

The Small Claims Tribunal Decree: An Assessment¹

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Abstract

The Small Claims Tribunal, established by the Small Claims Tribunal Decree (hereafter also referred to as SCT Decree), has become a reasonably well-known institution within the wider range of judicial bodies dealing with disputes. This paper provides a critical assessment of the SCT Decree, the associated amendments and judgments related to SCT, and recommends a number of amendments that could strengthen the enabling legislation for the SCT.

Introduction: The Empowering Legislation

The first Small Claims Tribunal was established in 1996, five years after the Small Claims Tribunal Decree 1991 was promulgated by the President. The SCT was to 'provide prompt and inexpensive relief to claimants' (long title). The primary function of a SCT is 'to attempt to bring the parties to a dispute to an agreed settlement' (s15) in certain specified types of disputes involving monetary claims up to a specified maximum sum.

The Decree (s3) empowers the 'Attorney General and Minister for Justice' to, after consultation with the Chief Justice, establish such number of tribunals as he thinks fit. Each such tribunal established becomes a division of a specified Magistrate's Court. The Attorney General (A-G) and the Minister for Justice could also dis-

¹ A longer version of this paper appears as a report Chand (2009). This study could not have been completed without the cooperation of staff and referees of the SCT, including former referees; the useful discussions that the author had with former referee Ikbāl Jannif is gladly acknowledged.

establish a SCT; this can be done without consultation with the Chief Justice.²

Jurisdiction

The jurisdiction of a SCT is exercised by a Referee or by a Resident Magistrate (s4). Referees are appointed by the Chief Justice (CJ) after his consultation with the A-G and the Minister for Justice. Persons so appointed need to be 'qualified'. S6(2) states that a 'person is qualified to be so appointed if he is capable by reason of his special knowledge or experience of performing the functions of a Referee'. As such, a Referee need not have legal qualifications, or be qualified to practice as a barrister or solicitor. Appointments are for a term of 3 years, with provisions for re-appointments for further 3-year terms.

A Referee may at anytime be removed from office by the Chief Justice after consultation with the A-G and the Minister for Justice, for the following reasons provided to the satisfaction of the CJ and the A-G/Minister for Justice: disability; bankruptcy; neglect of duty, and misconduct.

Referees receive a remuneration by way of fees, salary and allowances as determined by the Public Service Commission. However, they need not be full-time employees of the judiciary, and may hold, with the consent of the CJ, any other office or be employed elsewhere (s6(5)).

A SCT has a jurisdiction in respect of any claim which does not exceed a specified sum in value (s8). Upon first establishment, the limit of the jurisdiction was \$2,000. In 2007, this limit was increased to \$5,000. A claim for an unliquidated sum is deemed to be for a maximum value of \$5,000. If claims concern chattels or value of work done that is under claim, and it becomes necessary for the

² The authority for the establishment and/or disestablishment of a SCT lies in the hands of the 'Attorney General and the Minister for Justice'. This provision is fine as far as one person holds the two portfolios of Attorney General and Minister for Justice. There, however, is no necessity that the two portfolios be held by the same person. In the event that different persons hold these two positions, there would be confusion on which office can create or disestablish a SCT, the AG's office or the Minister for Justice's office. The possibility of the portfolios being split is strengthened under political power sharing arrangements. What is needed is a clear legislation that keeps the functioning of courts within the jurisdiction of the Office of the Minister for Justice.

dispute to be resolved to establish their values, this would be done by the Tribunal in such manner as it thinks fit.

The decree allows a person to abandon so much of a claim as exceeds the limit (now \$5,000), in order to bring the claim within the jurisdiction of a Tribunal (s11). If this were done, any order of the Tribunal in relation to the claim shall operate to discharge from liability the sum so abandoned.

There, however, is one exception to the requirement to abandon any claim over the \$5,000 limit: in certain circumstances, a Magistrates Court or a High Court could transfer proceedings filed with them to a SCT. If any of these courts did so without the consent of the parties, the requirement that a claimant abandon any claim exceeding the limit are dispensed with (s23(4)).

The Decree also disallows a cause of action to be divided into 2 or more claims for the purpose of bringing it within the jurisdiction of a Tribunal. A Tribunal is also empowered to have such other jurisdiction as is conferred upon it by any other law. However, a Tribunal has no jurisdiction in respect of any claim:

- (a) for the recovery of land or any estate or interest therein;
- (b) in which the title to any land or any estate or interest therein, is in question;
- (c) which could not be brought in a Magistrates' Court; and
- (d) which is required by any law to be brought only before any other specified court.

Thus, matters concerning wage claims, or those related to employment contracts of service, can not be taken to a SCT; these need to be addressed to the mechanisms established under the Employment Relations Promulgation. However, matters related to contracts for service, fall within the jurisdiction of the SCT.

The distinction between contracts of service and contracts for service needs to be clearly spelt out in the laws of Fiji. Different legislations provide different interpretation of contracts for service. The *FNPF Amendment Act (2005)*, for example, deems certain contracts for service as being contracts of service.

