IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0064 OF 1992S
(High Court Case No. 472 of 1992)

B E T W E E N

ANTHONY FREDERICK STEPHENS

Appellant

A N D

THE ATTORNEY GENERAL OF FIJI

Respondent

Counsel:
Mr. R. Douglas and Mr. M. Narsey for the Appellant
Mr. D. Singh for the Respondent

Date and place of hearing: 26 August 1996, Suva

Date of delivery of judgment: 4 October 1996

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court, given at Suva on the 16 December 1992, by Scott J. The High Court had been asked by the appellant on an originating summons to make a declaration that a certain Deed of Settlement made on the 17 September 1992 between the appellant (Stephens) and the respondent (the Attorney General) on behalf of the Fiji Government constituted a valid and binding agreement. Scott J. declined to make the declaration sought and in fact held the Deed to be void.

The reason for the delay in bringing the appeal on for

hearing has never been satisfactorily explained. It is surprising, too, that the respondent had not applied to have the appeal struck out for want of prosecution. However on the 16 May 1996 this Court directed that the appeal be reinstated in the hearing list, it having been previously removed from the list on the appellant's request with the concurrence of the respondent. The originating summons was supported by an affidavit made by Stephens and one made by a member of Parliament, Ratu Osea Gavidi; it was opposed by an affidavit made by the Attorney General. Stephens then filed a second affidavit in reply.

The story told by these affidavits and the exhibits attached to them is an astonishing one. It starts in January 1989 when the appellant commenced proceedings in the High Court claiming $30,000,000 for alleged wrongful detention by the Fiji Police. Three years later in February 1992 the appellant commenced a further set of proceedings in the High Court, this time apparently claiming unquantified damages for another alleged wrongful arrest, false imprisonment and assault. It appears that during the following month a receiving order was made in respect of Stephens' property under the Bankruptcy Act Cap.48. However, from the month of June 1992 he had, he stated, "been liaising with the former Attorney General of Fiji Mr Apaitia Seru for a settlement" in the two civil actions. He went on to say that during the course of the negotiations with the Attorney General, the Attorney General had agreed to support his application to the

National Bank of Fiji for an overdraft facility. He, the Attorney General, wrote to the Chief Manager. This letter was dated 28 August 1992, which it may be noted was before the date of the Deed of Settlement, the subject matter of these proceedings. This letter said that the Attorney General confirmed that Stephens had a claim against the government and that a deed of settlement was in the process of being finalised. Further, that a part of the settlement was the sum of $980,000 which had been agreed to. He then asked the Chief Manager for his support and approval of Stephens' application for an overdraft. Whether Stephens' property was still the subject of a receiving order or not is not expressly disclosed, though presumably it was because it is clear that on the 15 May the Official Receiver had written to Stephens' solicitor granting them consent to take legal proceedings in Stephens' name, subject to certain conditions.

The appellant's first affidavit went on to say that in the month after the Attorney General wrote to the National Bank, that is on the 9 September, he wrote to the Governor of the Reserve Bank again confirming that there was a deed of settlement in the civil actions which was in the process of being finalised. It went on to say that part of the settlement amounted to a payment of $F980,000 and had been agreed. The letter went on to make reference to section 9(3) of the 1990 Constitution which, mistakenly, it said would apply to Stephens if he wished to remit some or all of the money out of Fiji. It ended saying "your approval is

required urgently".

Later that month on the 17 September there was signed a document headed "Deed of Settlement" between Stephens and the Attorney General. Stephens' affidavit expressly states it was signed by the Attorney General "on behalf of the Government". The deed was as follows:

"DEED OF SETTLEMENT

THIS DEED is made the 17th day of September 1992

BETWEEN ANTHONY FREDERICK STEPHENS (hereinafter called 'the Plaintiff') of the one part

AND THE ATTORNEY GENERAL OF FIJI (hereinafter called 'the Defendant') of the other part

WHEREAS (a) Actions have been commenced by the Plaintiff against the Defendant in the High Court of Fiji being Civil Actions No. 34 of 1989 and 134 of 1991.

(b) The said actions are claims by the Plaintiff for damages arising out of the Plaintiff's arrest and detention by the Fiji Police and matters incidental thereto.

(c) It has been agreed between the Plaintiff and the Defendant that the Defendant should pay the monies and perform or cause to be performed the matters hereinafter referred to in full satisfaction of all damages and costs suffered and incurred by the Plaintiff on account of the said arrest, imprisonment and matters incidental thereto and in and about the prosecution of the said actions and that upon payment of the said monies and performance of the said matters required to be carried out the said actions and all further proceedings therein shall be wholly stayed and discontinued.

