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

CIVIL APPEAL NO.ABU0014 OF 1999S
(High Court Civil Appeal No.HBC 496 of 1992S)

BETWEEN:

ATTORNEY-GENERAL OF FIJI
MINISTER OF JUSTICE — *1st Appellant*

FIJI TRADE AND INVESTMENT BOARD — *2nd Appellant*

AND:

PACOIL FIJI LIMITED — *Respondent*

AND:

CIVIL APPEAL NO.ABU0016 OF 1999S
(High Court Civil Appeal No.HBC 496 of 1992S)

BETWEEN:

PACOIL FIJI LIMITED — *Appellant*

AND:

ATTORNEY-GENERAL OF FIJI
MINISTER OF JUSTICE — *1st Respondent*

FIJI TRADE AND INVESTMENT BOARD — *2nd Respondent*

Coram: The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: Thursday, 11 November 1999, Suva

Counsel: Mr. R. Smith, Mr. R.K.Naidu and Mr. F.V.Hanif for the Attorney-General and Minister of Justice and the Fiji Trade and Investment Board (1st and 2nd Appellant and 1st and 2nd Respondent)
Mr. G.P.Shankar for Pacoil Fiji Limited (Respondent and Appellant)

Date of Judgment: Friday, 7 January 2000

JUDGMENT OF THE COURT

Chronology

Before embarking on the judgment we think it helpful to set out a chronology of the relevant proceedings in this litigation.

12 November 1992	Pacoil Fiji Limited issued proceedings in the High Court Suva against the Attorney-General, Minister of Justice and Fiji Trade and Investment Board (collectively called "the State") claiming damages (later quantified at $23,664,298) for failure to grant protection against oil imports, and seeking declarations of entitlement.
14 March 1996	Following agreement that the trial be split between liability and damages, Pathik J. gave judgment in Pacoil's favour on liability with costs, and directed damages be assessed up to 18 June, 1992. He refused to make the declarations sought.
29 March 1996	This Court gave judgment dismissing the State's appeal against liability and extended the date for assessment of damages to 30 April 1993.
16 April 1999	Pathik J. gave judgment on damages against the state for $4,522,865 and costs.
13 August 1999	This Court made orders suspending judgment and staying execution on condition of the State paying interest at 18% from the date of judgment.
11 November 1999	Appeal against assessment of damages heard.

Judgment

These two appeals against the judgment of Pathik J in the High Court, Suva on 16 April 1999 were consolidated and heard together. In it he assessed damages due to Pacoil from the other parties whom, along with other government agencies involved, we refer to collectively as "the State." Pacoil had issued proceedings on 12 November 1992 claiming damages for the loss of its proposed oil blending business, alleging breach of duty by the State in failing to honour its undertaking to grant protection from oil imports. Counsel had agreed that the issue of the State's liability should be determined first, followed if necessary by a separate trial to assess damages. After a hearing lasting 6 days Pathik J found the State liable in a judgment delivered on 14 March 1996. The State appealed and the judgment was upheld by this Court, but on substantially different grounds (judgment 29 November 1996). The later hearing on quantum of damages took place over five days in November 1997 and January 1998, with the judgment presently under appeal being delivered on 16 April 1999, as noted above.

This case affords another example of the disadvantages of split trials. Almost invariably they end up taking far more time and involving greater expense than if all issues had been determined at a single hearing. We cannot emphasise too strongly that only in the most exceptional cases will separate trials on liability and damages be warranted.

In its pleadings Pacoil claimed that in reliance on the State's representation on 30 September 1987 that it would be granted 100% protection against imported oil, it embarked on the establishment of an oil blending plant. It said that in breach of the State's duty of care to ensure that the promised protection would not be altered, that level of protection was reduced to 50% on 18 June 1992, rendering the undertaking uneconomic and resulting in its abandonment. Damages claimed comprised wasted plant establishment costs (including the

purchase of oil stocks) of $9,164,293 and $14,500,000 for lost business opportunity.