The SCT Decree provides for a respondent to counterclaim against the claimant if the counterclaim is within the jurisdiction of the Tribunal (s10). A counter claim is treated in all respects as if it were a claim.³

³ The Referee's Manual (2006: 24) provides a guide to referees on the treatment of counterclaims. If two claims are lodged on the same matter, the referee will

A provision in any contract or agreement that excludes or limits either the jurisdiction of a Tribunal, or the right of any person to invoke that jurisdiction, is deemed to be of no effect (s13). The Tribunal has jurisdiction even where agreements contain provisions that provide for submission of any dispute or difference to arbitration. The decree, however, provides for an exemption from contracting out where 'a cause of action has accrued, or is believed to have accrued, to a person and he had agreed to the settlement or compromise of the claim based on that cause of action' (s13(3)). This section is not clear and needs to be simplified.

The Decree also disallows the consideration of the issues of dispute in a matter that is before a Tribunal by any other Tribunal or Court (s14). The only exceptions to this law are:

- if the claim before the Tribunal is withdrawn, abandoned, or struck out; or
- an order is made by the Tribunal to transfer the case to the Magistrate's Court; or
- the proceedings before that other Court or Tribunal were commenced before the claim was lodged with or transferred to the Tribunal.

Similarly, if a matter of dispute is before another Court or Tribunal, a claim can not be filed in a Tribunal between the same parties, unless the matter were transferred from the Court to a Tribunal, or from one Tribunal to another, or unless the claim before the other Court or Tribunal were withdrawn, abandoned, or struck out. Thus, if a claim for money is struck out in a Magistrate's Court, the claimant can file a claim in a SCT. The law on SCT binds the state (s43).

Procedures & Evidence

Lodging Claims

To commence a proceeding in a SCT, the aggrieved party is required to lodge his/her claim in writing in a specified form. Four copies of this completed form are to be lodged, together with the

have to decide which is a claim and which a counterclaim. The rule to apply, generally, is that the first claim lodged is the claim and the one lodged later is a counter claim. A counterclaim may also be lodged after the tribunal makes a decision on the claim; in this case, the matter would be reheard, and the counterclaimant asked to explain the reasons for not raising the counterclaim as a part of the first hearing.

payment of appropriate fees. The fees on establishment of the SCT were \$5 (excluding VAT) to lodge a claim or counterclaim; \$10 for re-hearing and \$10 for lodging a notice of appeal. The fee schedule has remained the same to date. If the claimant wants to engage bailiffs provided by the SCT to deliver the summons to the other party, an additional bailiff's fee is to be paid.

The Clerk or Deputy Clerk of the Magistrates' Court is required to ensure that 'assistance is reasonably available from himself or his staff to any person who seeks it in completing the forms required' in relation to the lodging of a claim, an application for a rehearing, an appeal against an order of a Tribunal, or the enforcement of an order (s37). There is no mention of any fee charged for this service, thus the assistance is to be given to claimants or appellants without any charge.

It is a requirement that claims be lodged at the Tribunal nearest to the claimant's residence (s18(2)). This requirement does not relate to the place of the event or activity causing the claim. For example, if a claimant resides in Suva, but a claim deals with an activity, like non-payment of rent for a property the claimant has in Labasa, the claim is to be lodged in Suva.

The provision on the place of the claim can work against the interest of the respondent, and could prove to be a huge burden if the claim finally turns out to be faulty. There is no provision in the Decree for costs, except for cases where the claim is frivolous or vexatious (s28). This provision needs to be re-examined. Requiring a claim to be lodged at the location where the activity leading to the claim takes place, may not be ideal. A claim arising from a motor vehicle accident would be a case in point. If the parties resided in a location different from the one where the accident took place, for example, the most convenient location for the claim would be the Tribunal close to their residence. The filing location requirement, therefore, needs to be flexible.

Notice of claim and hearing

Upon receipt of a claim, the Registrar is required to immediately fix a time and place of hearing. The hearing date shall be not less than 15 days nor more than 30 days from the date of lodgement of the claim if all respondents live within 6 hours of normal travelling time from the Tribunal, or not less than 30 days nor more than 45 days from the date of lodgement of the claim if all respondents

live further than 6 hours of normal travelling time from the Tribunal (s3, Small Claims Tribunal Rules, 1994). For both cases, adequate notice is to be given to the respondents; for the former case, at least 10 days and for the latter, at least 15 days before the hearing.

On receiving the claim, the Registrar is also required to give notice to the claimant by endorsing the details on the same form, of the time and place of the hearing. He is also required to, as soon as reasonably practicable, give notice of the claim and of the time and place of hearing to the respondent and every other person who appears to the Registrar to have a sufficient connection with the proceedings of the claim in the capacity of a claimant or respondent. The latter is done by delivering a sealed copy of the claim with the details of the hearing endorsed on it (s19).

While the law requires the Registrar to give notice to the respondents by delivering a sealed copy to the same, in practice, the office of the Registrar requires the claimants to make this delivery either in person or through a bailiff. The claimant could pay a fee to engage a bailiff on the SCT's list for delivery of the same.⁴

A person is regarded as having a sufficient connection with the proceedings on a claim if his presence as a claimant or respondent is necessary to enable the Tribunal to effectually and completely determine the questions in dispute in the claim or to grant the relief which it considers may be proper.

