

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO.: HBC 576 OF 1990**

**BETWEEN:**

**RATU SOLOMONE NAQA & OTHERS**



**Plaintiff**

**AND:**

THE ATTORNEY-GENERAL OF FIJI  
THE NATIVE LAND TRUST BOARD  
THE **Fiji** ELECTRICITY AUTHORITY

**Defendant**

Counsel; **Mr. R. Burbidge QC, Mr. G. Radburn  
& Mr. P. Wood-for Plaintiff  
Mr. R. Fardell QC & Mr. Barnes - for Defendant**

Date of Hearing; 26<sup>th</sup> - 29<sup>th</sup> September, 2005  
Date of Judgment: 31<sup>st</sup> October, 2005

**JUDGMENT**

**1. Production and Background**

The Fiji Electricity Authority ("FEA") commissioned its Monasavu Hydro Project in 1983. The land on which the infrastructure is built was acquired by outright purchase in 1978. Many Monasavu folk saw little of this money. This aggravated their genuine sense of loss and bewilderment as their traditional land was submerged for the betterment of the country.

The Monasavu water catchment area, though identified as such, was not acquired, leased or submerged, in fact, the defendant Authority had written to the Senior Valuer of

Ministry of Lands and Mineral Resources in 1978, before the dam **acquisition** and **confirmed that** it **did** not wish to **control** the catchment area at **all**, but wished to have a one chain wide strip **of** land, beyond **the** maximum flood level around **the** perimeter of the lake. As **far** as the FLA were concerned the landowners **could** use **the** catchment area **for** traditional purposes, agriculture, grazing and logging. The use of the waters in any **tributaries** for village supply was to remain with **the** people.

**The total** area of the **catchment** is 25,075 acres. It contains Native Lands, Crown Schedules A and B, **Forestry** Reserve as well as Native Reserve. It would appear that agencies other than **FEA** subsequently prohibited the landowners from using the catchment *snil* in **particular** logging trees. The landowners perceived this as depriving them **of** resources and land use; this created great offence. The restriction also reinforced the idea **of** demanding compensation for the "use" of the catchment area. This became a convenient banner for spoilers and profiteers who for their own purposes agitated the wounded feelings of these poor people.

Although the waters in all tributaries belong to the State the landowners perception assisted by some questionable legal advice was that as the waters used *for* hydro generation were collected over the catchment area and as they believed they had lost **the** use of the catchment their **Mataqali** should be compensated. The gravity of this grievance was recognized by the Government very early on, but nothing was done to settle it.

Matters came to a head in 1998 when frustrated landowners staged a takeover of the VVailoa Power Station, placed armed roadblocks around the complex and burnt down the administration block. The police and the military were based at the site to maintain order. Instigators were arrested and charged.

Monasavu was vital to the nations sustainable development. It provided 80% of Fiji's power. The spoilers and profiteers weli knew **the** hydro plant had to run unhindered and efficiently. Pursuing their own ends they continued to push these frustrated people to demand greater payment for the catchment use.

So it was **that** a **taskforce**, engaged by the Prime Minister, made its report on **the** valuation of **the** compensation claim and suggested leasing the catchment area to the **FEA**. Cabinet approved a payment without poundage **to** the NLTB. The NLTB was then prepared to issue **a** lease offer to **the** defendant. **The** compensation offer comprised:

99 year iease rent paid up front	\$10,010,176.00
Timber premiums compensation	\$1,406,180.3(5
Timber royalty	\$3,225,702.69

This culminated in a meeting held at the Tradewinds Convention Centre where settlement was agreed by most landowners **on** these terms. However, some **Mataqalis** did not agree and walked out of the meeting.

The dissident landowners, who did not agree **to** the **Tradewinds** Accord, were gathered **up** by **a** lawyer, Mr. Fa, who on their behalf for a modest deposit and a retainer of 10% then issued a High Court writ, citing the Attorney-General, the NLTB and FEA as defendants, claiming **\$38m** (Civil Action 576 of 1998 after consolidation of Action 575 of 1998). Further, an injunction was placed on the **NLTB** from proceeding **with** the lease offer. As **a** result the grievance was not settled most Mataqali joined the Fa proceedings and agitation increased over the claim.

Following the events of May 19<sup>th</sup>, 2000, a group of landowners and rebels captured **the** Monasavu complex at gunpoint and shut down **the** plant. This resulted in **a** massive shortfall **of** generation capacity for **FEA**, and a period of rolling power cuts took place. The **blackouts** assisted lawlessness. Diesel generation over the use of water to make **power** was costing the FEA and the nation a million dollars a week. The rolling blackouts, insecurity and high diesel generation costs took their toil on both the FLA and the nation's economy.

The pressure **on** the FEA to fix **this** problem was compounded by the historic sense **of** grievance deeply felt by **the** Monasavu Mataqali, the uncertainty of the Speight coup

outcomes and the personal safety of those most closely involved in seeking a return of the facility.

In August 2000, a meeting was called by **the FEA** at the Pacific Harbour **Centra Hotel**, Deuba. This meeting was convened by the FEA **to** regain control of the Monasvu Hydro complex and secure the safe return of all arms and ammunition on site **to** the military. The team appointed to **this** task had few riding instructions. They were under considerable pressure **to** 'fix' the problem.

The meeting produced a joint Statement of Understanding ("JSU") that said for a payment **of** \$52.8m the **Monasavu** Mataqaii would settle their grievances for **all time** and compromise Case 576 on terms. In return the Monasavu people in occupation of the dam **would** surrender the facilities and **all** the Mataqaii would support the FEA **in** its vital role of power generation. There were some reservations in the Joint Statement. The document is attached as Appendix A.

