter.

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20 The Main Issue

20. The Appellant's case on the Main Issue may be summarised as follows:

(1) the Office of the Director of Public Prosecution is a "business of the Government" and/or a "department of the Government" within the meaning of Section 76(1) of the Constitution;

(2) the assignments made by the directions are not in absolute terms, but are expressly limited and qualified so as to leave intact the independence of the Director of Public Prosecutions from direction or control in the exercise of the reserved powers conferred upon him by the Constitution and, accordingly, do not contravene Section 85(7) of the Constitution;

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(3) the expression of that limitation and qualification is sufficiently clear not to render the assignment invalid and the effect of that limitation and qualification is to leave under the general control and direction of the Appellant a substantial area of administrative activity without violating Section 85 of the Constitution.

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These submissions are developed below.

"business of the Government" and "department of the Government"

21. The Appellant respectfully submits that the Court of Appeal were right in holding that the Office of the Director of Public Prosecutions was

<p><u>Record</u> p.77 1.44 - p.78 1.30</p>	<p>a "business of the Government" within the meaning of Section 76(1) of the Constitution for the reasons given by them and that this is sufficient to bring that Office within the ambit of Section 76(1). The Supreme Court expressed no opinion on this question.</p>	
<p>p.45 1.1 - p.46 1.16</p>	<p>22. The Appellant further respectfully submits that Mishra J. was right in holding that the Office of the Director of Public Prosecutions was a "department of the Government" within the meaning of the said sub-sections for the reasons given by him. The Court of Appeal found it unnecessary to express any opinion on the question given their opinion as set out in the preceding paragraph hereof.</p>	<p>10</p>
<p>p.78 11.17- 20</p>	<p>23. It is respectfully submitted that it is not easy to discern the precise basis upon which Williams J. held (to the extent that he did in fact so hold) that the Office of the Director of Public Prosecutions was not a "department of the Government". It would appear, however, that his reasoning was that the intention of the Constitution was to screen the Director of Public Prosecutions, whose office is declared to be a public office, from ministerial interference and that it would, accordingly, need specific provision in the Constitution (as he thought there was in relation to the Office of the Commissioner of Police) to bring the office within the ambit of Section 76(1). To a considerable extent this approach is bound up with the more general question of the effect of the assignment (discussed below). However, the Appellant submits that the learned Judge erred in this approach. Firstly, the learned Judge erred in comparing the words "department of the Government" with the words "public office" (i.e. office in the sense of post or position) as opposed to the word "Office" used in the directions complained of (i.e. Office in the sense of establishment.) Indeed it would appear that the learned Judge accepted that there was a department attached to the Director of Public Prosecutions in that latter sense which could, so he appears to have accepted, properly be the subject of an assignment of responsibility "provided the extent of the ministerial responsibility is clearly set out in the notice". Secondly, the learned Judge erred (it is submitted) in attaching any significance to the absence from Section 85 of words similar to the opening words of Section 84 (4) of the Constitution relating to the Commissioner of Police; in particular, the Appellant contends that these words were inserted in Section 84(4) to avoid an inference that might</p>	<p>20</p> <p>30</p> <p>40</p> <p>50</p>
<p>pp.23-39</p>		
<p>p.28 1.37 - p.30 1.34</p>		
<p>p.29 11.28- 36</p>		
<p>p.29 1.37 - p.39 1.34</p>		
<p>p.28 11.37- 46</p>		
<p>p.29 1.51 - p.30 1.20 p.32 11.3-15 p.144 1.17</p>		
<p>p.32 11.16- 30</p>		
<p>p.29 1.37 - p.30 1.34 p.30 11.3-8</p>		

10 otherwise be drawn that Section 76(1) did not cover this department in view of the immediately preceding provision in Section 84(3) ("The Prime Minister, or such other Minister as may be authorised in that behalf by the Prime Minister, may give to the Commissioner of Police such general directions with respect to the maintenance of public safety and public order as he may consider necessary ...") Indeed the very presence of these words in Section 84(4), given that the office of the Commissioner of Police is itself declared to be a "public office" (Section 84(1)), demonstrates, it is submitted, the fallacy of the distinction drawn between "department of the Government" and "public office" and the significance attached thereto.