Only if a notice of the claim has been delivered to the respondent can a claim proceed before a Tribunal. If no such notice was given, the Tribunal is required to ask the Registrar to provide such a notice.⁵ There is no provision on which party is to bear the costs of the Registrar providing the notice to the respondent.

⁴ In 1994, the CJ published the *Small Claims Tribunal Rules*, under which Rule 5 deals with service of documents. In essence this rule states that the service of process in SCT is 'to be generally the same as in a Magistrates' Court'. Thus Order VII of the Magistrates' Court Rules apply for service. The issue is whether this Order varies the requirements under the SCT Decree. The SCT is a division of the Magistrate's Court. As such one may accept that the schedule of fee shown in the Magistrate's Court Rules (s65, Schedule B). However, the Magistrate's Court Rules are a part of the Magistrate's Court Act. The SCT Decree is another legislation, equivalent to the Magistrate's Court Act. The SCT Rules are issued by the CJ. There, thus, needs to be a clearer provision on the process of service and the fee to be charged in the SCT legislation itself.

⁵ The exact specification in law is 'may direct the Registrar'. However, a contextual interpretation makes it mandatory for Tribunal to require that a notice be given to the respondent of any claim against him/her.

A Tribunal may, at any time, order that the name of a person who appears to it to have been improperly joined as a party, be struck out from the proceedings.

If a minor (someone who has not attained the age of 18 years) is a party to any proceeding in a Tribunal, whether as a claimant or a respondent, the Tribunal may, if it considers that it would be in the interests of the minor to do so, appoint someone, except a barrister/solicitor, to represent the minor.

If a party to any proceedings in a Tribunal is a person of unsound mind then the Public Trustee is required to control the conduct of the claim on that person's behalf.⁶ A person empowered to control the conduct of the case of another person may do all such things in the proceedings as he could do if he himself were a party to the proceedings in place of that other person.

Transfer of Proceedings

If any proceeding has been commenced in a Tribunal which it has no jurisdiction to hear and determine, the Tribunal may, instead of striking out the proceedings, order that it be transferred to a Magistrate's Court in its ordinary civil jurisdiction. Similarly, if a proceeding has commenced in a Tribunal which in the opinion of the Tribunal would more properly be determined in a Magistrate's Court, the Tribunal may order that the proceedings be transferred to a Magistrate's Court in its ordinary civil jurisdiction. This applies only to the extent that there is no agreement related to a claim that requires any disagreement to be submitted to arbitration.

In like manner, if proceedings within the jurisdiction of a Tribunal have been commenced in a Magistrate's Court, which has a Tribunal as a division of it, the Magistrate may order that the proceeding be transferred to the Tribunal. Similarly, if proceedings within the jurisdiction of a Tribunal have been commenced in a High Court, the Court or a Judge may order that the proceeding be transferred to a Tribunal. For all such claims transferred to the SCT, the Tribunal can take notice of evidence given in the courts in lieu of fresh evidence before the Tribunal.

⁶ Alternatively, if a Committee of the estate of the person of unsound mind has been appointed under the *Mental Treatment Act*, this Committee is to represent the person.

Hearing

At the hearing of a claim, every party is entitled to attend and be heard. One overriding limitation is that no party can appear by a representative unless it appears to the Tribunal to be proper in all the circumstances to so allow, and the tribunal approves such representative (s24).

The following parties may appear by a representative who is approved by the Tribunal:

- the State, if the representative is a servant of the State;
- a corporation or an unincorporated body of persons, if the representative is an employee or member thereof;
- a person jointly liable or entitled with another or others, if the representative is one of the persons jointly liable or entitled or, in the case of a partnership, is an employee of those persons;
- a minor, or other person under a disability.

In deciding on allowing for a representative of a party, the Tribunal is required to satisfy itself that the person proposed:

- is acting in the best interests of that party,
- has sufficient personal knowledge of the case, and
- has sufficient authority to bind the party.⁷

A Tribunal can not approve a representative who is, or has been admitted as a barrister or solicitor or who, in the opinion of the Tribunal, is or has been, 'regularly engaged in advocacy work before Tribunals' (unless the person is himself a claimant or a respondent) or is an employee of a party to a claim. Under Rule 7 of the *SCT Rules 1994*, the Tribunal may approve a person to act as a representative of a party (including a wife acting on behalf of her husband or vice versa) at any time, either before a hearing or after a hearing has commenced.

⁷ The Referees Manual provides two additional grounds that Referees can consider in deciding to allow 'support persons' before the Referee:

- the number of support people in attendance and the composition of the support group, and
- any power imbalance which may arise as the result of the attendance of support persons (2006: 23-4).

There is no provision in the Decree or the SCT Rules providing the referees this authority.

The Consumer Council of Fiji may, by its employees, servants or agents, represent any claimant in proceedings before a Tribunal if the claimant so consents. However, such a representative shall not be a barrister or solicitor.