NOW THIS DEED WITNESSES that in consideration of the premises and the payment of the monies and the performance of the matters hereinafter referred to the PLAINTIFF HEREBY RELEASES AND DISCHARGES the Defendant

from all actions suits causes of action claims and demands whatsoever which he the Plaintiff now has or at any time hereafter may have or but for the execution of this deed could or might have had against the Defendant for or in respect of the said arrest, imprisonment and matters incidental thereto or for or in respect of any matter or thing in anywise relating thereto.

AND the Plaintiff hereby agrees that all proceedings in the said actions shall forthwith be stayed and that upon completion of the payments and performance of the matters hereinafter referred to the Plaintiff will at the cost of the Defendant give all necessary consents to any application which may be made by the Plaintiff for that purpose.

SCHEDULE OF PAYMENTS AND PERFORMANCES

The settlement as follows in each case shall be free of all income tax, land sales tax, value added tax or any other tax or duty and, in the case of land and mortgage settlements, free of all encumbrances which cash compensation shall be remitted to any country of the Plaintiff´s choice outside Fiji. The Defendant shall:-

1. Make cash payment of the sum of $980,000.00 (nine hundred and eighty thousand dollars) to the Plaintiff.

2. Settle in full and effect a full and final discharge of the following mortgages over Crown Lease No. 2563.

    (a) Mortgage No. 253629 in favour of Home Finance Co. Limited.

    (b) Mortgage No. 265000 in favour of the National Bank of Fiji.

3. Settle with the said ANZ Banking Group Limited all claims by the said bank made pursuant to a guarantee dated 10 June 1987 granted by the Plaintiff to the said bank in respect of Economic Enterprises (Fiji) Ltd.

4. Settle all debts filed with the Official Receiver pursuant to a Receiving Order made against the Plaintiff in Bankruptcy Action No. 474 of 1991 and at no cost to the Plaintiff have the said Receiving Order discharged.

5. Settle all matters requiring to be settled in respect of the following lands formerly owned by the Plaintiff´s family and have the said land

transferred to the Plaintiff save the discharge of the family mortgage over the said land which will be attended to by the Plaintiff. The said family lands is all that land comprised and described in Certificates of Title Nos. 7161, 7162 and 7270.

6. All that land situate on the Island of Taveuni commonly known as Soqulu Plantations and being under the ownership/mortgagee control of the National Bank of Fiji be transferred to the Plaintiff.

SIGNED by the Plaintiff) A. Stephens
in the presence of)
O. Gavidi
17/9/92

SIGNED for and on behalf) A. Seru
of the Defendant in the) Attorney General's
presence of) Chambers Suva Fiji
M. Tuisawau
17/9/92"

It was not long after this deed was signed that Stephens' solicitors wrote making a demand in terms of the deed. It drew a rapid and forthright response from the then Solicitor-General, F. Jitoko, in a letter dated 16 October 1992 in the following terms:

"The Government denies any liability to your client and to any one else claiming any right or interest, entitlement or benefit deriving from the Deed of Settlement made on 17th Setpember, 1992. The Deed of Settlement is legally unenforceable. There is no legal obligation on the Government to meet your client's demand. The relevant cases that the Deed of Settlement purported to have settled are still pending and ought to be pursued and prosecuted in the Court as normal."

Stephens' account of events was supported by an affidavit made by Ratu Osea Gavidi, a Member of Parliament, in which he said that he and two of his parliamentary colleagues, the Honourable Sakease Butadroka and the Honourable Mosese Tuisawau, had agreed that they would help Stephens by approaching the government of the day to try and

resolve the case by an out of court settlement. They arranged a meeting with the Prime Minister at which were the Prime Minister, the Attorney General, the Honourable S. Butadroka, the Honourable Tuisawau, and Stephens himself. They discussed "amongst other matters" the possible settlement of Stephens' two civil claims. This meeting was on the 5th June 1992. As a result of the meeting he said the Prime Minister directed the Attorney General to look into the matter and that we were "to liaise" with the Attorney General. Thereafter there were several meetings that they had with the Attorney General at his chambers and also at his residence. It appears that by the end of July Ratu Gavidi felt they were not making any progress so he arranged another meeting with the Prime Minister on the 14 July. At that meeting the Prime Minister assigned the Honourable Ratu Etuate Tavai, Minister of State, to the matter. Subsequently, the three parliamentarians met the Minister of State many times. After these meetings, as Ratu Gavidi puts it, "my parliamentary colleagues Ratu Etuate Tavai and I finally agreed to the terms and conditions that are embodied in the Deed of Settlement of 17 September 1992".