20 24. In so far as Tuivaga C.J. expressed himself in agreement with Williams J. on this point, the above comments are applicable to his judgment also. His further ground for deciding against the Appellant on this question was based heavily on what he described as "the common knowledge that the Office of the Director of Public Prosecutions does not have a Permanent Secretary or a supervising officer within the meaning of Section 82 (of the Constitution). It is respectfully submitted that the learned Chief Justice erred in this approach. In particular, his reasoning was that the combination of Sections 82, 105 (1) 30 105 (3) (d) and 105(5) of the Constitution meant that if the Office of the Director of Public Prosecutions was a "department of the Government" it would need a Permanent Secretary or other supervising officer whose appointment would be controlled by the Executive and that therefore (although non constat in the Appellant's submission) the absence of such Permanent Secretary or other supervising officer meant that the Office of the Director of Public Prosecutions was not 40 such a "department of the Government". The error, it is submitted, is in construing those provisions as if they vested in the Public Service Commission exclusively the power to appoint Permanent Secretaries and "some other supervising officer" (Section 82). However, Section 82 merely provides that any department in the charge of a Minister shall be under the supervision of a Permanent Secretary "or of some other supervising officer" and that such other supervising officer shall hold 50 an office which is a public office. So long, therefore, as the department in question is under the supervision of a person with a public office, the provision is fulfilled. Section 105(1) then provides that the power to make appointments to public offices vests in the Public Service

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pp.16 1.23 -
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especially
at p.17 1.47-
p.18 1.10
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p.20 1.44
p.16 11.31-
42, p.17 11.
3-10, 17-23,
29-36

p.16 11.31-42

p.17 11.3-10

Record
p.17 11.3-4 Commission but (a) this is expressly "subject to the provisions of the Constitution" (for example, Section 85(2) which vests in the Judicial and Legal Services Commission the power to make appointments to the public office of Director of Public Prosecutions) and (b) the power is expressly excluded inter alia in the case of "any office appointments to which are within the functions of the Judicial and Legal Services Commission" (Section 105(3)(d)). Moreover, it is only where it is for the Public Service Commission to make appointment to certain offices (including that of a Permanent Secretary) that the Prime Minister must concur in the appointment (Section 105(5)). Further, the words "or some other supervising officer" in Section 82 do not mean, nor is it the case, that there is some special category of public officer whose title is "Supervising Officer". Therefore, there is no reason why the Office of the Director of Public Prosecutions should not be under the supervision, for the purposes of Section 82, of the Director of Public Prosecutions, the holder of a public office, himself. Indeed, this is in fact what has happened, viz. the Director of Public Prosecutions is the supervising officer of his department and he has been designated as such (see e.g. the Public Services Commission (Constitution) Regulations and the Notice dated 8th March 1974 under which a number of public officers, including the Director of Public Prosecutions, are appointed to have the powers and functions of a Permanent Secretary for the purposes of those Regulations). This point is exemplified by consideration of the Ministry of the Attorney-General (responsibility for the administration of which was also assigned to the Attorney-General by the directions complained of) which is plainly a "department of the Government" and in respect of which there is no appointed Permanent Secretary, but which is under the supervision of the Solicitor-General (a public office appointed also by the Judicial and Legal Services Commission - see Section 102 of, and Schedule 3 to, the Constitution) and who is also named in the Notice of 8th March 1974 referred to above.

Assignment does not contravene Section 85(7).

p.144 25. The Appellant submits that the effect of the disputed part of the directions was to assign to the Attorney-General responsibility for the administration of the Office (in the sense of "department" or "establishment") of the Director of Public Prosecutions but subject to the limitation expressed by the words "subject to

Section 85 of the Constitution". That limitation meant, and could only mean, that the responsibility conferred did not extend to power to subject, or to attempt to subject, the Director of Public Prosecutions to direction or control in the exercise by him of the powers conferred on him by Section 85 of the Constitution, nor was the Attorney-General in the exercise of such responsibility as was conferred upon him to seek to subject the Director of Public Prosecutions to such direction or control. Accordingly, the directions did not, and could not, conflict with Section 85; indeed, they expressly subjected themselves to Section 85.

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p.144 11.19-
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26. The main error of the Court of Appeal and of Tuivaga C.J. and Williams J. was, in the Appellant's respectful submission, to fail to distinguish between whether the directions were constitutional and whether particular actions which might be taken by the Attorney-General in pretended pursuance of those directions might be constitutional. This fundamental distinction was rightly drawn by Mishra J. in his dissenting judgment whose words the Appellant respectfully adopts.

p.44 11.35-
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27. Further, it is submitted, the Court of Appeal and the majority in the Supreme Court failed to maintain the distinction between responsibility for the proper and efficient administration of an office, without seeking thereby to exercise control over the way the Director of Public Prosecutions' reserved powers were exercised, and seeking to exercise such control by means of administrative policies.