Thereafter the defendant changed its mind on acquiring a lease of the catchment and sought a variation of the 'JSU'. The parties continued to talk about **that** issue. A summons for compromise on terms containing the defendants varied offer to settle was filed in June of 2001. It was rejected by the plaintiffs. No order was made on the summons. Instead, the plaintiffs commenced these further proceedings, separate from Case 576 claiming a binding settlement was reached at Deuba or alternatively later. The original proceedings in Case 576 were stayed by my brother Justice Byrne pending a decision in this case.

In these separate but related proceedings the plaintiffs claim a compromise to the original Case 576 **on terms** was agreed at Deuba or alternatively later. They seek specific performance of that agreement and damages for loss of money use in the meantime.

**The** defendant replies that its agents had no authority to settle the landowners grievances on Case 576. Even if they had authority, the FEA further responds by pleading their was **no** intention to be immediately bound to the terms contained in **the** Joint

Statement of Understanding. It is claimed the 'JSU' was no more than a significant progress report **on settlement**. It does not contain all the essential terms of **the** contract. As for the **later** formation of **an** agreement the defendant denies their subsequent offer of compromise was accepted before it was withdrawn.

The following issues fall for my **determination**:

- (i) Was **an** Agreement reached at Deuba on 11<sup>th</sup> August 2000 or alternatively later to compromise the claims described **in** Civil Action 576 and thereby settle the **Monasavu grievances** for all time.
- (ii) If **an** Agreement was reached at Deuba whether the defendants Agents had the requisite authority to compromise the claims described **in** Civil Action 576 and thereby settle the Monasavu grievances for **all** time.

### Formation of Contract Intention to be bound

it goes without saying that there is no agreement if the parties did not intend to be bound. It is sometimes a question of considerable difficulty whether the evidence does establish such an intention. That can be particularly so where the parties have signed a preliminary document, for example a heads of agreement, it being anticipated that a more formal and detailed document will be drawn up in due course. The preliminary **agreement**, however brief it is, can be binding if it was intended to be. (Professor Burrows Canterbury University Update on Contracts NZLS 2003).

The question of whether a heads of agreement constituted a binding contract arose in the case of **Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd** [2002] 2 NZLR 433. The parties agreed that the Court should be guided by this New Zealand Court of Appeal decision and its general statement of principle. I accept the relevance of the case subject to the one reservation that **Fletcher** was about a complex

long term commercial **oil** and gas supply contract and not the settlement by compromise on **terms** of a case **essentially** over native land grievances.

In **my** view (he bargaining process and resultant contracts are different between the two types of agreement.

A **purely** commercial arrangement may involve a complex set of **inter-related trade-offs** that allocate **acceptable** risk in a deliberate and intended transaction **that** derives its integrity and durability from the general interests of **commerce** and the reasonable expectations **of** commercial men and women about the essence of **their** bargain. A native land grievance settlement seldom adheres to such a course as its formation, integrity and **durability** rely on party relationships in addition to the formal rules of contract law. **The** negotiation formation and interpretation of **such** a relational arrangement must, in my view, be augmented by good faith **principles**.

The **Fletcher** case involved a heads of agreement for the supply of gas between Fletcher Challenge Energy and Electricity Corporation of New Zealand. it was summarized by Professor Burrows in this way.

The heads of agreement was a relatively short and summary document. After a lengthy meeting the parties had agreed on most aspects of it but alongside two items (a force **majeure** clause and a prepaid gas relief clause) had written "not agreed", they also noted **that** an efficiency factor was **still** "to be agreed". The **document** was signed by executives of the two companies **under the** notation "agreed {except where indicated)". A clause read: "FCE-ECNZ to use all reasonable endeavours to agree a full sale purchase agreement within **three** months of the date of this agreement". The heads of agreement was subject to the condition that ECNZ's board **approved** it. That approval was duly given. It was held by the Court of Appeal (Thomas J dissenting) **that** the parties had no contract, because **at** that stage they could not have intended to be contractually bound. The use **of** the words "not agreed" beside two items was seen as particularly significant; it suggested **that** the items in question were important and that more work needed to be done on them. The court considered that the "not agreed" items were so labelled because

they were of a kind which could not be expected to be settled for the parties by a court or other third party. At page 450 Blanchard J. said:

*"Those provisions, it seems to us, had such substantial financial implications - (or ECNZ if they were not included and for FCE if they were - that it would be surprising if the parties had simply left them to be negotiated at a later time. We consider that they were marked "not agreed" as an indication of their importance, and that they were regarded as essential terms."*

The court thus believed that the heads of agreement was in the nature of a progress report from the negotiators, and had been signed simply to indicate that the parties had reached "an important staging post on the way to final agreement".

The Court of Appeal provided a useful summary of the prerequisites to the formation of a contract. They said at page 444:

The prerequisites to formation of a contract are therefore:

- a) An intention to be immediately bound (at the point where the bargain is said to have been agreed); and
- b) An **agreement**, express or found by implication, or the means of achieving an agreement, (eg an arbitration clause) on every term which:
  - i) was legally essential to the formation of such a bargain; or
  - ii) was regarded by the parties **themselves** as essential to their **particular** bargain.



A term **is to** be regarded by the parties as essential if one party maintains **the** position that there must be agreement upon it and manifests accordingly to **the** other party.

The Court of Appeal in the **Fletcher** case also provides guidance on how an intention to be immediately bound can be adjudicated.

