

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0009 OF 2006S  
(High Court Civil Action No. HBC 0262 of 2001L)

BETWEEN: NEW ZEALAND PACIFIC TRAINING  
CENTRE LIMITED *Appellant*

AND: TRAINING & PRODUCTIVITY  
AUTHORITY OF FIJI *Respondent*

Coram: Pathik, JA  
Khan, JA  
Lloyd, JA

Hearing: Friday, 14<sup>th</sup> November 2008, Suva

Counsel: C. B. Young for the Appellant  
Denton, SC and R. S. Deven for the Respondent

Date of Judgment: Wednesday, 19<sup>th</sup> November 2008, Suva

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JUDGMENT OF THE COURT

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The Brief Facts & Chronology of Events

- [1] The respondent, the Training and Productivity Authority of Fiji, formerly known as the Fiji National Training Council ('the FNTC'), is a body corporate established under the Fiji National Training Act ('the Act'), Cap. 93. The appellant, the New Zealand Pacific Training Centre Limited ('NZPTC'), at all material times was a company providing in Fiji business training and various educational courses to the public at large.

[2] Section 9 of the Act, as amended, relevantly provides:

*'The functions of the [FNTC] shall be...*

*(a) to provide, arrange for or regulate the appropriate training, of persons or classes of persons, whether by apprenticeship or otherwise, to assist such persons or classes of persons in connection with employment;...*

*(k) to assist and contribute towards the cost of training, and the promotion of training, of any person or class of person;...*

*(l) [to] develop the national qualification framework and make provision for the registration of such training courses or training providers or facilities or qualifications of such category as it shall direct, and make provision for the approval of such qualifications, courses, providers and facilities'.*

[3] At all material times the Government of Fiji had in place a scheme whereby, in order to finance vocational training within industry and the workplace, a 1% levy was imposed on all employers, which levy was used then partly used by the FNTC to reimburse employers the majority of the costs of their employees attending training courses provided by various private training entities, provided the particular courses provided by these training entities and undertaken by the employees were first approved by the FNTC as *'grant claimable courses'*.

[4] There were no prohibitions whatsoever on the type and content of courses independent course providers could offer to employees. But employers could only seek reimbursement from the FNTC for the costs of courses which had been pre approved by the FNTC and which were therefore *'grant claimable'*.

[5] In early 1997 officers of the NZPTC discussed with staff of the FNTC plans for the NZPTC to offer to employees in Fiji various vocational training courses. By way of letter dated 18 April 1997 the NZPTC sought from the FNTC *'accreditation of our centre'*. In furtherance of this request the NZPTC stated in another document (apparently dated on or around 26 May 1997) sent by it to the FNTC that it wanted *'its courses to be recognised as FNTC grant claimable'*.

- [6] On 28 May 1997 the Director General of the FNTC wrote a letter to the NZPTC the subject of which letter was stated to be 'Accreditation of Training Programmes'. The letter went on to advise the NZPTC that 'approval has been given to [NZPTC] to conduct the following grant claimable courses'. Sixteen courses were then specified. The letter from FNTC went on to say 'The approval is for two (2) years from the date of this letter and [FNTC] reserves the right to withdraw its approval at any time'.
- [7] After receiving the FNTC letter of 28 May 1997 the NZPTC immediately commenced a practice of describing itself on its printed letterhead, registration forms, course completion certificates and awards and the like with descriptions such as 'Fully FNTC Accredited Centre', 'FNTC Accredited Centre' and 'Recognised and accredited by FNTC'. The NZPTC also placed similar descriptions on signboards at its various offices and places of instruction. At the trial of this matter NZPTC tendered several of its early letters to the FNTC as exhibits showing that during 1998 NZPTC wrote to the FNTC on letterhead containing such descriptions without complaint from the FNTC.
- [8] As early as 2 July 1998, when writing to the NZPTC approving new NZPTC courses as 'grant claimable', the FNTC stated:

*'Apart from the words "Grant Claimable" no other words or slogans shall be used:*

*\*To convey attachment/recognition/association with FNTC*

*\*For publicising, marketing or advertising purposes'.*

- [9] By way of letter dated 27 January 1999 sent to all training providers the FNTC advised all training providers as follows:

*"27 January 1999*

*To: ALL TRAINING PROVIDERS*

*Dear Sir/Madam*

*Grant Claimable Courses/ FNTC Recognition*

*We are concerned at the way some Training Providers are using FNTC to promote their training programmes and in some cases their*

organisation. It ought to be noted that the Council only approves courses for grant claim purposes.