In his first judgment, Pathik J found in Pacoil's favour on liability as claimed, accepting that the level of protection promised in 1987 was 100% and that the State was in breach of duty by reducing it to 50% in 1992. On appeal, this Court was satisfied that although no figure was mentioned, the State had led the company reasonably to believe that it would receive, if not 100%, at least sufficient protection to enable the establishment of a viable operation. This Court also found that in June 1992, in the proper exercise of its powers, the State reduced the level to 50%, but there was insufficient evidence to support His Lordship's conclusion that in doing so it acted in breach of a duty of care owed to Pacoil. However, it found that such a breach occurred when that protection was never implemented, leading to the conclusion that by 30 April 1993 any idea of protection had been effectively abandoned. In these circumstances it was satisfied that liability for damages should be assessed up to that date, instead of up to 18 June 1992, the date fixed by His Lordship.

In the judgment on damages His Lordship awarded Pacoil $4,522,865 under the following heads:

SPECIAL DAMAGES		$	$
(a)	**Factory Building**	Nil	Nil
(b)	**National Bank of Fiji Loan (used for establishment costs)**	882,911	
	Interest thereon from 25.2.92 to 30.4.93 at 13.5%	119,192	
		1,002,103	
	Interest thereon from 1.5.93 to 16.4.99 (i.e. 5 years 11 ½ months) at 4% p.a.	264,000	

		1,266,103	1,266,103
(c)	**Fiji Development Bank Loan (used for establishment costs)** (agreed amount inclusive of interest to 30.4.93)	622,354	
	Interest thereon from 1.5.93 to 16.4.99 (i.e. 5 years 11 ½ months) at 4% p.a.	149,352	
		771,706	771,706
(d)	**Caltex Singapore**	176,927	176,927
			2,214,736
	(purchase of stock and equipment)		
(e)	**Advance by K.R.Latchans Limited**	Nil	Nil

GENERAL DAMAGES

(g)	(a)	**Economic loss/Loss of profit** $1,414,256 per year for 3 years	4,242,768	
		Less 35% tax	1,484,969	
			2,757,799	2,757,799
	(b)	**Loss of use of factory building** from 18.6.92 to 30.4.93	42,000	
		Interest thereon from 1.5.93 to 16.4.99 at 4% p.a.	8,330	
			50,330	50,330
				5,022,865
		Less interim order for payment of damages made on 2.9.97		500,000
		Balance payable		$4,522,865

With respect, we are satisfied that His Lordship misunderstood an important finding in this Court's judgment in the appeal against liability. He approached the assessment

of damages in accordance with his earlier finding that the State's breach of duty lay in its reduction of protection to 50% in June 1992. Mr Shankar took that approach before His Lordship and before us. But, as noted above, this Court concluded that the State was entitled to make this reduction, and that the relevant breach of duty was its later failure to implement it.

On the present appeal the State initially submitted that Pacoil could receive nothing for any expenditure incurred in setting up the project before 18 June 1992 (that being the date of the breach assumed in that submission); or (in its supplementary submission) before it became evident by 30 April 1993 that protection for oil blending had been abandoned. Both these submissions overlooked the reality of what happened, as well as running counter to the State's attitude in the High Court. Essentially it represented in 1987 that there would be protection for a viable oil blending and refining industry, and this representation was intended to be made good by the decision in June 1992 to grant 50% protection for 3 years. In spite of assertions made by Company representatives in the course of dealing with the State agencies that 50% would be uneconomic, such a belief was not demonstrated by them once that decision was made. Pacoil set about organising production and marketing at the reduced level, only to have its efforts frustrated by the State's failure to put in place any protection at all.