- **The** intention of the parties is to be assessed objectively. The Court asks what meaning **the** document would convey to **a** reasonable person having **all the** background knowledge available to the parties **in** the situation in which they were **in** at **the** time. Subjective views are **not** relevant. The kind of person making this assessment in my view would be taken to be a fair minded, informed, reasonable and neutral bystander. This bystander before making **a** decision important to the parties would ordinarily be taken to be informed of the basic considerations relevant to arriving at a conclusion founded on a fair understanding *of* all the available circumstances.
- In determining whether there is **an** intention to be bound preliminary negotiations, surrounding circumstances and subsequent conduct are relevant. In **Fletcher** one **of** the points taken **into** account was the fact that when the parties came back to the negotiating table after having signed the heads of agreement, they regarded points apparently already agreed as **up** for **re-negotiation** (page 444).
- The matrix of fact including printed and spoken words or actions of the parties **in** the course of their negotiations may be considered. In **Air Great Lakes Pty Ltd v K.S. Foster (Holdings) Pty Ltd** [1985] 2 NS WLR 309 at 337, McHugh JA drew attention to **Corbins** observation **in** "Contracts" (volume 3 **at** page 305) **that** "*we need not begin excluding all **parol** evidence **until** we know the contract has been made*".
- It is also very important **in** considering the intention of the parties to be bound by agreement to bear in mind the dynamics *of* the negotiation process and the internal



**inter-relationship** of the terms of the bargain. **Tamberlin** J of the Federal **Court** of Australia made the following valuable observation in **Telstra Corporation Ltd v Seven Cable Television Pty Ltd** [2001] 71 ALK 89 at page 114 (para (97));

*"When parties are negotiating in order to arrive at a contract to govern their legal relations the process is often complex, .-.this process sometimes involves a series of mutual "trade offs" whereby a concession is made by one party in respect of one provision in exchange for the giving of a concession by the other party in respect of a different provision. It will also involve compromise and adjustment so that it is often difficult to determine whether at any particular point of time prior to execution of a final agreement the parties have entered into contractual relations. Before a final contract is made it is also difficult to detach any particular provision from its context and say that a full and final agreement had been reached on that particular clause as a discreet agreement".*

The court adopts a **neutral** approach when determining whether the parties have intended to enter a contract.

An agreement to agree is no longer necessarily **fatal**, I doubt **May and Butcher v The King** [1934] 2 KB 17n, long regarded as one of the leading cases in this area, **would** be decided the same way today. An agreement to agree will not be held void for uncertainty if **the** parties have provided a workable formula or objective standard or machinery such as arbitration or indeed if the Court is able to determine any matter that has been left open, (cf Professor **McLauchlan** in "Rethinking Agreements to Agree" [1998] 8 NZULR 77).

Once **an** intention to **be** bound is found, the court can be quite proactive in assigning meaning to the terms to be agreed. The court can step in and apply the formula **or** standard if the parties fail to agree, or can substitute other machinery if the designated machinery breaks down.

- If a court is satisfied that **the** parties intended a contract it **will** do everything within its power to give meaning to **the** terms or to operate the contract without them. In **the Fletcher** case, indeed, the court found **that** had that intention [o be bound been present, there was enough in the document to render it enforceable. The problem was **that the intention** had not been established (pages 453-457).

### The Background to Deuba

It is common ground **that** the "FEA" acknowledged **the** long standing **Monasavu** landowners grievance and their demands for compensation. I find it relevant that as early as 1998 the FEA Board participated in a Government organized scheme to pay over some \$14m. This was the sum fixed by the Tradewinds **Accord**. Indeed **the** FEA was in the process of considering a lease of the catchment area provided by the NLTB when that accord was destroyed by dissident landowners filing the original proceedings seeking a far greater sum.

The **Deuba** meeting took place in the immediate background of the May 2000 coup and **the** uncertainty surrounding its outcome. It is an irresistible inference that some plaintiff landowners assisted in the takeover and partial destruction of the hydro dam complex in conjunction with Speight rebels.

What is clear is that the cost to the nation of having the hydro electric facility off line was unacceptable. A loss of \$1m a week caused by the need to make power under diesel generation if **unchecked** would effectively bankrupt the FEA and ruin the nation. (See Deans Board Report Ex.1 tab 7). Something had to be done quickly and if **that involved** paying more than **the** \$14m fixed by the Tradewinds Accord then the FEA would have to absorb that comparably modest cost.

I find **the** immediate need to recover the facility and safely see FEA employees back in **control** of **the** hydro plant after the surrender of arms and ammunition by the rebels drove the FEA to its meeting at Deuba. The expectations of the meeting for both parties were different but I accept the evidence of the defendants witnesses and their explanation for the involvement of the **Qaranivalu** and the advertising of the meeting (Volavofa para

21). The fact **that** the first item on the agenda after the traditional ceremonies had been completed was a **demand** for the return of the facility and surrender of weapons and ammunition emphasizes **the** importance **of** this issue **in** the minds of the FEA negotiating team.

I **find** the FEA negotiating team otherwise had few riding instructions. Their **mandate was to** secure (he return **of** the dam. It is clear that to achieve their **objective** they would have to discuss settlement *of* **landowner "grievances** and a compromise of Case 576. Kasa **Saubuiinayau included** those in his agenda (332/9). They must have known the cost of diesel generation over hydro power and so had a sense of how valuable **a** cash settlement would be over paying ongoing fuel costs.

I further **find that** while there is *no* **direct** evidence that the FEA oversaw or approved the offer made by Kasa Saubuiinayau prior to the 11<sup>th</sup> of August 2000 it is a fair inference **that** FEA knew **that** to secure the return of **the** dam they would have to consider a compromise **of** the original proceedings thereby settling the peoples grievance. The claims subsequently made by **the** CEO Mr. Dean that he knew nothing of the grievance settlement discussion at Deuba is unbelievable. I found his evasive answers in cross-examination unhelpful.

The amended writ (28 June, 2000) sought various **declarations** and included a compensation claim for \$52,423,032.60. This claim was based on causes of action loosely pleaded as breaches of constitutional rights, unlawful occupation of the plaintiff's land and trespass. The plaintiffs sought compensation from the defendants for the use of their land as a water catchment area for **the** previous 15 years (since 1982). The figures claimed in those proceedings were allegedly based on **a** study commissioned by the plaintiffs **that** calculated compensation \$2,356.64 per acre. The writ also sought various **declarations** that by inference seek to hobble the defendant with a future lease of the catchment.