The Council wishes to notify Training Providers that apart from the words "Grant Claimable Courses", no other words or phrases, such as, "FNTC Accredited Centre", "FNTC Accredited Course" etc. should be used.

- To convey attachment/recognition/association with FNTC
- For publicizing, marketing or advertising purposes.

Training Providers who are currently using the above phrases to advertise or market their products are advised to stop doing so immediately. While the Council encourages the provision of training by Private Training Providers, it is in no way engaged in promoting certain courses or organisations over others.

It is hoped that Training Providers will take serious note of the above.

Yours faithfully

[sgd.]

S. Kishun (Ms)

for DIRECTOR GENERAL

- [10] Evidence was adduced at the trial of this matter that on 28 January 1999 officers of the FNTC hand delivered to the Chief Executive Officer of the NZPTC a copy of its letter of the previous day.
- [11] Thereafter on 28 May 1999, 1 July 1999, 4 April 2000, 23 August 2000 and 28 September 2000 the FNTC reminded the NZPTC to refrain from using any offending words or slogans apart from the words 'Grant Claimable Courses'. Despite these clear reminder letters NZPTC continued to use the offending descriptions on its stationery, signage, certificates and awards and generally in advertising its business.
- [12] On 6 October 2000 the FNTC wrote yet another letter to the NZPTC raising with the NZPTC fresh complaints against the NZPTC of offending behaviour and once again requesting it to refrain from such behaviour. This letter was drafted in stronger terms than previous letters. FNTC's letter noted that NZPTC 'have stubbornly disregarded our gentle reminders and wilfully violated the terms and

*conditions under which approvals were granted to your courses'. At the end of its letter the FNTC gave NZPTC two weeks in which to remove all offending wording from NZPTC signboards and other written advertisements otherwise the FNTC 'would be left with no other alternative but to withdraw/cancel its approval'.*

- [13] On 12 October 2002 NZPTC responded to FNTC's letter of 6 October 2000, saying *'we are more than happy to remove all sign etc mention but...we need at least 3 months to remove the signs as you will appreciate the logistics involved'.*
- [14] By way of letter dated 13 December 2000 from the FNTC to the NZPTC the FNTC acknowledged receipt of NZPTC's letter of 12 October 2000. In its letter, the FNTC raised continuing breaches of the officially approved wording by NZPTC as observed by FNTC staff as late as 4 December 2000. Yet again the FNTC requested the NZPTC to refrain from breaching the approved wording and stated *'Please treat this matter as top priority as the [FNTC] will withdraw/cancel its grant approval should these requirements not be met immediately'.*
- [15] On 18 December 2000 NZPTC responded and said it would remove the offending wording from its advertising material but that this would take time. Contrary to its assertions, NZPTC continued its offending behaviour well into early 2001. So at a meeting of the FNTC Training Grants Committee on 20 March 2001, the Grants Committee decided that approvals for all courses conducted by NZPTC would be withdrawn and cancelled as from 20 March 2001. On 23 March 2001 the Director General of the FNTC wrote to the NZPTC notifying it of the cancellation of its approval for NZPTC courses, and explaining why this course had been taken.
- [16] FNTC's letter to NZPTC dated 23 March 2001 stated as follows:

*"23 March 2001*

*The Chief Executive Officer  
New Zealand Pacific Training Centre  
P O Box 4451  
Suva*

RE: GRANT CLAIMABLE COURSES - WITHDRAWAL/CANCELLATION  
OF APPROVAL

Dear Sir

The Council's Training Grants Committee at its meeting held on Tuesday 20 March 2001, decided that approval for ALL courses conducted by your organisation be withdrawn/cancelled effective from Tuesday 20 March 2001.

The decision to withdraw approval is due to your organisation's blatant and continuous disregard for the Council's instructions and conditions under which all approval for grant claimable courses were granted.

In our letters dated 27/1/99, 28/5/99, 1/7/1999, 4/4/2000, 23/8/2000, 28/9/2000, 6/10/2000 and 13/12/2000 we advised you to refrain from using any other words or slogans apart from the words "Grant Claimable Courses."