The Company was justified in acting on the reasonable belief that adequate protection would be given when it set about establishing the project over the succeding years from 1987. It was well known to the State agencies concerned that Pacoil was incurring expense towards this end, and that it would suffer substantial loss in that regard if the promised protection were not forthcoming. In accordance with usual principles for assessment of damages in tort, the Company is to be put in the same position as if the breach of duty had not occurred. (See for example L Shaddock & Associates Pty Ltd v Parramata City Council (1981) 150 CLR 225 at 255 per Mason J. cited by Pathik J.) This means compensating it for the foreseeable expenditure it

incurred and wasted as a result of relying on the representations made at the outset of its dealings with the State, and for its lost business opportunity. This must be so, irrespective of whether adequate import protection was to be achieved by the grant of 100%, as alleged,or by the 50% for 3 years eventually decided upon. For these reasons we reject the State's general submissions that Pacoil's expenditure incurred before 30 April 1993 cannot be recovered, and we turn now to consider the specific items challenged in the appeals.

Interest

Pacoil has a capital of only $100,000 and the equipment stock and establishment expenses were largely financed by bank loans. His Lordship accepted the calculations agreed between the respective accountants and awarded the Company in respect of the National Bank of Fiji loan $1,002,103 being principal $882,911 and interest at the bank rate of 13.5% p.a. to 30.4.93, being the date up to which this Court decided that the damages should be assessed. He awarded interest at 4% from 1.5.93 to the date of judgment (16.4.99) amounting to $264,000, the total coming to $1,266,103.

He also gave judgment in respect of the Fiji Development Bank Loan, which with interest stood at $857,903 on 30.6.97 when the interest was frozen; as at 30.4.93 (the damages cut-off date) the inclusive amount was $622,354 which the Judge awarded, again with interest at 4% thereon to the date of judgment ($149,352) totalling $771,706.

Counsel for the State submitted that interest should not have been awarded because it was not pleaded as required by Order 18 r.14 of the High Court Rules in accordance with this Court's interpretation thereof in Usha Kiran v Attorney General (Unreported FCA 25/85; 23 March 1990). It is true that in the original statement of claim damages only were sought, without any particulars being pleaded. However, the trial was divided between liability

and assessment of damages and when the latter came to a hearing a detailed statement of claim had been furnished which made it quite clear that recovery was sought of the interest and charges on the bank loans. This satisfied any pleading requirement and there can be no question of the State having been taken by surprise. That such interest is a legitimate head of damage was rightly accepted by His Lordship, citing comments to this effect by Mason C.J. in Hungerford v Walker (1989) 171 CLR 125 at 144. In our view the further interest at 4% up to judgment was also within the ambit of the pleading.

Pacoil claimed in its appeal that His Lordship had erred in not awarding interest at the actual rate charged by the financiers. Mr Shankar accepted that in respect of the National Bank of Fiji loan interest was correctly allowed at 13.5% from 25 February 1992 to 30 April 1993; but he submitted that His Lordship should have awarded interest at 18% on all the borrowed monies from 1 May 1993 to 16 April 1999, as this was the rate being paid by Pacoil. However, we can find nothing in the evidence beyond his assertions that a penal rate of 18% was ever charged over this period. Pacoil's accountant (Mr. Whitside) could not say whether anything beyond 13.5% was charged by National Bank of Fiji, and he thought that interest at an unspecified rate due to Fiji Development Bank was frozen on 30 June 1996.

Mr. Shankar pointed to the Order made by this Court on 13 August 1999 in response to Pacoil's unsuccessful application for payment or execution of the judgment. Clause 3 reads: -

> *"Subject to any variation of the judgment of 16 April as the result of any appeal, in the case of the First Appellant, as a condition of the suspension of payment and, in the case of the Second Appellant, as a condition of the continuation of the stay of execution, they shall pay simple interest to the Respondent on the amount of that judgment from 16 April 1999 until satisfaction at the rate of 18% per annum."*

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For the purposes of the Order the Court accepted Mr Shankar's statement (not challenged by the State) that his client was currently being charged 18% and had been placed in receivership by a major creditor. The obvious aims of order were to ensure that Pacoil did not incur further loss in penal interest because of the State's delay in payment and to expedite the appeal. We are satisfied that it should be understood as applying only to these loan components of the damages awarded, so as to provide for simple interest at 18% per annum on the amounts assessed as part of the damages, from 16 April 1999 until satisfaction. Those amounts were $1,266,103 for the National Bank of Fiji and $771,706 for the Fiji Development Bank, making a total of $2,037,809, but it would be appropriate for the $500,000 paid on account (as acknowledged by Pathik J.) to be deducted from those totals before calculating the interest due under the Order. The statutory rate of interest on the judgment is 4% and to avoid duplication this must be put aside in respect of the period and the amount covered by the Order.