An objective bystander would know that **a** compromise on terms would somehow have **to** settle payment of **the** sum claimed and settle the lease issue for the FEA once and

for **all**. The FEA **has** at times for **collateral** reasons, such as durability of any long **term settlement**, been prepared to lease catchment. However, FEA's concern that a lease of **this** or any other catchment was unnecessary is underscored in their statement of defence *on* Case 576. That defence was filed before the Deuba meeting.

I find the parties came to Deuba prepared to settle Case 576. Some of the evidence supporting this finding is:

- Mr. **Kasa Saubulinayau** was appointed by the Chairman of **the** FEA to form a negotiating team.
- The recruitment of the **Qaranfvalu**.
- The drafting of **an** agenda including a third item which was compensation (Mr. Saubulinayau 332/9).
- The arrival **at** Deuba on the Friday of the defendants chief financial officer with comments on the construction of the offer of settlement.
- Discount calculations made with the assistance of Mr. Donlan (**Ex.1** tab 10).
- The first offer of **\$10m** and the subsequent counter offer of \$52.8m.
- Telephone calls between the negotiating team at Deuba and their FEA masters.

Something must be said of the private negotiations conducted between the defendants representative Mr. Saubulinayau and Mr. Fa.

It must be remembered at this time Mr. Fa held an agreement of retainer with his plaintiff clients that would see **him** receive 10% of any settlement or court award. That he managed to secure a \$5m deposit into his trust account upon the executing and filing of a Deed of Settlement is therefore understandable but not coincidental (evidence p. 101).

This concession by the FFA negotiator underscores in my view the defendants intention to be bound **not** only to a payment *of a* fixed sum but a structured payment. It also says something of the breadth of mandate the FEA negotiators believed they had. Why else would the FEA negotiator 'sweeten' the deal by keeping a major portion of Mr.

Fa's **retainer** secure in his trust account, it also says something about the ostensible authority held out to the landowners and their lawyer.

The written offer by **Mr. Saubulinayau**, an oral counter offer by Mr. Fa and its acceptance sealed a bargain for the FEA, **Mr. Fa** and his clients. The essence of the bargain was recorded in the Joint Statement of Understanding. It is to that document i now tuni (Ex.1 vol.1 tab VI of appendix).

### The 'J5U'

**The** introductory statement makes it clear that the understanding deals with **the Monasavu** landowners claims represented in High Court Action 576/98.

It was recorded that an agreement would be drafted (by inference for presentation lo **court**) that would firstly: bring an "end to the dispute;" that is the wider sense of grievance **held** by the Monasavu landowners and the FEA's resistance to a lease; and secondly: "discontinue Case .576" as then pleaded. That includes the claim for damages, **the** declarations sought and the future use of the land. The JSU commits the parties to include in that agreement the subsequent "principle features".

Paragraph 1 sets the price for putting an end to the dispute and the discontinuance of Case 576. It was \$52.8m. It leaves open the issue of equity participation by the landowners. Unlike **Fletcher** this was an open issue to be pursued in good faith as opposed to a term marked not agreed,

Paragraph 2 secures for the FEA its long established principle in relation to **Monasavu** and any other generation project that there was no requirement for it to lease any catchment area. The inclusion of this principle was consistent with the FEA's particular defence and standing on this issue generally.

Paragraph 3 is I find a collateral agreement concerning the **Wainisavulevu** Water Catchment Area. It is a good faith sweetener for the FEA but not an essential term.

Paragraph 4 again emphasizes that the **FEA** is paying the \$52.8m to settle the court action. **That** is **all** the aspects of Case 570. "The first payment is to the plaintiffs **negotiator Mr. Fa**. It is described as a goodwill payment into his trust account in **the** sum of \$5m. That payment was to act as a trigger for the landowners to file their notice of discontinuance. It was due to be paid **on** the execution of a Deed of **Settlement**."

The fact that the agreement then provides for additional future payments indicates an understanding by the FEA negotiators of the breadth of their mandate. It must be remembered that the defendants' chief financial officer prepared the payment schedule. It also portrays the negotiators as having **the** authority to conclude arrangements over not only the amount to settle but also the method of payment.

Paragraph 4 parks the issue of indexation and an equity scheme. These are open not closed issues as they are subject to variation or discontinuance. Clause 4 makes it clear that either party can resile from the payment method not the payment nor the settlement of claims or compromise of Case 576.

Paragraph 5 specifies a good faith gesture from the plaintiffs landowners.

Paragraph 6 records that the plaintiffs will accept the payment of the \$52.8m in "full and final settlement of all claims" against the FEA in respect of the Monasavu Electricity Scheme claims. Objectively I take that to mean not only those claims represented in High Court Action 576 of **1998** but any other present or future claim.

The issue of indexation was resolved in another way. Shortly after Deuba Mr. Fa withdrew the claim for indexation (Vol.1 tab 26 and Evidence p.113). The quantum and **method** of payment provided for in the joint Statement of Understanding remained consistent throughout the documentary trail. I accept Mr. Fa's evidence that Clause 4 was inserted to provide him with time to discuss the indexation issue. He did **not** see it as preventing settlement.

The informed bystander would know the Courts have a wide overriding power to approve or vary settlements. The Court may **well** consider a "**stream**" of payments or equity participation preferable to a one lump sum payment if only to protect 'minor' interests (under Order 80) and ensure that future generations of landowners gain the benefit of such a substantial settlement.