The affidavit made by the Attorney General gives a very different picture of the substance of the discussions and negotiations that took place though he certainly confirms that there were many meetings with Stephens, his legal advisers and the parliamentarians mentioned by Stephens, and that these discussions took place between June and September

1992. It went on to say that after he had been appointed Attorney General and Minister of Justice on the 3rd June 1992 he adopted the practice of not being involved in the day to day handling of cases in his chambers, which he left to the Solicitor-General and other professional staff under his control; a practice which, it could well be said, is what could be expected and which is appropriate as it diminishes, if it does not entirely eliminate, political influences upon legal processes. The Attorney General deposes that he is a barrister and solicitor of the High Court of Fiji and also of the High Court of New Zealand; such a practice is what would be expected in New Zealand and Australia.

The Attorney General in dealing with the many meetings he had with Stephens and his advisers said that at one meeting on or about the 10th July Stephens handed him a draft letter which he presumed Stephens had drafted. This draft was in the form of a letter to Stephens from the Government. It stated that while the Government admitted liability it was unable to fix a quantum and a time - presumably for payment. It then recited that the Government understood from his letters that he had agreed to reduce his claim from $30 million to $5.1 million if it was settled out of court. The particular significance of this draft, as will become apparent later, is that it contained the following passage:

> "In the meantime, we are acceptable to your representatives meeting with my team to finalise a date and possibly an amount which could be acceptable to both parties and at the same time within the parameters of the Governments financial ability.

> You will realise that because of the amount claimed and the exceptional circumstances surrounding your claim final approval lies with the Prime Minister and Cabinet.
>
> In the interim, the satisfactory conclusion to your financial status and this letter should help alleviate your situation."

The Attorney General confirmed that he had written to the Chief Manager of the National Bank of Fiji on the 28th August as deposed to by Stephens. He said he did this because Stephens told him, after showing him a draft of the deed of settlement, that he would not seek to enforce any settlement on the Government; he said he knew the Government did not have the money anyway. He said he was involved in a finance deal which would enable money to be made available to Fijians to enable them to engage in commercial activities. As to the letter to the Governor of the Reserve Bank, which was about two weeks later on the 9th September, he said he was in a hurry as he was about to leave to go to Kadavu for the Provincial Council Meeting when approached at home by Stephens and Ratu Gavidi. They wanted the letter for the following day.

So far as the actual signing of the deed was concerned the Attorney General said Stephens, together with Ratu Gavidi and the other two named members of parliament, came to his office. They showed him a copy of a letter dated 17 September from the Chief Manager of the National Bank of Fiji to a Mr Sultan Ali, Chartered Accountant, in relation to an overdraft facility for a company, Viti Properties Investment Limited, which was a company of Stephens'. The terms of the

letter were as follows:

> "We refer to your letter dated 16 September, 1992 regarding the above.
>
> We regret to inform you that we have been instructed by the Minister of Finance and Economic Planning, that without the appropriate government endorsement, we are not to entertain this request which is based on the said settlement."

There was a lot of discussion about the letter and he was told it would assist the National Bank of Fiji to assist Stephens if the draft deed of settlement, which they then showed him, was signed by him. Stephens told him he "was not to worry about paragraphs 2 to 6 of the schedule of payments and performances in the deed of settlement; it was only the first paragraph dealing with the cash payment of $980,000 which was important". He went on to say he would not enforce it against the Government; it [the deed] was drafted this way to assist the bank. The Attorney General then deposed as follows: (p.68 of the record)

> "I did not want to sign the draft deed. I told them that I did not have authority to settle the case. I suggested that the word ´endorsement´ in the letter (annex "D" of my affidavit) meant Cabinet endorsement; and I told them that Cabinet would not agree to it and that it would have to be left to the Court. The Plaintiff then said that the draft deed was simply to assist him in obtaining his finance deal; he realised that Cabinet would not agree to the proposed settlement; but that all he wanted to do was go away for 3 weeks to complete his finance deal, and once this was arranged, he would come back and withdraw his claim against the Government. On the basis of these assurances from the Plaintiff and his companions, I signed the deed of settlement (annex "D" of the Plaintiff´s affidavit). I did not intend to enter into a legally binding contract with the Plaintiff - I signed the deed because I wished to assist in the process of encouraging the participation of Fijians in business. I accepted the assurances of the Plaintiff that the deed was not to be enforced against the Government because of the presence

> of his companions - I thought I could trust them, being Members of Parliament. I did not consider the legal implications of the deed, only the political objectives which I thought were laudable."

Finally the Attorney General said, as far as he was aware, the Government had no legal interest in any of the properties referred to in paragraph 5 of the deed and he was not aware who was the owner of the Soqulu Plantations referred to in paragraph 6.