We cannot accept the rate of 18% adopted in the special context of that Order as evidence justifying an award of interest at that rate for the period from 30 April 1993 to the date of judgment, as sought by Mr Shankar.

Pathik J. had a discretion to award a commercial rate of interest on the damages beyond 30 April 1993, the date fixed by this Court for their assessment following the pragmatic approach taken by His Lordship in his liability judgment, when he fixed 18 June 1992 as the appropriate date. At that point Pacoil had to decide whether to wind up the operation and sell or return the plant and stock to mitigate its loss, as counsel for the State contended should have been done. Instead, the directors elected to keep the project alive and seek a declaration from the High Court that the State was bound to follow and continue with the promise and assurance of protection. Pathik J. refused to make that declaration.

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In cross-examination Mr. Latchan, a director of Pacoil, explained that the stock was not returned in order to show the Court, if need be, that the project was ready to be put into effect. In taking the risk that the litigation would achieve this end, Pacoil continued to incur high rates of bank interest, while it was becoming increasingly obvious over the years that import protection was unlikely to be available. We discuss this point further under the heading of General Damages.

His Lordship said the award of 4% further interest in relation to the bank loans was made to compensate Pacoil for being kept out of its money. This is a common ground for ordering interest on damages until judgment, but higher commercial rates may be, and frequently have been given in the Judge's discretion. Interest on the judgment itself is fixed at 4% under the Judgments Act 1838(Imp.) still in force in Fiji by s.22 of the High (formerly Supreme) Court Act (Cap.13).

With respect to Pathik J., we think that in addition to compensating Pacoil for being kept out of its money, he should have taken into account that on the evidence it was paying the National Bank of Fiji up to 13.5% interest for the whole period up to judgment and probably the same rate up to 30 June 1996 to the Fiji Development Bank. The overall interest bill got to such heights because of Pacoil's decision to keep the operation on foot, instead of cutting its losses much earlier and seeking only damages. While the state should not have to face the full impact on interest of this risk-taking conduct, it can properly be expected to pay a figure which takes more account of commercial rates then that which His Lordship saw fit to impose. In all the circumstances, and taking into account the $500,000 paid on account, and that interest to the Fiji Development Bank was frozen, we think 8% p.a. simple interest payable on the damages assessed in respect of the two bank loans from 30 April 1992 to judgment would be appropriate, instead of the 4% fixed by His Lordship and we order accordingly.

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Mitigation of Damages

There was no detailed summary of plant and equipment, financed mainly by the Banks. A valuation made for the State on 3 November 1997 estimated their depreciated replacement cost at $296,815. Bank advances also paid for "inventory" (presumably oil stock etc. for blending) from overseas oil companies costing about $310,000, with a further $135,000 (approx) owed to Caltex Singapore. There was little evidence of how much of this stock is on the premises, but Mr Latchan in his evidence spoke of deterioration and damage over the years. He said that because of their special character, the stock, plant and equipment were useless to anybody in Fiji unless they contemplated a similar business, which would now be uneconomic; and it would cost too much to ship them back to the suppliers, even assuming they would accept them and make some refund. He said the state could have it all, a suggestion taken up by His Lordship who directed that it be at liberty to take and sell all the assets purchased in order to recoup its losses in having to pay damages.

Both Pacoil and the State appealed against this order, the former on the grounds that the Judge acted "outwith" (presumably "without") jurisdiction, and submitted that it should have been credited with the value of the assets at 30 April 1993. We have no doubt that an approach along those lines could have been taken and we were not referred to any precedent or authority for His Lordship to take the novel course he adopted without the consent of the parties. Furthermore, there is now a receiver (according to Mr. Shankar at the hearing on 13 August 1999) and secured creditors may have different views about the disposal of these assets.