28. It is submitted that there is a proper and legitimate public interest, firstly, in ensuring and protecting the proper and efficient use and administration of the public monies and resources that the Director of Public Prosecutions requires in order to perform his duties and, secondly, in ensuring that adequate public monies and resources are in fact allocated to the Director of Public Prosecutions for that purpose. These matters may properly be the subject of Parliamentary debate and decision. Further they may properly be the subject of Ministerial responsibility without infringing the independence granted to the Director of Public Prosecutions by the Constitution. It is no answer, it is further submitted, to these arguments to point, as for example, did Williams J. in his judgment to the powers for control of the Director of Public Prosecutions contained in Sections 109 and Section

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136 of the Constitution. (The reference to "Section 199" appears to be a typographical error for "Section 109"). These are indeed important powers but they are limited in scope and do not touch directly upon the matters referred to above.

29. Further, the Court of Appeal and the majority in the Court below erred in their approach to the exercise of administrative functions necessarily incidental to the performance of the reserved powers. It is accepted that it would be unconstitutional for the Attorney-General, or any other person, to attempt to influence the decision whether the Director of Public Prosecutions should institute particular criminal proceedings (Section 85(4) (a)) or take over particular criminal proceedings (Section 85(4)(b)) or discontinue particular criminal proceedings (Section 85(4) (c)), for example, by withholding or threatening to withhold money, accommodation or equipment that the Director requires to perform his duties. That does not mean, however, that the Director of Public Prosecutions has in some way the exclusive right to provide those resources or to say what shall and shall not be provided; indeed it is not understood how, in practice, such a right could be exercised. It does mean, however, that any such abuse by a Minister would be subject to review by the Courts who would, no doubt, declare the conduct in question unconstitutional. Further, in any such proceedings, the Minister could not seek to justify his conduct by reliance on the assignment of responsibility to him for administration because the assignment was expressly limited to exclude interference with the reserved powers.

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p.56 1.2
p.56 11.3-7

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30. Whilst accepting these arguments in some degree, and, in particular, accepting that the intention of the directions was to avoid conflict with Section 85(7), the Court of Appeal nonetheless rejected their validity by reason principally of the drafting technique used in that (in the Court of Appeal's opinion) it failed to make it plain that the severance of responsibilities between the Attorney-General and the Director of Public Prosecutions was being maintained. The Appellant respectfully submits that it is sufficiently plain from the wording of the relevant words of the directions that the assignment thereby made for responsibility for the administration of the Office of the Director of Public Prosecutions did not extend to a power to direct or control the Director in the exercise of his reserved powers and that this is all that was required. Further, the Appellant submits that no more detailed formulation would have improved the

p.86 11.28-30
p.85 1.43 -
p.16 1.48

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position. Thus, a lengthy and detailed list of administrative matters for which the Attorney-General was to be responsible would still have required the limitation that even this was subject to Section 85 of the Constitution, as indeed the Court of Appeal appear to have accepted.

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p.85 1.7

31. Accordingly, the Appellant submits that the directions are and were constitutional.

10 32. The Respondent's contention that the disputed directions were also unconstitutional in so far as they assigned responsibility for "Criminal law and Procedure" and "Evidence" to the Attorney-General was rejected by the Supreme Court, whose declaration did not cover this part of the directions. The contention was not pursued by the Respondent in the Court of Appeal. Accordingly, the Appellant does not deal with this contention in this Case.

Tuivaga CJ
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Williams J.
p.26 11.36-42
Mishra J.
p.46 11.17-26

20 The Subsidiary Issue.

33. The Appellant submits that Mr. Kepa was not entitled to commence or prosecute these proceedings in the name of his office using the resources of Government to attack the Government but should have commenced them in his own name. This submission is effectively ground 3 of the Appellant's grounds of appeal to the Court of Appeal. For the avoidance of doubt the Appellant states that he does not pursue on this appeal the submission contained in ground 4 of the said grounds. The Appellant's submissions on this point are as follows.

p.50 11.37-42

p.50 11.43-44

30 34. Section 97 of the Constitution provides, subject to matters not relevant for present purposes, that

40 "... if any person alleges that any provision of the Constitution ... has been contravened and that his interests are being or are likely to be affected by such contravention then ... that person may apply to the Supreme Court for a declaration and for relief under this Section ..."