Stephens replied to this affidavit of the Attorney General by saying that the Attorney General, by the selection of only some correspondence and a few events, had tried to create the impression that he was coerced or pressured into signing the deed of settlement dated 17 September. He denied that this was the case and said there were discussions with the Prime Minister, the Honourable Ratu Etuate Tavai and the Attorney General leading eventually to the signing of the deed. He then produced some eleven letters which he said completed the exchange of correspondence. It is not necessary to give the details of all this correspondence but reference can usefully be made to some parts of it. First it may be noted, in the first of these letters dated 6 July 1992 and addressed to the Attorney General, that Stephens said he was prepared, because a democratic and new government had been elected, to accept $5.1 million in an out of court settlement instead of the $30 million dollars claimed. The next day he wrote again to the Attorney General proposing the government provide him with a $1.5 million guarantee at any bank, to be treated as part payment of the $5.1 million.

This was to enable him to "repatriate" the sum of $1 million to resume his lost position in an off-shore project which was destined to assist greatly in the development of the nation. On the 5th August there was a letter to the Prime Minister from Ratu Gavidi and his two parliamentary colleagues to ask the Prime Minister to intervene and assist Stephens and his company Viti Properties Investments Ltd. so that the indigenous people of Fiji and their resources might be developed. They asked, too, that in the meantime the government assist by arranging with the National Bank of Fiji the overdraft facility that Stephens and his company needed urgently. It will be remembered that Viti Properties Investments Ltd was the company, mentioned earlier in this judgment, which National Bank of Fiji at a later date declined to assist without government endorsement.

On the same day the 5th August there was a letter, also to the Prime Minister, from Stephens saying that the delegation to meet him that day, presumably the three parliamentarians, was seeking his help in approaching the National Bank of Fiji to provide Viti Properties Investments Ltd with an overdraft facility of $1.5 million. The letter went on to discuss what it referred to as the securities it offered and which appeared to be as follows. <u>First</u> an outline of a venture it was embarking upon in Kuwait with the potential of a US$200 million loan; the need for a "letter of comfort" to the bank from the Attorney General to assure it that he, Stephens, would receive a minimum of $1.5 million.

Second, his compensation claim. Third, a timber concession it owned at Nukusu, Vanua Levu, which the bank were reluctant to accept. Fourth, commission which was expected on the US$200 million loan amounting to US$1.8 million. Fifth, some arrangement through another company called Viti Marketing (Fiji) Ltd, of which Stephens reminded the Prime Minister he was once a shareholder. Stephens went on to say they considered he, the Prime Minister, should assist them in their time of need as they had assisted him in his time of need and helped to make him Prime Minister.

Four days later, on 11 August, the three Parliamentarians wrote to the Hon. Ratu Etuate Tavai, Minister of State, and enclosed a deed of settlement with a figure of $980,000 cash and "in kind" as stated in the deed which they said should be sufficient for both Stephens' compensation claim and the request for an overdraft.

At the commencement of this summary of the affidavit evidence we said the story told was an astonishing one; this summary we believe bears that out. In passing we observe that though apparently not challenged some of this material may well not be admissible. However, what is shown is that on Stephens' side he maintains that to him this was a genuine settlement contract, negotiated apparently in conjunction with some overseas project in Kuwait for which funds were needed, and which could be obtained from a bank on the strength of the deed of settlement, that was going to produce great benefits for the indigenous people of Fiji; it was

accompanied by some special pleading to the Prime Minister by Stephens. On the other hand the Attorney General contended this was not a genuine settlement. It was never intended by him, in the light of representations by Stephens, to be a genuine settlement contract and was never to be enforced against the State but was to be used by Stephens to obtain money by way of overdraft from a bank to be used on an overseas business venture. He believed this, he said, because of the involvement of the three members of parliament and he thought he could trust them because they were members of parliament. He maintained he had told them he did not have authority to settle the case; Cabinet endorsement was required and Cabinet would never agree.

However, there were no findings made in the High Court as to which, if either, account should be accepted as established. The learned Judge recorded that numerous contentious allegations of fact had been made in the press and in the affidavits filed but that Parliament had resolved that those matters would be the subject of a Commission of Enquiry that would be held after his judgment was delivered. He considered he was able to determine the issue before him taking as a foundation facts that were not in issue and which would therefore not be subject to a different finding by the Commission of Enquiry. Ordinarily we would have been of the view that the issues raised were not ones that could properly be determined by affidavit evidence. This kind of factual conflict is particularly appropriate for hearing with