An important feature of the Joint Statement of Understanding is its preservation of the defendants position over catchment leases. At the outset the FEA's defence to such **claims** was that they did not need a lease of the catchment area as **the** water running over the land and through the tributaries befongecTto the State and did not create a use by the **FEA** of the catchment area (cf Amended Statement of Defence Case 576 paragraphs 2 - 4). Further their defence was **that** they had never restricted the landowners use of the **catchment** area. The FEA had been prepared to 'trade' on **this** issue for the sake of compromise but **I find** the defendants preference was to treat any settlement as a good will payment and not compensation (cf Minutes Day 2 Ex.1 vol.1 tab p.34). This was an important point of principal for the **FEA** on Monasavu and any other hydro scheme.

It was only after Deuba that the defendant sought a variation of the agreement to include a lease to improve the look of such a substantial goodwill payment in its books (Ex 1 voi 2 tabs 40 and 42). At Deuba the bystander would view Clause 2 as indicative of a '**win**' for the FEA on **this** issue and a further indication of an intention to be bound to its terms.

**I am** satisfied by the subsequent conduct of the parties that they proceeded on the unaltered basis that the FEA would pay the sum of \$52.8m over time. That sum and payment method were consistently recorded in correspondence throughout the following months. The FEA Legal Adviser and its CEO refer to an agreement reached at Deuba and a commitment to pay the \$52.8m (Ext 1 tabs 16, 18 and 33). The FEA Board and Cabinet approved this payment. The figure of \$52,8m and method of payment were also described in the summons to compromise.



After **the** meeting had been told about the **JSU**, **the** parties participated in a traditional **Fijian** ceremony denoting **resolution of** their grievances. The **defendant** points to that ceremony and submits **that** it **is** irrelevant as [he case falls to be determined by conventional legal principles and not by reference to traditional ceremonies. This is **not** ,w occasion **on** which I need to **explore** the significant cultural impact of ceremonies on domestic **law** and the importance of making agreements **in Fiji in** a traditional way.

The fact is however that **such** ceremonies are an every day experience **in** the lives of our citizens and have real meaning. I accept the evidence of Mr. **Volavola** that these ceremonies set the seal **on agreements** with **Fijians** by having both parties embrace the arrangements by the sharing of "yaqona" the presentation of "tabua" and the offering of respect **to** the **agreement**, ancestry and parties involved by eloquent rhetoric.

Parliament has the power under the Constitution to make provision for the **application** of customary laws and for dispute resolution in accordance with **traditional Fijian processes** (Section 06 of **the** Constitution). The fact that Parliament has that power doesn't yet elevate these ceremonies into a legal significance but it does underscore their **importance in** the objective assessment of whether or **not** Fijians intend to be bound to 3^ agreement **at** any point **in** time.

I accept the sincerity and respect given by the parties to the agreement under this ceremony. I **find** it objectively points to an immediate intention to be bound.

An objective bystander would be taken to be informed of their importance **in** signifying **an** intention to be bound.

### **Finding**

I find there was a bargain made **at** Deuba on the 11<sup>th</sup> of August **that** sought to compromise Case 576 on terms. **This** bargain was always going to be subject of court oversight. This is reflected **in** the subsequent actions of the defendants in filing a summons of "compromise on terms" for the courts approval (Ex.1 vol.3 tab 72). There therefore existed a mechanism under which any outstanding matters may have been

resolved by the court exercising its residual discretion to protect the interests of children. **I am confident that** having found an **agreement** as described there is enough in (he joint Statement of Understanding to render it enforceable. Indeed enough for the Court to proactively assign meaning to **the** terms to be agreed under its wide powers to protect minor interests and ensure durability of any settlement.

Despite my finding that a bargain was reached to compromise Case 576 on the 1<sup>st</sup> of August 2000 at Deuba the question remains whether the FEA's agents had the power to commit to such a settlement.

### Ostensible Authority

The defendant Fiji Electricity Authority is a body corporate established under the Electricity Act (Cap. 180) Laws of Fiji. A good starting point to assess the authority of the FEA negotiators is that act. Under Section 11A the Authority may appoint officers and servants to carry out the provisions of the act. The general functions of the Authority are detailed in Section 13 and include the ability to acquire any property, construct any generating station and carry on any other activity that appears advantageous or convenient to it in connection with the performance of its prime duties. The authority of an FEA servant or officer is derived directly from statute by way of appointment which may include appointment by ratification.

A statutory corporation is a legal fiction. Its existence capacities and activities are only such as the law attributes to it. The acts and omissions attributed to a corporate body are the acts and omissions of natural persons. A corporation is bound by an act done when an officer who does it purports thereby to bind the corporation and that person is authorized to do so (directly or ostensibly) or the doing of the act is subsequently ratified.

The foundation of ostensible authority is estoppel, as Diplock LJ pointed out in *Freeman and Lockyer v Buckhurst Park Properties (Mangaia) Ltd* [1964] 2 QB 480 at 530. In that passage although Diplock LJ confined his observations to the ostensible authority of an agent to bind his principal to a contract the same rules apply to officers acting for statutory authorities (see *Armagas Ltd v Mundogas S.A.*, [1986] AC 717 at page 732.

The material enquiry calls for identification of the particular **act**, the person who did it and the authority - actual or ostensible - for that person to bind the corporation by the doing of that act.

I accept the submissions of **the** plaintiffs **that** there is considerable evidence to support **both** actual and ostensible authority;

- The Act contemplates that officers will be appointed from time to time to conduct the corporation's business (Section 11(A)).
- The history of the Monasavu grievance and the involvement of the FEA in terms of settling it and **the** active participation of the Government in the matter.
- The process of convening the meeting and encouraging mataqalis participation.
- Mr. Saubulinayau at page 330 refers to his appointment by the Defendant's Chairman to head a negotiating team "to take over full negotiation with the landowners". He believed he had ample authority to draw up an agenda which included compensation.
- The frequent contact between the negotiators and the FEA during the course of the meeting. The presence of the defendants Accountant and his contribution.
- The pattern of bargaining including an initial written offer of **\$1Qm** then the subsequent offer of \$52.8m including payment terms.
- I accept Mr. Fa's evidence as the **pre** Deuba conversations he had with Mr. **Saubulinayau** he had the power where he claimed to negotiate **settlement**.