While corporations may be represented by barristers and/or solicitors if they are employed by the corporation, the same provision does not apply to the Consumer Council. Thus a barrister or solicitor employed by the Consumer Council can not be a representative of a claimant if the claim were through the Consumer Council. The consequence could be significant. For example a claim where the Consumer Council assists a claimant against a corporation, could see the corporation send a solicitor but the Consumer Council can not nominate its own employee who may be a solicitor to represent the claimant. This is an anomaly in the legislation.

Proceedings before a Tribunal may be held in private if all of the parties agree thereto. The onus of a public hearing, therefore, is with either of the parties to a claim.

The primary function of a Tribunal is to bring the parties at dispute to an agreed settlement. If an agreed settlement is reached, the Tribunal is empowered to make the agreed to order; this order is not limited to the monetary limits of the jurisdiction of the SCT. Thus, if the parties agree that one owes and would pay another a sum over \$5,000, the order would be so made. The Tribunal in such cases only gives effect to the agreements reached between the parties.

However, if it appears to the Tribunal to be impossible to reach a settlement within a reasonable time, the Tribunal shall proceed to determine the dispute (s15). This is done according to the substantial merits and justice of the case. In doing so, the Tribunal is required to have regard to the law but is not bound to give effect to strict legal rights or obligations or to actual forms or technicalities.

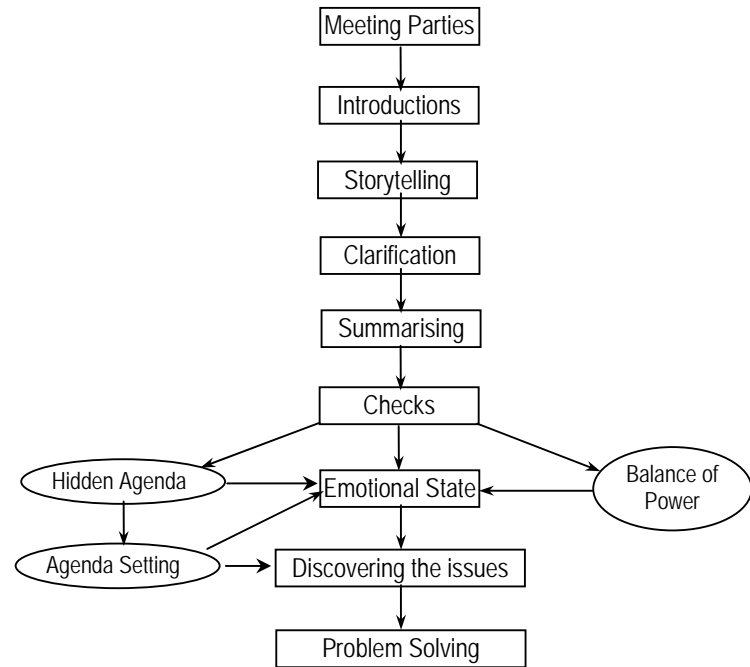
Given that the primary aim of the SCT is to bring the parties to a dispute to an agreed settlement, the Referee’s manual provides a mediation process for referees to adopt. This model is shown in Figure 1. It is after the utilization of the processes listed in Figure 1 that the Tribunal ought to proceed to determining the case.

Language of the Tribunal

The proceedings of the Tribunal are to be conducted ‘in a language that the Tribunal considers is best suited to the parties, but the record of the Tribunal... and the Order of the Tribunal, must be in

English’ (Rule10, *Small Claims Tribunal Rules*, 1994). The Tribunal is empowered to use ‘any trustworthy person’ to translate proceedings of a party or the Tribunal.

Fig 1: Mediation Model



Source: Referee’s Manual, 2006: 28)

Evidence

The rules of evidence that are necessary for courts of law (under Evidence Act), are not binding on the SCT. A Tribunal may receive and take into account any evidence or information submitted to it. In addition, evidence tendered to a Tribunal by or on behalf of a party need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specific part thereof, be given on oath whether orally or in writing (s26). The law

also allows a Tribunal to, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit. All evidence and information so received or ascertained need to be disclosed to every party.

If the case of any party is not presented to the Tribunal after reasonable opportunity has been given to him to do so, the issues in dispute in the proceedings may be resolved by the Tribunal (and decision so made) on such evidence or information as is before it, including evidence and information obtained by the Tribunal on its own.

If, however, a respondent does not appear at a hearing, the Tribunal can only adjourn the case unless it is satisfied of the claimant's case by calling witnesses (s9, SCT Rules 1994).

An order made by the Tribunal, if a party does not attend a proceeding, can not be challenged on the ground that the case of the party was not presented to the Tribunal. The party, however, may apply for a rehearing on the ground that there was sufficient reason for his failure to present his case (s27).

Except for any explicit or implicit provision on procedure contained in the Decree, a Tribunal can adopt such procedure as it thinks best suited to the ends of justice (s29).