The Council is very concerned that after numerous reminders and warnings you continue to display the phrase "recognised and accredited by FNTC" in your Certificates of Participation issued to your course participants. We have on hand photocopies of certificates issued to course participants which were completed as recently as 23 February 2001.

The withdrawal/cancellation of grant claimable approval will remain in force until such time your organisation is able to show cause as to why such an approval should be reinstated.

Jone Usamate  
DIRECTOR GENERAL

- [17] On 24 March 2001 the FNTC caused to be published in local newspapers a prominent 'Notice to all Levy Paying Employers' to the effect that FNTC had been forced to withdraw approval for all NZPTC courses as NZPTC had continued to breach the terms and conditions under which approval had been granted by FNTC. FNTC advertised to employers that it would only pay grants for NZPTC courses attended by employees up to and including 20 March 2001 but not beyond that date.
- [18] On 26 March 2001 the new CEO of the NZPTC wrote to the FNTC admitting non compliance on the part of NZPTC with the FNTC's approved wording for

advertising material. The new CEO stated that he had rectified the situation and requested *'immediate approval for our courses as grant claimable'*. The FNTC responded by letter dated 27 March 2001 stating *'The withdrawal/cancellation of approval for all your grant claimable courses will continue until such time as all our grievances have been appropriately addressed'*.

- [19] As the months went by the FNTC and NZPTC could not resolve their differences and on 3 September 2001 by way of summons with a statement of claim attached the NZPTC commenced proceedings against the FNTC claiming damages. The NZPTC had evidently decided to take no action by way of judicial review in relation to the actions of the FNTC in withdrawing its approvals of NZPTC courses.
- [20] An amended summons was filed and served by the NZPTC in September 2005 claiming damages to be awarded against the FNTC for three separate causes of action.
- [21] NZPTC's *first cause of action* was for damages based on an assertion that in its letter of 28 May 1997 to NZPTC, FNTC had represented to NZPTC that it was, in effect, *'recognised and accredited by FNTC'* and that FNTC was thereafter estopped from requiring NZPTC to cease using such wording in any of its material. NZPTC pleaded that FNTC by way of its letter of 23 March 2001 breached its earlier representations as a result of which NZPTC had suffered loss and damage.
- [22] NZPTC's *second cause of action* pleaded a breach of section 54 of the Fair Trading Decree. This claim asserted that by way of its letter of 28 May 1997, and its conduct for a short time thereafter, in allowing the NZPTC to use the words *'recognised and accredited by FNTC'* in its correspondence and advertising, the FNTC had engaged in misleading and deceptive conduct, which conduct caused damage to the NZPTC.
- [23] The *third cause of action* pleaded by the NZPTC in its amended claim was based on an assertion that the FNTC was acting ultra vires in withdrawing FNTC approval of the NZPTC's courses in its letter of 23 March 2001 and the FNTC

was also acting in a discriminatory, arbitrary and oppressive way in so acting. This third cause of action does not form any part of this appeal.

- [24] In its defence to the amended claim of the NZPTC, the FNTC did not dispute most of the factual assertions pleaded in the claim, but denied totally the merits of any suggested legal or equitable rights that the NZPTC said arose from the largely undisputed facts. In its defence, the FNTC stated that at all times it was acting in accordance with its statutory powers. In short, the FNTC said that in cancelling the approvals of the courses run by the NZPTC it had not breached any legal or equitable right of the NZPTC and that, in effect, NZPTC had been the author of its own misfortune.
- [25] The NZPTC claim was heard by a judge of the High Court ('the trial judge') on 7 and 14 November 2005. The trial judge delivered his judgment on 16 December 2005, formal orders being entered on 19 December 2005. The trial judge found for the FNTC on each of the three causes of action pleaded and dismissed the NZPTC's overall claim, ordering that the NZPTC pay the costs of the FNTC.
- [26] It is convenient for us to say something about the proceedings in the High Court and the factual findings of the trial judge.