For these reasons I **find** it was clear that the **FEA** officers and servants present **at** Deuba portrayed an ostensible authority to negotiate a compromise on terms of Case 576. I find the plaintiffs reasonably relied on that ostensible authority.

A more cynical view would only have the negotiators deliberately sent to the Deuba meeting **without** a clear mandate. They may have been sent only to secure the hydro plant **at** any cost ignorant of their instructions thus leaving the CEO and Board with deniability of any settlement reached on the wider issues. If **that** was so **the** defendants 'willful blindness' over mandate does not assist, it is still valid for **a** party to rely on an ostensible authority of opposing negotiators until such time as the authority portrayed is unequivocally revoked. Clear revocation of authority was not given **until** the Smith letter of 30<sup>th</sup> August (Ex. 1 **tab** 21) long after the Deuba meeting.

I quite separately find **that** the defendants Board ratified and adopted the actions of Mr. Saubulinayau at Deuba and the settlement he achieved (see Administrative Board Meeting 1/11/2000 Exhibit I tab 36 page **218.9** and again Ex.1 tab 44 page 261). That position was confirmed by Mr. Dean to the Director of Energy by two letters written in January 2001 (Exhibit 1 tab 45 page 266 and **tab** 46). Similar advise was given by Mr. Dean to the Ministry of Works and Energy by letter of the 2<sup>nd</sup> of March, 2001. Finally the settlement was published as part of **the** corporations Annual Report (Ex.1 tab 44).

i find there is no ambiguity or confusion about ratification of the amount agreed to settle Case 576 the figure of \$52.8m remains **constant** in documents from the 11<sup>th</sup> of August throughout the documentary trail past the FEA Board on more than one occasion and the Cabinet up to **the** compromise proposed to the **Court** and after (Ex.1 tab 78).

The only real **alteration** during **that** time being the apparent about turn of **the** defendant on the issue of a lease for the catchment area. They decided it was embarrassing to their books to have such a large goodwill payment made without a corresponding asset **to** record against it (Ex. 1 tabs 40 and 42). The lease was otherwise unimportant to the FEA as they had always believed it was unnecessary and may set a dangerous precedent.

### Good Faith

In *Bobux Marketing Ltd v Raynar Marketing Ltd* [2002] 1 NZLR 506, his Honour Mr. Justice Thomas believed that there was a place for a general obligation of good faith in New Zealand **Contract** Law. He noted **that many** contracts are not discreet but either create or reflect relationships which may last for a long period of time. **What** the future Will bring in such contracts is inherently uncertain and a duty of good faith enhances the continuous smooth working of such agreements. His Honour observed that in the commercial context such a duty exists in America through the Uniform Commercial Code and International Trade Law without any evidence that commercial transaction has become unworkable or uncertain as a result. He recalled also that the concept of good faith is the latent premise of many doctrines in the law of contract for example the doctrine of promissory estoppel, relief against forfeiture, the invalidation of penalty clauses etc he continued:

(at page 516)

*"certainly **the** notion of a more explicit concept of good faith in the law of contract will continue to have its detractors. The principle is already beset by agonizing enquiries into what can be meant by good faith. Good faith is closely associated with notions of fairness, honesty and reasonableness which are already well recognized in the law ... Underlying the concept, to my mind, is a perception of loyalty to the promise made which provides a standard, rather than a rule and which does not require the abandonment of self interest".*

In *I.T. Stanley Ltd v Fuji Xerox NZ Ltd*, High Court Auckland CP 479/96 **unreported** but dated 5 November 1997, **Elias J** said that an obligation of good faith must be implied **wherever** a contract is "predicated upon mutual confidence". **In commonwealth** jurisdictions there has been a marked **unwillingness** to imply any such obligation in detailed commercial contracts. However, relational contracts those relying more on mutual confidence for their legal integrity and durability must be negotiated and completed in 'good **faith**'. **In** my view, a distinction can be drawn between contracts of a

purely commercial nature such as joint venture and franchise agreements on the one hand and agreement:, reached to **settle** constitutional like disputes such as land grievances.

Fijian jurisprudence, and so its contract law, is underpinned by the Supreme Law of the Constitution. The constitutional compact described in Section 6 contains guarantees for the citizen **that in** return for accepting governance by **the** Republic **a** citizen's **rights**, culture and custom **will** be preserved and advanced. It must be remembered that **the majority** of (and in Fiji is protected for its Fijian owners by the creation of leasehold **interests** now supervised by a Native Land Trust Board.

in my view these constitutional provisions overlay negotiations and agreements about land in Fiji and particularly for our **purposes** land grievance disputes. They predicate that negotiations over such girevances and the subject **land** and **its future** use or alienation must proceed upon mutual confidence and good faith. Fairness, honesty and reasonableness ail weil recognized in the law must augment the formation, formulation and interpretation of such contracts.

The legal formalism that iead to the **Fletcher** decision is perhaps acceptable for a complex oil and gas **agreement** where astute commercial negotiators can be **left** alone lo pursue their bargain. Not so, in my view, the parties to a land grievance when negotiating and forming their settlements. These arrangements often reflect lengthy past relationships and bind generations to come. The agreements readied must be durable otherwise they risk uncertainty that impacts not only on the parties but all citizens as uncertainty in a land grievance challenges the credibility of the constitutional compact.

Accordingly, in addition lo the findings 1 have made and quite independent of **them**, I **imply** good faith into the negotiating process and the contract with tiie following effect.