The *SCT Rules* make a full provision on witnesses and evidence (s8, 9). S8 authorises the Tribunal to summon any person to attend before the Tribunal at the specified date and time to give evidence or to produce documents in that person's possession or control, if the Tribunal decides that the attendance of the witness is reasonably necessary to properly determine the case. Such witnesses would be paid expenses and fee as determined by the Tribunal. S9 authorises the Tribunal to call its own witnesses, including expert witnesses, to give evidence.

Orders

A Tribunal may make one or more of the following orders and may include therein such stipulations and conditions as it thinks fit:

- make an order that the party to the proceedings pay money to any other party;
- declare that a person is not liable to another in respect of a claim or demand for money, the delivery of goods or chattels, or work he performed;
- order a party to deliver specific goods or chattels to another

- party to the proceedings;
- make a work order against any party to the proceedings;
- make an order varying any agreement, or setting it aside (either wholly or in part) if it appears to the Tribunal that an agreement between the parties, or any of its terms, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner;
- make an order varying or setting aside any agreement, or writing (either wholly or in part), if it appears to the Tribunal that an agreement between the parties has been induced by fraud, misrepresentation, or mistake, or that any writing purporting to express the agreement between the parties does not accord with their true agreement; or
- make an order dismissing the claim (s16).

Where a work order is given, the Tribunal is required to also make an order for payment of money as an alternative to compliance with the work order.

A Tribunal can not make an order that exceeds the monetary jurisdiction of the Tribunal. Nor can it make more than one order if the aggregate amount or value of those orders exceeds \$5,000. Every such order that exceeds the monetary jurisdiction would be of no effect in its entirety.

An order made by a Tribunal is final and binding on all parties to the proceedings.

Costs can not be awarded against a party unless, in the opinion of the Tribunal, a claim made by that party is frivolous or vexatious, in which case it may order that party to pay to another party the reasonable costs of that party in connection with the proceedings (s28).

The orders of a SCT requiring a party to pay money or deliver specific goods or chattels to another party, are treated as equivalent to an order from a Magistrate's Court (s30). As such, the orders may be enforced as orders of a Magistrate's Court are enforced.⁸ For orders to pay money as an alternative to compliance with a work order, enforcement requires applications on prescribed forms to the

⁸ Until 1997, a year after the establishment of the SCT, no filing fee was payable by one who sought to enforce an order through the Magistrate's Court (s30(6)). However, this provision was repealed in 1997 (s3, *Small Claims Tribunals Decree (Amendment) Act 1997*).

Magistrate's Court; objections may also be filed through prescribed forms. In these cases, the case would be referred back to the Tribunal. A failure to pay the money would entitle the claimant to apply to the Magistrate's Court for any of the following five remedies:

- Judgment debtor summons (under which a magistrate can order for instalment or lump sum payment, and in default a committal period)⁹,
- Writ of *Fieri Facias* (under which a magistrate can order a court sheriff to seize and sell chattels to satisfy a monetary judgment),
- Distress Warrant (which will entitle a claimant to have a bailiff demand payment from the debtor for the amount owing, and seize his personal possessions and sell them if he does not pay the amount due),
- Garnishee proceedings (under which a Magistrate can order collection of the amount due by reaching the debtor's property/income when it is in the hands of someone other than the debtor), or
- Charging Order (under which the property of the debtor in any stock, funds or land stands charged with the payment of the amount of debt due) (Referees Manual, 2006: 57).

Work orders, on the other hand, do not require a claimant to seek Magistrate's court intervention as these orders can be enforced through the Tribunal (s31). If this is done, the Tribunal may either vary the work order or make a further work order or any other order which it is authorised to, or grant leave to the party in whose favour the work order was made to enforce the alternative money order provided; or discharge any order previously made. Work orders are to be enforced within 12 months from the date of a work order. Any enforcement after 12 months requires leave of the Tribunal.

Appeals or Rehearing

Rehearings

A tribunal is empowered to rehear a claim if an application is made for rehearing if either the claim was not disputed, or if it re-

⁹ Imprisonment for default of the court order does not cancel the debt. Where a respondent against who a judgment debtor summons has been issued fails to pay and does not appear before the Magistrate's Court, the court can issue a bench warrant for his arrest (Referees Manual, 2006: 57, 66).

lated to enforcement of a work order. The *Referee's Manual* lists the following additional grounds that a Referee may consider in determining a rehearing application:

- where a party has not received notice, or there has been insufficient notice;
- where a party produces sufficient reason for non-appearance and provides supporting documentation (e.g. medical certificate).
- When a Referee has incorrectly rejected evidence;
- Where there has been an administrative failure on the part of the court;
- When a representative should have been appointed;
- When procedural mistake has occurred; and
- When jurisdiction has been improperly declined (2006: 54).

When a rehearing is ordered by a Tribunal, the 'Registrar shall notify all parties to the proceedings of the making of the order and of the time and place appointed for the rehearing' (s32(4)).

Appeals

Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal in relation to a claim that is not disputed or on the enforcement of a work order, on the grounds that the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or that the Tribunal exceeded its jurisdiction (s33).