evidence viva voce. Indeed the whole case was more suitable for determination as on an action commenced by writ rather than by originating summons. The issues would be defined by statement of claim and statement of defence; here there were no pleadings, yet the causes of action raised included whether there was a contract at all, lack of authority as agent to contract for the State, illegality, impossibility of performance and public policy. The Court without seeing and hearing the witnesses was in no position to determine factual conflicts. Had the action been tried as an ordinary action commenced by writ the Court would have seen and heard the witnesses, who would have been cross-examined, and doubtless other witnesses, who could have assisted the Court, would have been called. Obvious examples of such witnesses would be the parliamentarians who were present on the 28 August and the 17 September and would thus be in a position to support or repudiate the evidence of the Attorney General as to his attitude to the proposed deed and as to what he said. These are matters where the evidence of others would be valuable, such as that of the Prime Minister and the Minister of State the Hon. Ratu Etuate Tavai on the question of ostensible authority, and other witnesses in relation to the ownership and value of the property referred to in paragraph 6 of the schedule to the deed.

It is provided in Order 5 r.4(1) of the High Court Rules that a plaintiff may commence his proceedings either by writ of summons or originating summons as he considers appropriate

but rule 4(2) provides as follows:

> "Proceedings
>
> (a) In which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or
>
> (b) in which there is unlikely to be any substantial dispute of fact
>
> are appropriate to be begun by originating summons" etc.

In our view this was certainly not a case that was appropriate to be commenced by originating summons. We note, too, that Order 28 r.9(1) provides that where a cause or matter has been begun by originating summons but it appears to the Court, at any stage of the proceedings, that it should be continued as if it had begun by writ it may order the proceedings to continue as if it had begun by writ. It may also order that the affidavits should stand as pleadings with or without liberty to any of the parties to add to them or to apply for particulars. We consider it would have been better if the Court had ordered the matter to proceed as if commenced by writ. It would not appear, however, that counsel for the State suggested this to the learned Judge and so it is not surprising that he continued to deal with the matter as on an originating summons. No doubt he thought that a vast amount of time in court, and expense, could be saved by taking the course he did. We note, in passing, that Mr. Douglas for Stephens in the course of his submissions accepted that the proceedings would have been better tried as if commenced by writ. Indeed he submitted that, while he was

arguing that the appeal should be allowed and declarations as sought in the originating summons be made, he was practical in his approach and would be seeking that in allowing the appeal the Court should direct that it return to the High Court and be tried at a hearing with witnesses giving their evidence orally.

However, in the circumstances we propose to deal with the appeal on the basis upon which the learned trial Judge dealt with it. He considered that the sole issue before him was the legal status, as he described it, of the deed of settlement and he found he was able to determine that issue taking as a foundation the facts disclosed by the affidavits which were not in issue. They would not therefore be subject to a different finding by a Commission of Enquiry set up by Parliament "to enquire into the alleged settlement of a civil action pending in the High Court in Suva" and which was to be held after his judgment was delivered. We doubt whether the fact that a Parliament appointed Commission of Enquiry was later to look into the circumstances generally was a relevant reason for taking the course the Judge took but, as he said, he found he was able to determine the case on that basis, namely, on the facts which were not disputed in the affidavits and putting to one side facts which were disputed. He set out in his judgment a summary of the uncontested evidence of both Stephens and the Attorney General. We accept his summaries though we add later some additional material which also was uncontested in the

affidavits.

The learned Judge in the court below approached the matter on the basis that there were two main questions to be resolved. They were -

1. Did the Attorney General have an "unlimited mandate" to bind the Government by the terms of the compromise. We take this to be, in composite form, the question whether the Attorney General as an agent of the State had authority, actual or ostensible, to enter into such a contract on behalf of the State.

2. Was the deed of settlement actually entered into a valid contract of compromise.

We turn now to consider these issues and the grounds of appeal. We start by referring to s.82(1) of the Constitution. It is as follows:

> 82. (1) The executive authority of Fiji is vested in the President and exercisable by him or by the Cabinet or any minister authorised by Cabinet.

From a practical point of view, in ordinary circumstances, this means the power in respect of any particular matter is exercised by Cabinet or by any Minister authorised by Cabinet. It follows that the power to enter into contracts on behalf of the State of Fiji, but subject of course to any statutory provision that may apply to any particular, or class of, contract, is exercised by Cabinet or any minister authorised by Cabinet. Obviously the Cabinet, which unlike many countries with Westminster style governments is created and constituted by statutory provision (s.85 of the

Constitution) is unlikely to enter into contracts as a Cabinet. We would expect that as a general rule contracts would be entered into, and be executed on behalf of the State, by Ministers authorised by Cabinet. It may be that for particular and exceptional contracts a specific minister would be authorised by Cabinet to negotiate and execute the contract but broadly speaking the generally accepted rule would apply and ministers responsible for particular departments of State would act in respect of their departments and execute contracts arising in the scope of their departments' responsibilities. This view is consistent, subject to one qualification, with the view expressed in Liability of the Crown by P. W. Hogg 2nd Edn (1989) at p.168:

> "A contract within the power of a government representing the Crown will bind the Crown only if it is made by a servant or agent of the Crown, who is acting within the scope of his or her authority.
>
> Under the general law of agency, the act of an agent will bind the principal if the act is within (1) the agent's actual authority, or (2) the agent's ostensible authority, or, perhaps, (3) the agent's usual authority. Where the act is outside the agent's actual authority but is within the agent's ostensible or usual authority, the act will bind only if the other party to the transaction believed it to be within the agent's actual authority.
>
> Apart from statute, the scope of a Crown servant's authority to bind the Crown by contract is determined by the general law of agency. No statute or order in council is required to provide the authority to contract. Unless limited by statute or by order in council (or other direction of cabinet), a minister, as the chief executive officer of a department, has actual authority to bind the Crown by contract in respect of all matters within the scope of his or her department's operations. The minister's power may be delegated to the deputy minister and to lower officials, and even in

> the absence of a delegation the doctrine of ostensible or usual authority may make contractual undertakings by officials binding."

The qualification referred to above is that because Fiji has a Cabinet with powers defined by the Constitution, Ministers would need to have been authorised by Cabinet, which authorisation would no doubt be a general authorisation to all ministers which took effect upon their appointments. See also The Executive Power of the Commonwealth of Australia by H. E. Renfree at p.480 et seq. See also Chitty on Contracts 27th Edn. chapter 10 for a general discussion of principles relating to the Crown.

There was no evidence of any express authorisation by Cabinet of the Attorney General to execute such a contract nor does it come within the responsibilities of any department he administers. The learned Judge in the court below set out the position of the Attorney General in Fiji in extenso and it does not include responsibility for the Police, which is the agency of the State responsible for the arrest and detention of Stephens. See recital (b) of the deed of settlement. The Police, we were informed by counsel, is the responsibility of the Prime Minister as Minister for Home Affairs. In our view it is clear that it is not established that the Attorney General had actual authority to execute this deed of settlement.

The main thrust of Mr. Douglas' argument, however, was directed at the question of ostensible authority, though his argument had application to the whole of the reasoning of the

learned trial Judge. Scott J. had, in effect, held that the Attorney General had neither actual nor ostensible authority to enter into this contract though he expressed the matter somewhat differently. Mr. Douglas submitted that the Judge was in error in determining the question of authority to enter into the contract by relying on the provisions of the Constitution that deal with finance, and the supposed need for provision to be made in the annual Appropriation Act for the matter in issue. We think there is strength in this submission. We think that the true position is correctly expressed in Chitty on Contracts 27th Edn in paragraph 10-006 which is as follows:

> "Parliamentary funds. However, it has often been said that obligations undertaken by the Crown to pay money are subject to the implied condition that the funds necessary to satisfy the obligation shall be made available by Parliament. The precise legal effect of this principle seems at one time to have been misunderstood. In Churchward v. The Queen (1865) L.R. 1 Q.B. 173 the Admiralty covenanted to pay the plaintiff L18,000 per annum for the carriage of cross-Channel mail. The appropriation for this contract was expressly and deliberately withheld by Act of Parliament. The plaintiff sued for the promised sum. He failed on the ground that the contract provided for payment 'out of moneys provided by Parliament,' and no such moneys were ever provided. Shee J. went further and said: 'I am of opinion that the providing of funds by Parliament is a condition precedent to [the covenant] attaching.' But in New South Wales v. Bardolph (1934) 52 C.L.R. 455, the High Court of Australia held that it was no answer to a suit against the Crown upon a contract that the moneys necessary to answer the liability had not, up to the time of the suit, been provided by Parliament. The provision of funds by Parliament was simply a condition which must be fulfilled before actual payment by the Crown, and did not go to the formation, legality or validity of the contract. Moreover it seems that an express appropriation is not required; it is sufficient if provision has been made for a class of transaction to which the contract belongs. It is submitted that the interpretation of the rule adopted by the Australian

case is to be preferred to that of Shee J. in Churchward v. The Queen."

New South Wales v. Bardolph was heard in the High Court of Australia and was heard first by Evatt J. and then on appeal by the Full Court. The position is concisely stated by Evatt J. at p.474 where he said this:

> "... I am satisfied that, in the absence of some controlling statutory provision, contracts are enforcible against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorised by the responsible Ministers of the Crown, and (c) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates. In my opinion, moreover, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into the contract."