#### Proceedings in the High Court

- [27] In his judgment of 16 December 2005 the trial judge made some important findings of fact of importance to the determination of the grounds of appeal of the appellant, the NZPTC.
- [28] After hearing evidence from many of the senior staff and executives of both the NZPTC and the FNTC and after considering the large volume of documentary exhibits and the submissions of both counsel, the trial judge found;
- (a) What was being accredited by FNTC in its letter of 28 May 1997 and later correspondence were the courses and not the training providers or training centres themselves;



- (b) At no stage did FNTC specifically grant permission to or state to anyone at NZPTC that they could describe themselves as an FNTC accredited provider or centre;
- (c) All the FNTC correspondence showed that it was approving courses, not providers;
- (d) FNTC had a duty and legitimate interest in ensuring employers and the general public were not misled in the way training providers such as the NZPTC used the name FNTC in their advertising, certificates, letterheads and other material;
- (e) FNTC was acting within its powers in making it a condition of approval to a course being provided by a trainer that it use only the words 'grant claimable course';
- (f) FNTC had never represented to the NZPTC that it could use the various logos or slogans (or letterhead, certificates etc) in the way that it did;
- (g) Although an executive of the NZPTC may have been encouraged by a person at the FNTC on an early occasion to use one slogan or another, he was not given 'open ended' permission to do so;
- (h) There was no misleading or deceptive conduct on the part of the FNTC as such conduct is interpreted under the terms of section 54 of the Fair Trading Decree.
- (i) There was no intention on the part of the FNTC to cause any loss or damage to the NZPTC;
- (j) The FNTC did not act in any discriminatory way against the NZPTC;
- (k) He preferred the evidence of the FNTC witnesses over those of the NZPTC;
- (l) FNTC had no option open to it but to withdraw the grant claimable status of the courses being offered by the NZPTC, and FNTC was justified in so acting and acting within its statutory power when issuing its letter dated 23 March 2001 withdrawing accreditation to the courses of the NZPTC;
- (m) FNTC was acting within its powers when it caused to be published in newspapers on 24 March 2001 its Notice to Employers and FNTC was under no duty to give a prior warning of the intended publication of the published Notice to the NZPTC;

(n) There was no arbitrariness, discrimination, or oppressiveness on the part of the FNTC towards the NZPTC in the issue of the FNTC letter dated 23 March 2001.

#### The Grounds of Appeal

[29] In an Amended Notice of Motion and Grounds of Appeal dated 12 September 2008 the NZPTC relies on four grounds of appeal. The four grounds of appeal can be briefly stated as follows;

- 1) The judge erred in law and fact in not finding there were representations made by the FNTC by way of its letter dated 28 May 1997 (and subsequent conduct) such that the NZPTC was entitled to rely on those representations, advertise and use letterhead worded as it did, and that the FNTC was estopped by its conduct from withdrawing from such representations;
- 2) Given the representations the subject of first ground of appeal, the judge erred in law and in fact in concluding that the FNTC acted lawfully in withdrawing grant claimable status from the courses of the NZPTC by its letter of 23 March 2001;
- 3) The judge erred in law and in fact in not finding false and misleading conduct contrary to section 54 of the Fair Trading Decree by the FNTC sending its letter of 28 May 1997 and its subsequent conduct in allowing the NZPTC to use words such as '*Recognised and Accredited by FNTC*'; and
- 4) The judge erred in law and in fact in holding that the FNTC was entitled to revoke the accreditation of all of the courses of the NZPTC for the reason that the NZPTC was conducting other courses that were not accredited when such a defence was not pleaded by the FNTC.

#### The Merits of the Grounds of Appeal

[30] Of the above grounds, in our opinion the *fourth ground* has no merit whatsoever. We have reviewed closely the judgment of the trial judge and nowhere in the judgment does the judge state that which is now asserted by the appellant as the reason given by the judge in his judgment as to why the FNTC was entitled to revoke the course accreditations of the NZPTC. In his judgment,

the trial judge clearly stated that accreditation was withdrawn because the NZPTC failed 'to comply with course conditions'. The condition breached was said by the judge to be the requirement of the FNTC for the NZPTC to use only the words 'grant claimable course' in any of its advertising material, certificates, notices etc.

[31] As for the *third ground*, the assertion that the trial judge should have made a finding of false and misleading conduct contrary to section 54 of the Fair Trading Decree, in our opinion this ground also has no merit.

[32] Section 54 of the Fair Trading Decree, 1992 states:

*'A person shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.*

Section 2 of the Interpretation Act, Cap. 7 defines a 'person' as including any company.