The provision on appeals was the subject of two high court actions (*Sheet Metal and Plumbing (Fiji) Ltd v. Deo* - HBA 7/99, and *Chan Long Chong & Ye Hui Fang V. Yen Yain Kai* - High Court [1999] 45 FLR0). In *Sheet Metal*, the judge deliberated on the scope of s33 and ruled that s33 provided a 'rather confined ambit of the right of appeal'. The judge considered two matters that confined the right to appeal. These were:

- (a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
- (b) the Tribunal exceeded its jurisdiction.

The first ground, therefore, concerns specifically the *manner in which the referee conducted the proceedings*. This is separate from the matters of facts of the case, or the law behind the decision. All

that the appeal can be based on is that the manner in which the tribunal conducted the case was unfair to the appellant. It must also prejudicially affect the result of the proceedings. If either of these conditions is not met, there is no basis to an appeal, despite there being an error of fact or an error of law.

The other ground for an appeal is that the Tribunal exceeded its jurisdiction. This is straightforward, and requires the appellant to prove that the Tribunal acted outside his jurisdiction.

Sheet Metal is now the authority on matters concerning the ambit of appeals from SCTs. In *Krishna Murti v Krishna & Company* [Civil Appeal No. 24 of 2005, Magistrates Court, Lautoka], a case in which the appellant claimed money from a law firm which he claimed were kept by the law firm illegally, the Magistrate dismissed the appeal on the grounds that appeals can be made only on the grounds of the manner in which the proceedings were conducted which were unfair to the appellant and prejudicially affected the result of the proceedings, and that the tribunal exceeded its jurisdiction, but not on the merits of the decision of a referee. In this case, the appellant had appealed against the lawfulness of the SCT decision.

In this regard, therefore, the SCT functions unlike courts of law. The reasoning for this is that the SCT is not a court of law, and that the Tribunal is to 'determine the dispute according to the substantial merits and justice of the case, and in doing so, shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to actual forms or technicalities' (s15(4)).

Redress for those who feel aggrieved by an order of the SCT, therefore, is significantly restricted.

There is yet a further restriction to the right to appeal, which has not been considered by the courts to date. This concerns the condition (s33) that appeals are provided only 'against an order made by the Tribunal under section 15(6) or section 31(2)...'

S15(6) states:

To give effect to its determination of the dispute or in granting relief in respect of any claim, *which is not disputed*, the Tribunal shall make one or more of the orders which it is empowered to make under section 16 or under any other law (underline added).

A strict interpretation of this would be that appeals lie only against orders made where claims are not disputed. For orders that are made where claims are disputed, there can be no appeal. This

would apply even if the manner in which the case was conducted was unfair to the appellant, or if the tribunal were outside his jurisdiction.

S31(2) deals with work orders. The right to appeal applies only in cases that involve orders where claims are not disputed, or claims where work orders are issued.

These 2 grounds narrow the grounds for appeal much further, and further limit any redress that a party aggrieved by an order of the SCT may have.

Under law, appeals to higher courts are normal part of the judicial process. The SCT Decree, however, limits the appeals significantly.

First, there is no appeal on matters of law or on matters of fact. Second, appeals are limited to orders where claims were not disputed, or where work orders are concerned: 'Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal under section 15(6) or section 31(2)' (s33(1)). S31(2) deals with enforcement of work orders while 15(6) states:

To give effect to its determination of the dispute or in granting relief in respect of any claim, *which is not disputed*, the Tribunal shall make one or more of the orders which it is empowered to make under section 16 or under any other law (stress mine).

Thus, where a claim was disputed and if it related to an order of paying money, or an order dismissing a claim, there is no legal provision for an appeal. In 1997, a part of s33 (on appeals) was amended, but the amendment was unrelated to the limitations on appeals. It, therefore, remains the case that no order of a Tribunal can be appealed that does not relate to a disputed claim or claims involving enforcement of work orders. This can be considered as a serious weakness in the Decree.

Whether such restrictions are just, is a matter of public policy. In this regard, the interest of providing prompt and inexpensive relief ought to be balanced against a right to further redress. If rights to appeal are provided for merits of the case, then the process can be significantly delayed as referees would need to pay full attention to the legal aspects surrounding the case. The one firm basis supporting the retention of the current provisions is that the SCT's monetary jurisdiction is limited to \$5,000; thus even if a final outcome were regarded as not strictly according to law, the damage caused to

the aggrieved would be limited to a maximum of \$5,000.¹⁰

It is recognized that if the grounds for appeals are widened, respondents who are ordered to pay monetary sums can utilize appeals against decisions of the SCT to unduly lengthen the process of justice, thereby tiring out claimants where respondents are either well endowed financially or have access to solicitors. Magistrate's Courts and High Courts do not have any restriction on the type of representation that a party in a case may have. Thus, while a claimant may win a case in the SCT, an appeal could see lawyers bringing a whole gamut of technicalities to frustrate a claimant. This becomes a major problem where the normal length of getting cases cleared in the Magistrate's courts is significant. For this reason, one may propose that there are merits in restricting the grounds for appeal from the decisions of the SCT to matters of jurisdiction and unfairness.

One possible resolution of the problem could lie in the creation of a *Small Claims Appeals Court*, with specific jurisdiction to hear appeals from the SCT¹¹, and perhaps appeals from other Tribunals.