It is further discussed by Rich J. at p.496, Starke J. at p.502, Dixon J. at p.516 and McTiernan J. at p.530. See also Renfree The Executive Power of the Commonwealth of Australia p.477 and 480. We add in passing that in Fiji if the State fails to pay in terms of a contract the aggrieved party may obtain a judgment in the courts and if the State still fails to satisfy the judgment the judgment creditor could seek to invoke s.20 of the State Proceedings Act (Cap.24). The success or otherwise of such an approach will have to await the event. We express no view upon it.

In our view it follows that the question of the power of the Attorney General to enter into this contract is not to be determined by the provisions of the Constitution that deal with finance, or the matter of Parliamentary appropriation of moneys to provide for whatever may become due for payment in

terms of the contract, but by the answer to the question of whether he had authority from Cabinet to enter into it. We have already held he did not have actual authority and so return to the question of whether he had ostensible authority.

Mr. Douglas submitted the Attorney General clearly had ostensible authority. He submitted he had such authority by reason of his office and as the defendant in the proceedings. Further, that Stephens believed he had such authority. It must, however, be remembered that the Attorney General is by statute the nominal defendant in all proceedings against the State but that does not make him the ostensible agent of the State for the purpose of entering into contracts. As Chitty (supra) at p.527 paragraph 10-014 states:

> "Crown contracting through agents. The Crown generally contracts through agents; but the ordinary principles of agency may apply to such cases with some modification. The Crown is liable where the agent acts within his actual or ostensible authority; but in accordance with the ordinary principles of agency ostensible authority cannot arise merely from a representation by the agent that he has authority: there must be a holding out by the principal, or by someone authorised by him."

It appears to us that while it may well be accepted that the State holds out that a Minister has authority to enter into contracts in respect of matters arising out of activities within the scope of his department's operations it does not extend to contracts in relation to the activities of other departments. See the passage from Hogg Liability of the Crown cited earlier in this judgment. See also Re Western Canada Wilderness Committee v. The Queen in right of Alberta

(1993) 108 D.L.R. (4th) 495 at page 500:

> "The Crown argues that Ministers of the Crown, even without statutory authority, may contract on behalf of the Crown within the purview of their responsibilities unless there is some statute preventing or restricting their right to so contract. That proposition is fully supported by the Supreme Court of Canada in the case of J.E. Verreault & Fils Ltee v. A.-G. Que. (1975), 57 D.L.R.(3d) 403, [1977] 1 S.C.R. 41, 8 N.R. 72.
>
> I would add that the Verreault case also stands for the proposition that the power of a Minister to bind the Crown is based on the law of agency and is therefore limited by the scope of the ostensible authority of a Minister. For example, a Minister could not bind the Crown with an expenditure that equals the total budget of the province. The forestry Minister cannot bind the Crown to a contract concerning hospitals. The Minister must be engaged in matters over which he has ostensible authority."

Here the Attorney General is the Minister of Justice and Minister in charge of the State Law Office, of which the Solicitor-General is the head, but it does not make him responsible for the Police. Mr. Douglas submitted that the evidence showed Stephens had discussions on the question of settling his claim at meetings at which the Prime Minister and the Attorney General were present. The Prime Minister was Minister for Home Affairs, or so we were told by counsel, and so responsible for the Police. We note that these meetings were not included in the learned Judge's summary of uncontested facts and we note that Stephens makes no reference to the Prime Minister as having either authorised or not authorised the Attorney General to settle the matter on his behalf. Such direct evidence as there is comes from the affidavit of Ratu Osea Gavidi who said that at one meeting with the Prime Minister in June he, the Prime

Minister, directed the Attorney General to look into the matter and that they were to "liaise" directly with the then Attorney General. He went on to say that about a month later in July he arranged another meeting with the Prime Minister because he felt they were not making any progress with the matter. At that meeting the Prime Minister assigned the Hon. Ratu Etuate Tavai to the matter and thereafter they had a number of meetings with him to try and reach a settlement. This evidence was not challenged by the Attorney General in his affidavit; indeed he does not even mention Ratu Osea Gavidi's affidavit in his affidavit evidence. However, what Ratu Osea Gavidi says in his affidavit certainly does not suggest to us that the Attorney General was authorised by the Prime Minister to act for him in his capacity of Minister of Home Affairs.