We think Pacoil was justified in retaining the assets for a period after 30 April 1993 while there was any realistic hope that the Court would make a declaration and the import protection would be implemented. But, as pointed out elsewhere in the judgment, this

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prospect was becoming increasingly unlikely with the passage of time. Probably when the valuation of $296,815 was made on 3 November 1997 Pacoil should have been taking steps to wind up the enterprise, and that figure may be considered as a starting point for their value, remembering that it was expressed to be a depreciated replacement estimate only. Having regard to Mr Latchan's evidence about market value which obviously influended Pathik J. in making his orders, this estimate would have to be substantially discounted to arrive at a value for the purposes of mitigation. We cannot accept that the assets and stock had no value whatever, either in Fiji or abroad, despite Mr Latchan's contrary opinion and his evidence (unsupported in any detail) of attempts to sell stock. Pacoil should have taken serious steps to realise them, instead of expecting the State to meet the whole loss. We think an estimate of $100,000 would be fair as an allowance to the State. Accordingly we set aside His Lordship's order dealing with the assets and direct that the sum of $100,000 be deducted from the assessed damages by way of mitigation in respect of the stock, plant and assets retained by Pacoil.

Building

The sum of $4,435,446 was claimed for the cost of the factory building including interest. Pathik J. rejected this claim, and Pacoil challenges this in its appeal. The building was put up as part of a bus business long before any representation about oil import protection was made: accordingly its actual cost of $424,873 cannot be claimed as expenditure made in reliance on such a representation. By some process of revaluation the building and land appeared in the company's accounts at $1.3 million. This was its value as represented to the Fiji Trade and Investment Board, which acknowledged in a letter of 9 November 1987 to K R Latchan Buses Limited (Pacoil's former name) that, following a recent visit, it noted "Factory building completed to an amount of $1.3million which includes land purchases also." Pathik J. rightly rejected Mr. Shankar's strenuous argument that this was an admission binding the State,

and on appeal he submitted that it was an uncontroverted acknowledgment that the company had spent $1.3 million to acquire the land and building for an oil blending project.
The letter is plainly no more than an acknowledgment that this information about these items had been given, and we agree with His Lordship's conclusion that this part of the claim must be rejected.

Mr. Whiteside explained that the addition of interest to this amount, bringing the "cost" claimed for the building up to $4,435,446 represented opportunity costs foregone as a result of the failure to grant the protection On the other hand Mr Underhill would not admit this interest claim, pointing out that the interest component for the building was included in the amounts owing to the banks; and its inclusion wrongly suggests an annual appreciation in value of 13.5%.

As we observe later in this judgment, the building was still being used as a bus depot, and the absence of any firm evidence about the extent of that use makes it impossible to assess any realistic figure for opportunity cost (if appropriate), let alone the millions suggested by Mr Whiteside. Furthermore, the value of those parts of the building and plant designed for in the oil business would be recoverable from profits by amortisation in the Company's accounts, if the business yielded sufficient to cover those items. On this aspect, as we point out later, Pacoil is to be compensated for its future economic loss, but at a much reduced level from that claimed because of what we see as commercial restraints emanating from changes in government policy, and independent of any default by the State. Accordingly any failure to recoup these asset costs from profits is not the latter's responsibility. We agree with His Lordship that the claim for interest in respect of the building is misconceived and must be rejected.

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In the Statement of Claim no specific reference was made to damages for alterations to and loss of use of the building. It had been constructed for the company's extensive bus operation and it had been used for that purpose throughout the period since 1987 when the representation were first made. However, the evidence of the extent of that use was vague and inconclusive, without any details of its effect on Pacoil's overall operation to support its submission the damages should have been awarded for its loss of use through being reserved for the oil blending business. Nor was there any satisfactory evidence of the cost of alterations needed for the purpose. Mr Latchan mentioned figures ranging from $100,000 to $250,000 but he was plainly just guessing.