[32] In Taco Company of Australia Inc & Anor v Taco Bell Pty Ltd & Ors (1982) ATPR 40-303, the Full Court of the Federal Court of Australia, when considering the meaning of section 52 of the Australian Trade Practices Act (a provision in similar terms to section 54 of the Fair Trading Decree) said that irrespective of whether conduct produces or is likely to produce confusion or misconception, it could only be categorised as misleading or deceptive if it contained or conveyed in all the circumstances of the case 'a misrepresentation'. The Full Court said that the test to be applied was objective and that 'whether or not conduct amounts to a misrepresentation is a question of fact to be decided by considering what is said and done against the background of all the surrounding circumstances'.

[33] In Butcher v Lachlan Elder Real Estate Pty Ltd (2004) 281 CLR 592 (at [39]) the High Court of Australia said that in applying the relevant principles applicable to the examination of conduct said to be misleading or deceptive under section 52 of the Trade Practices Act:

*'[I]t is important that the...conduct be viewed as a whole. It is not right to categorise the problem as one of analysing the effect of 'conduct' divorced from disclaimers about that conduct and divorced from the other circumstances which might qualify its character.'*

- [34] Applying the above reasoning to the important facts in this case as found (quite properly in our view) by the trial judge and as listed in summary form by us above, it cannot be said that there was any actionable misrepresentation on the part of FNTC at any relevant time.
- [35] This is particularly in light of all the warning letters sent by the FNTC to the NZPTC over many years calling upon the NZPTC to refrain from the objectionable conduct it was and continued to engage in. In our opinion the trial judge was clearly correct in finding as he did and finding against the NZPTC in its action based on the terms of section 54 of the Fair Trading Decree.
- [36] Any slight 'encouragement' perceived by the NZPTC to have been given to it by the FNTC at an early stage and for a short period of time tolerating the use by the NZPTC of offending words must be put in the context of increasingly forceful and more frequent objections to such behaviour on the part of the FNTC as time went on. Further, throughout the course of correspondence from the FNTC to the NZPTC demanding that the NZPTC refrain from its offending conduct, the NZPTC did not claim it had the earlier imprimatur of the FNTC to be conducting itself as it did. Quite the reverse, it was continually apologising to the FNTC for its behaviour and espousing it would strive to do better in future. The third ground of appeal must also fail.
- [37] The *first and second grounds of appeal* can conveniently be dealt with together. From the reasons we have set out above for our agreement with the trial judge that there was no misleading or deceptive conduct on the part of the FNTC towards the NZPTC, it also follows that in our opinion there was at no time any actionable representation made by FNTC towards the NZPTC that the NZPTC was entitled to use any offending letterhead, slogans, logos, certificates and the like.
- [38] Viewed alone, the large volume of documentary exhibits tendered by the parties at the trial, made a finding of fact by the trial judge that there was no actionable representation inevitable. In our opinion any other finding of fact would have

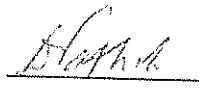
been against the weight of evidence. But since the trial judge's findings of fact as regards the lack of any representation were based not just on the documentary exhibits but also on findings on the credibility and demeanour of the witnesses who gave evidence at the trial, it would be wrong of us to overturn the trial judge's findings of fact in this regard (*Rosenberg v Percival* (2001) 205 CLR 434 at paragraph [41]).

[39] Even if we were of the view (which we are not) that there was a representation capable of giving rise to an estoppel of one form or another, on any view of the chronology of events, the FNTC clearly and firmly resiled from its very early position of benign tolerance of the NZPTC's offending letterhead and signage, giving the NZPTC reasonable notice of doing so and giving the NZPTC reasonable time to resume its position, which it could easily have resumed by a simple and relatively inexpensive reprint of its stationery and repainting its signboards (*Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All E. R. 657; *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394).

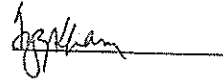
#### Orders

[40] For the above reasons this Court orders that:

- (1) The appeal is dismissed;
- (2) The orders made by Coventry J on 19 December 2005 are confirmed;
- (3) The appellant is to pay the respondent's costs of the appeal in the sum of \$12,000.00.



Pathik, JA



Khan, JA



Lloyd, JA

Solicitors:

Young and Associates, Lautoka for the Appellant  
Ncel Shivam Lawyers, Suva for the Respondent