As noted earlier in this judgment in the passage cited from Hogg, Liability of the Crown, where the act in issue is outside the agent's actual authority but is within the agent's ostensible authority, the act will bind the principal only if the other party to the transaction believed it to be within the agent's actual authority. In view of Mr. Douglas' submissions as to the Prime Minister's role we looked at the apparently uncontested evidence of Ratu Osea Gavidi and now, as we mentioned earlier in this judgment, we propose to look at some further uncontested evidence. The Attorney General in his affidavit referred to a draft letter handed to him by Stephens on or about the 10th July, the essence of which is

set out earlier in this judgment and the significant part is set out verbatim. This shows that Stephens knew that final approval of any settlement lay with the Prime Minister and Cabinet; hence it follows he did not in fact believe that the Attorney General was acting within his authority. One might have thought, too, that he would have some doubts about the matter when the quantum of the settlement appeared to be in excess of $2 million (Counsel accepted that figure) cash plus whatever was the value of the Soqulu Plantations on Taveuni Island, the value of which was unstated. One might think all this a somewhat disproportionate amount to compensate for what we were told by counsel was 68 days' detention.

For all the above reasons we are satisfied that the Attorney General was not authorised to enter into the deed of settlement, nor did he have ostensible authority to do so. Accordingly the learned Judge was right in his conclusion even though the process of reasoning by which we reach the same conclusion is somewhat different from that of the learned Judge. That is sufficient to dispose of this appeal but since the learned Judge in the court below relied on a number of other matters, apart from the question of the Attorney General's actual or ostensible authority, for holding that the deed of settlement was not a valid contract we refer to them briefly.

First, Scott J. held that the deed purported to commit the Attorney General to allow remittance of the funds or moneys payable under the deed overseas, a commitment which he

correctly held was not within the Attorney General's power. If by this he was holding it required the Attorney General to commit an offence against the laws of Fiji we are not able to agree. It does not appear to us that the wording in the schedule to the deed requires such a construction. In our view the schedule provides that the Attorney General should remit the cash payable under the deed to any country of the plaintiff's choice outside Fiji but without requiring him to do anything unlawful. It was Stephens' duty to obtain whatever consents were required, and no doubt the Attorney General should do what was reasonably necessary to assist Stephens in obtaining those consents, but he was not required to do anything unlawful. See Butts v. O'Dwyer (1952) 87 C.L.R. 267 at 280 and 283. Also Secured Income Real Estate (Australia) Ltd v. St. Martin's Investments Pty Ltd. (1979) 144 C.L.R. 596 at 607.

Second, Scott J. was of the view that the wording of the schedule was such as to involve a breach of s.108 of the Income Tax Act. We do not think this is so. Damages for wrongful detention, that is false imprisonment, are not ordinarily liable to income tax and nothing was put to us that suggested that in this case they would be liable to income tax. We add it was also suggested that in any event the deed could be interpreted to mean that any income tax payable, if there was any, would be met or reimbursed by the Attorney General and that such provision would not offend against s.108. There may be merit in such an argument but it

is not necessary to determine that. The schedule to the deed does refer also to land sales tax, value added tax or "any other tax or duty" but the learned Judge did not mention them, and counsel made no submissions as to them either, so we have disregarded them as, presumably, having no application.

The third matter relied upon by Scott J., and which he regarded as the most serious defect of the deed, was its impossibility of performance, at least as to part. It appears clear that the lands referred to in paragraph 5 of the schedule to the deed have never belonged to the State and it appears unlikely that the land referred to in paragraph 6 did either. Mr. Douglas accepted that it was difficult to support the validity or efficacy of those two paragraphs - there were, as he put it, impediments in the way - but he submitted that if the Court held they were not capable of enforcement they were capable of severance. Mr. Singh, on the other hand, had submitted that severing paragraphs 5 and 6 would have rendered the deed worthless. We do not think it possible to consider the question of severance without adequate evidence as to the nature and value of the lands in question. The amounts involved paragraphs 1, 2, 3 and 4 of the schedule would, as has already been mentioned, have been at least $2 million; but we have no evidence in the record of the value of the lands included in paragraphs 5 and 6. No court is able to order severance of some parts of a contract without knowing what effect such severance would have on the

contract as a whole. It follows that the finding by Scott J. that this deed was invalid or void for impossibility of performance must stand. We note that no submission on the question of severance appears to have been made to Scott J.; or, at all events, it was not discussed by him.

Finally, Scott J. was of the view that the deed was void as against public policy. He discussed this issue briefly on the basis that the deed involved illegality and also, in a general way, that the amount involved was such a colossal one that there must be serious doubt whether it could be in the public interest and so he declined to exercise his discretion and declare the deed of settlement valid. In these circumstances we do not propose to discuss the public policy issue further other than to say we would need considerable argument to satisfy us that it had application in these circumstances.

The appeal is dismissed. The respondent is allowed costs.

Sir Moti Tikaram
President

Mr. Justice Savage
Judge of Appeal

Mr. Justice Hillyer
Judge of Appeal