Pacoil complained that His Lordship was wrong in refusing to award damages for fixed assets, holding these must come from profit. To paraphrase Mr Shankar's submission, the assets would have generated profits to pay for them, but the ability to do so was frustrated by the State's breach of duty. We have already dealt with the similar approach taken in Mr Whiteside's method of seeking compensation for opportunity costs in relation to the building. Pacoil is entitled to an award for general damages for economic loss. The fact that it may not be enough to recoup the full cost of the fixed assets is not the State's fault; it is the result of the value of the business not being as high as its founders had hoped, because of the factors discussed below under General Damages.

Pathik J. awarded $42,000 plus interest based on an assumed rental value of $4,000 per month for the period of 10½ months from the time of "withdrawal of protection on 18 June 1992 to 30 April 1993, the date on which damages were to be assessed. He said that as a result of the breach (which he assumed to be that "withdrawal" - properly the grant of protection at 50%) Pacoil had not been able to use the building fully over that period. However, on our view of the case, the State's breach of duty was its failure to implement the protection,

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effectively as at 30 April, 1993, so that there is no additional period of loss of use to be taken into account beyond the date of the breach of duty to assessment date for the damages, because these two dates now co-incide. We uphold the State's appeal on this aspect, and agree with its Counsel that there was no evidence on which His Lordship could have made such a finding.

Advances from Associate Companies

Under this heading Pacoil claimed $365,103 being advances by associate companies in the Latchan group ($180,414) plus interest ($184,689). Pathik J. considered the evidence, noting that according to Pacoil's accountant (Mr. Whiteside) they were made well before the oil project commenced, and that there were also advances by the Company to the associates. His Lordship was satisfied that there was no agreement to pay interest. He found the evidence of the exact state of the accounts between the companies unclear, and even Mr Shankar conceded that the evidence "was not too convincing." We think the Judge had no option but to dismiss this claim as unproved.

Management Time

He also rejected a claim for management time of $1,500,000 which is another subject of appeal by Pacoil. This was calculated at the rate of $30,000 p.a. for each of the four directors and the accountant, Mr Whiteside. There were no particulars of how the amounts were arrived at, nor was there anything in the company's accounts referring to them as having been paid, or as a liability. Mr Shankar submitted that after inspecting the factory, the Judge should have been able to estimate what their services were worth. Instead, he held that the claim was not allowable in the absence of any evidence that they were to be paid and that their remuneration would be expected to come from profits. It must be borne in mind that the claims were for damage or loss suffered by the Company, not by its directors or accountant. We agree with His Lordship's rejection of this claim for the reasons he gave.

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General Damages

Under this heading is the major claim of $14,500,000 for loss of business opportunity based on a projected annual profit of $1,450,000 under 100% import protection, taken for 10 years for the purpose of compensation.

After referring to a number of cases dealing with damages in tort stating well-established general principles, His Lordship approached his task on the basis that Pacoil was to get 100% protection from imports. However, as we have pointed out, the protection was properly fixed at 50% for 3 years and it is for the failure to implement this decision that the State is liable. Mr Whiteside (Pacoil's accountant), shared His Lordship's misunderstanding and presented a calculation based on 100% protection, simply multiplying the projected annual profit for 10 years. He acknowledged that there was no basis for taking that particular period in a business which would have run indefinitely, and said the claim was restricted in this way merely for the purpose of assessing general damages. The sheer arbitrariness of this approach suggests that it cannot be the answer to this difficult problem.

Mr Shankar advanced an alternative claim to the effect that if the promised protection of 100% had been granted the business could have been sold as a going concern for $20 - $25 million, and this should be the measure of Pacoil's loss. His Lordship rejected this proposition outright because he saw no evidence to support the claim made in such general terms. Pacoil's appeal against his rejection of this estimate of value was on the ground that he was wrong not to accept it, when it was given as undisputed and unchallenged evidence. That "evidence" appears to have been no more than Mr Latchan's personal opinion given during the course of his evidence-in-chief, and, as such, did not provide a basis for any rational assessment of damages, nor call for a response by the defendants. We are satisfied His Lordship was correct

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in rejecting this alternative claim, which in any event does not accord with what we see as the correct approach to the assessment of the economic loss in this case, to which we now turn.