Regarding ostensible authority I find that the FEA was obliged to tell the landowners and their lawyer in a way they could understand that their negotiators at the meeting did not have the power to decide"? in the absence of such a clear and



unequivocal statement i **find** the plaintiffs were entitled to accept **the** ostensible **authority portrayed**. **Indeed the defendants** own CEO after Deuba recognizes thai **the accord mUSt** proceed because **expectations** of settlement have been raised in the minds **of the** plaintiffs. (Ex.1 vol.2 tab 53).

I **find** that in good **faith the** landowners accepted **the** \$52.8m in full **settlement of** **all** disputes *for all* time for all generations including the dispute portrayed in Case 576. I **find** they compromised their position by accepting there was no *need* for the PEA to lease catchment.

I find that in good **faith** the parties were prepared to discuss indexation **but** this was not an essential term **as** it could be varied or discontinued at either parties option. The fact **thai** indexation was excluded **subsequently** underscores this finding.

I find **that the** parties **in** good faith formed an immediate intention to be bound to a settlement described by the joint Statement of Understanding. In good faith they fixed a settlement sum. in good faith they agreed a payment schedule. Now in good faith they should both be held to that arrangement.

### Conclusion and Orders

The plaintiffs wish to retain the benefit of their agreement compromising Action No. 576 of 1998. The defendant accepts the plaintiffs submission that a remedy of specific performance *oi* any agreement is available and would be appropriate in this case.

The equitable remedy of specific performance is discretionary and will be granted only if the Court regards the making of such an order as one appropriate in the circumstances (**Jones** and Goodheart - Specific Performance (**Butterworths** London 1906)). The courts will usually order specific performance where damages are an **inadequate** remedy **{Lone Investments Corporation of Australaisia vs Bonner** [1970] NZLR 724 (PC). I **have** decided an order for specific performance will not lead to any prejudice to the plaintiff or defendant through unwanted performance and may be of benefit to the plaintiffs minors and unborn children. Any compromise on behalf of those persons



requires **the** approval of the court under Order 80 Rule 6. I find (subject to the filing of a further plaintiffs memorandum) that I have enough information available to me to consider specific performance as opposed to damages **as** an appropriate safeguard for the interest of those minors.

I am satisfied that an order for the specific performance of the Deuba Accord will give effect to the particular arrangements that both parties deemed appropriate when they reached their agreement to compromise Case 576 to settle **all** of the Monasavu grievances. I am satisfied that Mr. Fa was prepared to waive indexation on his clients behalf and it is therefore an unnecessary burden on the defendants now to expect them to pay it.

I generally accept the terms of that agreement as described by plaintiffs counsel in closing submissions at page 7.

#### Damages

The plaintiffs seek damages for the delay in implementation of the relevant agreement. They submitted an actuarial report of Mr. David Keep, a chartered accountant. **His** report proceeded on three assumptions. The first as to the timing of payments. The plaintiffs conservatively submit that the first payment would have been made several months after the Deuba Accord and chose the 1<sup>st</sup> of May, 2001 as an appropriate starting date. I accept the plaintiffs reasoning in that regard. However, because of a subsequent finding that early date does not assist the plaintiffs damages claim.

Secondly, the plaintiffs assumed only part of the expense of the litigation would have been deducted from that initial payment leaving a balance available for investment. However, their assessment of the amount of those expenses have been wrongly calculated with the benefit of hindsight and consideration of Mr. Fa's new fees agreement for hourly charging. Mr. Fa may latterly have altered his agreement with the plaintiff for the payment of **his** legal fees **but** at the relevant time I am satisfied **that** he would not be charging on an hourly basis and was looking to secure the bulk of his retainer fee by accepting payment of the sum of \$5m into his trust account. I reject the plaintiffs

argument **that** one can, with the benefit of hindsight, assume **that** a smaller amount would have become payable on an hourly charging basis.

I am fortified **in** that view as Mr. Fa's subsequent conduct **indicated** quite an aggressive approach to protecting that payment. The least **that** can **be** said is that he wanted **to** ensure he had control of that \$5m; therefore the only proper assumption is that it would not have been available for investment on behalf of the plaintiffs and on the balance of probabilities was to be used to secure Mr. Fa's retainer.

Accordingly, in my mind that first sum should be excluded from the loss of use calculation.

This has the practical effect of making the first available payment to the plaintiffs as the \$1,000,000.00 due on the 30<sup>th</sup> of September, 2002. It is from that date interest would have been earned on the accumulated investments over the period.

As for the quantum of that interest I prefer the reasoning used by the defendants' expert Mr. Chung. I adopt the calculation method set out by him in Schedule 3 of his report. In particular I accept that there would have been entry fees charged to any investor and thereafter management fees for the ongoing care of the investment portfolio.

I also accept Mr. Chung's conservative reasoning that the benefit of hindsight is not to be used as a yardstick to gauge the appropriate interest rate and that in fact the prudent investor would have been likely to spread his investment between the then available unit trusts in Fiji and I accept the average rates of interest and average entry fee charges he has calculated.

Concerning the assumption of lease. It was important for the FEA to establish the principle that they had *no* obligation to assume a lease of any catchment area. That was **the** bargain they struck. FEA subsequently changed its mind and wanted a lease. That was a proposed variation to the bargain they made. A lease was included in a summons **for** compromise but that was rejected by the plaintiffs.

As I have found **that** the contract was formed at Deuba I prefer to maintain the position established in paragraph 2 of the Joint Statement of Understanding that the **FEA** did not need to lease the catchment area comprising some 25,000 acres. Accordingly the lease payments included in the plaintiffs calculations are removed entirely from the calculated loss.

It naturally follows that the order for specific performance will include a declaration that the **FEA** is not obliged to lease the catchment area. If the **FEA** decides it requires the exclusive control of more catchment land it can be free to negotiate any such lease with the **NLTB** in the usual fashion.