SCT Claim No 2225 of 2004: Case of Prolonging Justice?

In 2002, electrical equipment of a householder were damaged due to a power surge in the area. The householder filed a claim in the SCT in 2004, claiming that the power supply company was negligent in maintaining power cables to standard, which led to the power surge. The SCT decided for the claimant in January 2005. The respondent appealed in the Magistrate's Court on grounds that 'the proceedings were conducted by the Tribunal in a manner which was unfair to FEA and prejudicially affected the result of the proceedings'. The 'manner' basis arose from the FEA's claim that the Tribunal had failed to take into account a written submission filed by the FEA. The explanation of the grounds for the appeal are on the law of natural justice. The Magistrate's Court accepted the appeal, despite the Tribunal stating, in the Referee's Appeal report that the submissions were no more than a record of what transpired during the hearings, and that the Tribunal had traversed all aspects of the submissions. Over 4 years since the decision of the SCT, the appeal was still not heard.

¹⁰ The numerous restrictions to the right to appeal also prevents the Magistrate's Court from re-hearing the case, for if appeals were allowed on the merits of the Tribunal's orders, then the courts will, necessarily, have to re-open the case.

¹¹ The possibility of this mechanism emerged from discussions between the author of the report and former referee Ikbal Jannif.

Appeal Procedures

Appeals are made to the Magistrate's Court, and are to be lodged within 14 days of Tribunal's order (s33(3)).

The 14 day limitation period seems to emerge from the fact that SCT is mandated to resolve cases with speed and economy, thereby dispensing with the long drawn process of full record keeping. Within 14 days after a notice of appeal has been lodged in the Tribunal's records, the referee who heard the proceedings is required to furnish to the Court Registrar a report on the proceedings and on the manner in which the proceedings were conducted and the reasons thereof. The SCT requires referees to keep records of the proceedings of a Tribunal sufficient to enable him, if required, to furnish such reports. Longer limitation periods may blunt the memories of referees in cases where they do not keep full records of the proceedings.¹²

- A Resident Magistrate or Judge may, upon hearing an appeal,
- quash the order of the Tribunal and order a rehearing of the claim in the Tribunal on such terms as he thinks fit; or
 - if the appeal is heard by a Resident Magistrate quash the order and invoke his authority for him to exercise the jurisdiction of a Tribunal and make fresh orders; or
 - quash the order and transfer the proceedings to a Magistrates' Court for hearing; or
 - dismiss the appeal.

Appeals are heard in chambers.

Protection of Referees

The Decree protects SCT Referees in the same manner as the law protects other judicial officers (s38-39). To ensure that such protection is taken seriously, the Decree declares that the proceedings of a Tribunal are judicial proceedings.

Rules

The Chief Justice is empowered to make rules regulating the practice and procedure of Tribunals, prescribing such things (including fees) as are required by this Decree to be prescribed; and pre-

¹² Both *Sheet Metal*, and *Chan Long Chong* dealt with issues on appeals outside the limitation period, with the Court not waiving the 14-day limitation period, albeit through consideration of matters on grounds of appeal.

scribing such matters as are necessary or convenient for carrying out the provisions of this Decree (s41). The rules were enacted in 1994 (*Small Claims Tribunal Rules 1994*). The rules deal with the following matters: date of hearing, adjournments, service of documents, withdrawal of claims, representatives, witness summons, evidence, language of the tribunal, amendment of claims, sealing of documents, form of orders, records, and transfer of proceedings.

Objectives of SCT

The objective of the SCT is stated in the long title of the SCT Decree as one that is to 'provide prompt and inexpensive relief to claimants'. The Decree provides the ambit of the SCT. S15 of the Decree lists the primary function of the SCT: 'The primary function of a Tribunal is to attempt to bring the parties to a *dispute* to an agreed settlement' (emphasis added). S15(2) states: 'If it appears to the Tribunal to be impossible to reach a settlement ... within a reasonable time, the Tribunal shall proceed to determine the *dispute* (emphasis added).

The key term is 'dispute'. A dispute is generally defined as a disagreement or a difference of opinion. In this case, the term would refer to a disagreement of rights or interests or obligations that relate to money.

Claims figures show that approximately a half of all claims lodged in the SCT are from businesses for non-payment of money in breach of some form of a contractual agreement between the businesses and a consumer (Chand, 2009_a; 2009_b). Such claims are nothing but a method of debt collection.

As Chand (2009_a 2009_b) argues, since not an insignificant portion of the SCT resources is spent on cases that deal with debt recovery, the issue that arises is whether the SCT was intended to be a debt recovery instrument in the first place. The issue, then, is whether debt recovery where the parties do not have any dispute on any aspect of the debt, can be treated as a subject of dispute and, thus, be within the ambit of the SCT. Would, for example, a matter like 'I do not have the money to pay the debt' be regarded as a dispute? If it were, then the party disputing this statement would have to demonstrate that the party making this claim has the money to pay the sum due.