His Lordship rejected the 10-year period proposed by Mr Whiteside as unjustifiably long, and held that a reasonable period had to be worked out in line with the facts and circumstances of the case and the principles involved. He settled for 3 years, commencing 12 months after the year the factory was switched on for production. Accordingly he took the annual projected profit (accepted by him at $1,414.25), multiplied it by 3 to produce $4,242,768, and then deducted tax at 35%, giving a figure of $2,757,799 which he awarded under general damages for economic loss/loss of profits. Pacoil's appeal included a challenge to the deduction of tax which the State did not oppose. There was evidence that the Company could have expected a "tax holiday" while it was being established.

Pacoil complained that the Judge erred in not awarding damages for loss of income for 10 years as originally claimed, but in his submission to us Mr Shankar reduced this to 5 years as more appropriate, in accordance with the tax-free concession which he said was promised for that period. In its appeal the State pointed out that His Lordship had failed to take into account the substantive findings of this Court and consequently misdirected himself on assessment. We repeat that the effect of the judgment on the liability appeal is that damages are to be assessed on the basis that protection at a level of 50% was granted for 3 years on 18 June 1992, and that the relevant breach of duty was the failure to implement this by 30 April 1993. It follows that neither the calculations made by Mr Whiteside nor His Lordship's assessment can stand.

Mr Smith submitted that we should refer the matter to a referee or send it back to the High Court with suitable directions to enable the amounts to be properly calculated. We are

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reluctant to do this because of the desirability of bringing this long-running and expensive dispute to a conclusion. The onus was on the parties to bring all their evidence forward at the hearings and they are not entitled to a second bite. The Court must do the best it can with the material put before it. We are satisfied that there is sufficent in the record and in the report and evidence of Mr. Underhill (the State's accounting expect), to enable us to reach a decision. In adopting Mr Whitesides general approach, Mr Underhill prepared calculations of the projected income, but based on various levels of protection for 10 years and discounted the expected profits to arive at their net present value. We would point out that when assessing the present value of income to be received some time ahead, an appropriate discount must be applied, and the failure to make such an allowance in the simple multiplication exercises carried out by His Lordship and Mr Whiteside must also affect their calculations of economic loss.

As a starting point we see the economic loss as the worth, at the time of the breach of duty, of the Company's projected profit stream calculated at the level of protection (50%) over the period for which it was granted (3 years), plus some further time during which it might still retain an edge over its competitors. That worth or value is to be gauged by what a prudent investor might pay for it. However, such an investor, looking at the company at that time, would take into account the obvious risks to that protection from challenges and pressure by other oil companies (already presaged by Shell's proceedings under the Fair Trading Decree of 1992), and the new environment of competition and consumer protection evidenced by that Decree. It must have been increasingly apparent in this economic climate that protection, described as "a license to print money" (to use Mr Latchan's expression), would rapidly lose its appeal to a Government aware that there was no foreign exchange saving for Fiji, which was the object of the original proposal to refine used oil. The State's subsequent failure to implement the 50% can be seen as a clear symptom of this changed political outlook. In his judgment on liability Pathik J. refused a declaration for the grant of protection "bearing in mind the coming

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into force of the Fair Trading Decree", demonstrating his awareness of the changed economic climate. In the liability appeal this Court held that the executive government was free to alter the level of protection in the public interest. We see this uncertain future for protection as the dominant feature in assessing economic loss.