I should further note that in coming to my ultimate ruling and orders I have taken into account Order 80 and its sub-rules. The settlement is substantial and must benefit the plaintiff Mataqalis for a considerable time. Evidence was icad that Mr. Fa has arranged for separate **Mataqalis** Trusts to be established. He has devised a method for the equitable sharing of any monetary award between the plaintiffs through these trusts.

The Court will ensure the durability of its award and protect minor interests so I will require the plaintiff to file a **memorandum** containing those details. In the interim all monies will be paid into Court.

- (1) Judgment is entered for the plaintiff and subject to the following matters I order specific performance by the parties of the Deuba Joint Statement of Understanding (Ex.1 vol.1 tab-11).
- (2) The defendant will pay into Court the sum of \$52.8m in the following manner.

- (3) The defendant will pay into Court the sum of \$5m as a first payment by the 30<sup>th</sup> November, 2005. This sum may be disbursed by the Court to Mr. Fa after **approval** of the memorandum he **will** file.
- (4) The defendant will pay the plaintiff the outstanding capital *snd* interest due for payments from 2002 to 2005 calculated at appendix B.

That total sum of \$4,404,751 to be paid in to Court by the 30<sup>th</sup> November, 2005.

The calculation uses the method described by Mr. Chung in his Schedule 3. In case my calculation is in error I reserve leave to the parties to apply to vary any technical deficiency by application to be made no later than the 4<sup>th</sup> of November, 2005. Thereafter the calculated figure will be deemed correct.

- (5) The plaintiff will file and serve by the 11<sup>th</sup> of November, 2005 a memorandum detailing its intentions for the equitable distribution of the fund between the plaintiffs trusts; providing a full accounting of fees and disbursements and a general trust account reconciliation for the plaintiffs. That memorandum will include the following information:

- 1, Copies of trust deeds for each individual Mataqaii.
- 2, Proposals for trust administration fees.
3. Proposals for division of any money received as a lump sum and a schedule of payments for the future.
4. A full fee and disbursement statement together with a balance statement including client trust account reconciliations.

5.     iii the interim **all** settlement proceeds **will** be received by **the** Court one! held pending my final order giving practical effect to the disbursement of funds.
- (6)     1 declare that the **FEA** has no obligation to lease any catchment area for the Monasavu hydro scheme.
- (7)     1 declare that no indexation of future payments is required.
- (8)     Costs are reserved. An application is to be filed by the 11<sup>th</sup> of November, **with** replies by the 18<sup>th</sup> of November. There will be a hearing on costs on the 25<sup>th</sup> of November, 2005 **at** 9.30am.



  
Gerard Winter  
JUDGE

At Suva  
31<sup>st</sup> October, 2005

<u>Date</u>	<u>Capital</u>	<u>Kate</u>	<u>Amount</u>	<u>Fee</u>	<u>Net Int.</u>	<u>Balance</u>
30/9/02	1,000,000			40,000		960,000
29/9/03		10%	96,000	3,840	92,160	1,052,160
30/9/03	1,000,000					2,052,160
29/9/04		8.82%	181,000	7,240	173,760	2,069,520
30/9/04	1,000,000					3,069,520
29/9/05		9.32%	285,465	11,418	274,047	3,343,567
<b>30/9/05</b>	1,000,000					4,343,567
30/11/05	4,343,567	8.81%	382,668.25 (or\$1,048.41 per day) \$63,953	2,769	61,184	4,404,751



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Joint Statement of Understanding

understanding has *hem* reached between the FEA and the Monasavu Landowners •esemed in *htzh* Court Action 576/9H, at the meeting held at Centra Resort, Pacific bour, arbitrated by the Qaranhrai, Ratu Jnofce Takivelfcata.

The detail of Hie. understanding will need' to be drafted into an agreement that Will bring an ead to the dispute and the discontinuance of the legal action *on foot*. The principle features oHWhich will Include;

1 FEA payment to the Monasavu Landowners of "\$52.8M.-Alternatives such as the provision for equity participation in the FEA by the Landowners as payment are to be pursued.

2 Hie FEA docs not wish to acquire a lease over the catchment area comprising some 25,000 acres and therefore able to be employed by the Landowners to their benefit.

3 The Landowners have agreed to facilitate the extension of the existing Hydro scheme, in particular the Wainbsvulevu water catchment area Involving some 300 acres will be separately reviewed.

4J The FEA has agreed to mafce thb payment in relation to settling the court action, A goodwill payment will be made by *the* FEA of \$5M as a settlement deposit sum to the Landowners Solicitor, Fa 6r Company Trust Account upon executing and fiding of a Deed of Settlement. In consideration of thte payment the Landowners will provide a Notice Of Discontinuance *In* relation to these proceedings with respect to the FEA.

Additional Mure payments indexed to the CH of;

|'#

I) J1,000,000 will be made for the next *five* years a^d

«) \$460,000 thereafter for 93 years.

*These* terms may^be the subject of varMoa or discontinuance of-d«s understanding.

It *h* a reticulment of the Landowners that such tore payments be Indexed to the CFI to maintain the purchasing power of *th&* payments, the FEA Is -at this time,, *unsbk* to sgree to this. In addition the partis Intend to negotiate in relation to the participation and shareholding In the FEA as a payment aJtemaive,

5. The Landowners have undertaken *nox* to engage in any activities w^lch may prejudice or adversely sffect the operations of the FEA inside the MonasEra "Electricity Scheme area.

6. The; Landowners-accept the payment of S52.8M- In:fuH and "final setdement of all *GEHIS AGAIN* t. the & In *tesp*^ of the Electricity S|g^g

Allffetles-are pleased to announce a settlement understanding of this maner.and appredste theJfforts; The Landowners attending the'meetfng to v&obe to-Iqaygpute h3d earlier approved3 of a resolution to allow the FEA to resume norma! activity in the FEA.