35. The Appellant concedes that a person who holds an office under the Constitution the department or business of which is assigned to a particular Minister in circumstances which that office holder contends is a contravention of the Constitution is entitled to bring proceedings under Section 97. There could therefore be no objection to Mr. Kepa bringing the present

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proceedings in his own name but this he has not done. He has purported to bring them in the name of "The Director of Public Prosecutions".

Alexander Mountain & Co. (suing as a Firm) v. Rumere Ltd. (1948) 2 KB 436.

36. It is submitted, however, that, save where Statute or Rules of Court otherwise provide, a person must bring proceedings in his own proper name. (See Alexander Mountain & Co. (Suing as a Firm) v. Rumere Ltd. /1948/ 2KB 436). Thus, an individual should generally bring proceedings in his own proper name and a body corporate or sole in its proper name, but exception may be provided, such as in the case of two or more persons trading together as a partnership who may be entitled to bring proceedings in their firm name. The word "person" is not defined in the Constitution. It is defined in Section 2(1) of the Interpretation Act to "include any company or association or body of persons corporate or unincorporate". This definition, it is submitted, does not enable an individual to bring proceedings other than in his own proper name.

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37. There are no provisions in the Constitution or elsewhere creating the office of the Director of Public Prosecutions as a corporation sole or otherwise investing the office with a juridical personality distinct from that of the Crown or of the holder of the office. Furthermore, there are no statutory provisions or Rules of Court that entitle the holder of the office of Director of Public Prosecutions as such to institute civil proceedings although by Section 85 (4) of the Constitution he is given power to institute criminal proceedings. Nor is he authorised to bring civil proceedings on behalf of the Crown under the Civil Proceedings Act; only the Attorney-General is so authorised (Section 12(1) of the Crown Proceedings Act).

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p.55 l.38 -
p.56 l.7

38. Accordingly, it is submitted, Mr. Kepa ought to have commenced these proceedings in his own name and not as "The Director of Public Prosecutions". This is particularly so as this form of proceedings leads to confusion as to whether the Plaintiff, in proceedings in which the Crown is Defendant, is the Crown itself or Mr. Kepa.

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39. The Courts below should have ruled that the proceedings could only be brought by Mr. Kepa as an individual and that unless the name of the proceedings was amended to name him as Plaintiff such proceedings were defective and

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should be dismissed. The relevant rules of Court in force in Fiji at the relevant time are Order 15 rule 6 and Order 20 rule 5 of the Rules of the Supreme Court (of England and Wales) 1965 as amended up to the date of publication of The Supreme Court Practice 1967. These rules enable the Court to amend the name of a party without defeating the cause or matter before the Court. But it is now too late, in the Appellant's submission to amend so as to convert this action into a private law suit brought by an individual when the reality is that it has been brought in the name of a public office and using Government resources to challenge the Government.

40. On the 18th August 1981 the Fiji Court of Appeal granted the Appellant final leave to appeal to Her Majesty in Council. p.89

41. The Appellant respectfully submits that the judgment of the Court of Appeal was wrong and ought to be reversed, and this appeal ought to be allowed with costs here and below, for the following (amongst other) pp.53-87

R E A S O N S

1. BECAUSE the Office of the Director of Public Prosecutions carried on a "business of the Government" and is a "department of the Government" within the meaning of Section 76(1) of the Constitution of Fiji.
2. BECAUSE the directions in writing given on the 28th January 1981 by the Governor-General of Fiji to the Attorney-General of Fiji assigning to him, inter alia, responsibility for the administration of the Office of the Director of Public Prosecutions does not conflict with Section 85(7) of the Constitution of Fiji and is not unconstitutional. pp.143-145
3. BECAUSE Mr. Sailosi Kepa was not entitled to commence these proceedings in the name of his office.
4. BECAUSE the judgment of the Fiji Court of Appeal was wrong and ought to be reversed. pp.53-87

F.P. NEILL Q.C.

P.H. GOLDSMITH

No. 37 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

THE DIRECTOR OF PUBLIC
PROSECUTIONS Respondent

CASE FOR THE APPELLANT

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