There could be a strong basis to a proposition that the 'I know I have a debt and I have to pay this, but at this moment I do not have

the money to pay' is not a dispute on the rights or obligations of parties, and as such, they ought not to be matters taken to the SCT. For debt recovery, other legal channels could be resorted to.

The SCT Decree is not entirely clear on this matter. While s15 states specifically the primary function of the Tribunal, the long title of the Decree provides the objective of the decree to 'provide prompt and inexpensive relief to claimants'.

Chand (2009_a; 2009_b) proposes that it may even be imputed that those tasked to administer the SCT Decree were also not certain of the jurisdiction of the SCT. The SCT Referee's Manual, written in 1996 and revised in 2006 makes no reference to businesses or commercial enterprises specifically. Its introduction, for example, states: 'The Tribunal will attract a board [sic] range of litigants ... including citizens, consumers, trades people, artisans and others providing goods and services' (2006: 6). The terms 'citizens' and 'others providing goods and services' include business houses. But one would wonder why there is no direct reference to the commercial sector in the manual.

This uncertainty needs to be addressed through an appropriate amendment to the Decree.

Conclusion

This paper examined the enabling legislation of the Small Claims Tribunal, and a selection of magistrates and high court cases which had their roots in the SCT. On this basis, the paper finds that while overall, the legislation and the subsequent establishment of the SCT filled a large vacuum in the area of remedies for small claims, the legislation needs significant clarification and/or amendment to allow greater sustainability and efficiency in the SCT.

First, the Attorney General and the Minister for Justice could disestablish a SCT. This provision needs to be amended to keep the functioning of courts within the jurisdiction of the Office of the Minister for Justice only. Second, the provision disallowing contracting out of the SCT jurisdiction (s13(3)) is not clear and needs to be simplified. Third, the provisions on the place for filing claims (which currently is restricted to the Tribunal nearest the residence of a claimant) needs to be re-examined and made more flexible. Fourth, while disallowing barristers and/or solicitors from appearing in the SCT has a sound basis, the exception provided for corpora-

tions and/or public bodies to be represented by barristers/solicitors if they are employees of these organisations, creates an uneven playing field in the Tribunal. Disallowing the Consumer Council of Fiji from utilising its employee(s), who may be lawyers, from representing consumers in the SCT further lopsides the field.

Fifth, the SCT Decree disallows appeals except where the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings, or where the Tribunal exceeded its jurisdiction. There is a need to put in place mechanisms for parties aggrieved by the decisions of the SCT, to appeal on grounds of law and/or facts. This could be through the creation of a Small Claims Appeal Tribunal. The mechanism ought to also prevent abuse of appeals mechanism to delay justice by tying a party in rings of appeals which could take years to be finally determined.

Sixth, s33 of the SCT Decree, which states that appeals are possible only against an order made by the Tribunal under section 15(6) [claims that are not disputed] or section 31(2) [work orders], needs to be reviewed and clarified.

Under the *SCT Decree* a referee ought to be capable by reason of his special knowledge or experience for performing the function of a Referee. A referee need not have legal qualifications. Yet, the matters brought to the Tribunal are, essentially, matters of contract. Contracts are legal matters. Where referees appointed do not have legal qualifications, they need to be trained adequately to handle matters that essentially revolve around contracts.

Normally there is no written submission by a claimant or a respondent for the referee to consider, other than for any documentary evidence of payment, receipt, etc., submitted by any party. This makes it important for referees to record their understanding of the case before them. Such records become important in cases of appeals. Case recording is a skilled exercise. The SCT ought to develop a standard template for case recording by all referees. Referees ought to also be trained in utilising this template.

A major problem facing the SCT is the delay in serving documents to respondents. This is especially the case with the bailiffs that the SCT utilises to serve documents. Lack of timely service of documents leads to adjournment of hearings, thereby delays, increased costs, and inefficiencies. It also tends to discourage claimants, leading to cases being closed without hearings. Claims lapse if documents remain unserved for a period of at least 12 months after

the date of lodgement.

Finally, a matter that needs urgent legislative and/or administrative action concerns the use of the Tribunal as a debt recovery mechanism by commercial entities. There is a need for clarity in the legislation on the objectives of the SCT and to clearly delineate the functions and perimeters of the SCT. If it is the intent of the SCT to allow debt recovery action from the commercial sector, then an appropriate fee needs to be considered for this commercial service.

References

- Chan Long Chong & Ye Hui Fang V. Yen Yain Kai* - High Court [1999] 45 FLR0. In
- Chand, G. (2009) *The Small Claims Tribunal: An Effectiveness Study*. Suva: Consumer Council of Fiji
- Chief Justice of Fiji (1994) *Small Claims Tribunal Rules*. Suva: Office of the Chief Justice
- Krishna Murti v Krishna & Company* [Civil Appeal No. 24 of 2005, Magistrates Court, Lautoka],
- Office of the Chief Registrar (2006) *SCT Referee's Manual*. Suva: Office of the Chief Registrar
- Sheet Metal and Plumbing (Fiji) Ltd v. Deo* - HBA 7/99
- Small Claims Tribunal Decree, 1991*
- Small Claims Tribunals Degree (Amendment) Act 1997*.

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