Mr Underhill's analysis based on a 10 - year period was as follows:

	"Average Profit Per Year	*Net Present Value*	*Internal Rate of Return*
100% Protection	*$1,414,256*	*$5,680.246*	*78.00%*
50% Protection	*$ 534,651*	*$1,700.145*	*34.66%*
40% Protection	*$ 358,730*	*$ 904,125*	*24.95%*
30% Protection	*$ 182,809*	*$ 108.105*	*14.21%*
25% Protection	*$ 94,849*	*$(289,905)*	*8.16%"*

Obviously this analysis cannot be treated as a guideline since it is based on 100% protection, but even at that level the net present value of the projected profit stream is dramatically lower than Mr Whiteside's simple calculation, and less than half of His Lordship's without the tax deduction. Mr Underhill did not deduct tax. It would be simplistic to take three-tenths (i.e. for 3 years) of his net present value to arrive at an appropriate figure for this case, in which those can only be a broad estimate of general damages. Giving the matter the best consideration we can, we think an award of $750,000 would be appropriate under this heading. It has the overall result of largely restoring the wasted expenditure and in a very general way putting the Company back into the position it was in before embarking on this project. This figure will accordingly be substituted for His Lordship's award of $2,757,799.

Costs

Pacoil sought indemnity costs in the High Court because of the complexity of the trial and appealed against His Lordship's decision not to award them, after his review of

relevant authority. We agree with his conclusion that there was nothing exceptional, unmeritorious or reprehensible to justify such costs, and Mr Shankar did not persuade us to interfere with his discretion.

He also awarded Mr. Whiteside, Pacoil's accountant, his professional costs for preparing its account and for the whole of the period he was involved in the project until 16 April 1999. The state appeals against this order,which we find difficult to reconcile with His Lordship's earlier decision not to allow remuneration to the four directors and Mr Whiteside, on the basis: (a) it was not the subject of a claim or a liability against the company for which it could seek reimbursement from the State by way of damages; and (b) their remuneration for setting it up should come from profits. The same objections apply here. Accordingly, the State must succeed in its appeal on this point and that order is set aside.

Conclusion

We make the following awards for damages in confirmation of or in substitution for the orders made by Pathik J. as set on on pages 4 and 5 of this judgment:

Special Damages

(a)	Factory Building	Nil
(b)	National Bank of Fiji Loan and Interest to 30.4.93	$1,002,103
	Simple Interest thereon from 1.5.93 to 16.4.99 at 8% per annum	528,000

(c)	Fiji Development Bank Loan and Interest to 30.4.93	622,354
	Simple Interest thereon from 1.5.93 to 16.4.99 at 8% per annum	298,704
(d)	Caltex Singapore	176,927
(e)	Advances by Associate Companies	Nil
(f)	**General Damages**	
	Economic Loss/Loss of Profit	750,000
(g)	Loss of use of factory	Nil
		$3,378,088
	Less interim payment under order of 2.9.97	500.000
		$2,878,088

The order made for delivery of plant and stock to the first and second appellants/respondents (the State) is set aside. They are awarded $100,000 as recognition of mitigation of damages which sum is also to be deducted from the total due by the State to Pacoil, reducing it to $2,778,088. There will be judgment for Pacoil for this amount in place of the judgment of $4,522,865 awarded to it as plaintiff in the High Court with costs on that reduced amount as awarded in that Court. The order made for payment of Mr Whiteside's professional costs is set aside.

The State will also pay Pacoil the additional interest due under this Court's order of 13 August 1999 in the manner directed in this judgment, namely at 18% p.a. calculated on the

damages and interest assessed in respect of the National Bank and Fiji Development Bank loans totalling $2,451,161, less $500,000 paid on account leaving $1,951,161 under this heading. Such interest is to be paid on that amount or on any balance thereof outstanding from 16 April 1999 until payment. Any dispute over the amount of the interest is to be settled by the Registrar.

The State, having substantially succeeded this Court, is entitled to costs on the appeals which we fix at $6,500 inclusive of disbursements.

Result

1. Judgment for Pacoil for $2,778,088 and costs on that amount in the High Court in place of the High Court judgment of $4,522,865 and costs.

2. The Attorney-General, the Minister of Justice and the Fiji Trade and Investment Board (as appellants and respondents respectively in those appeals) are collectively awarded $6,500 against Pacoil Fiji to cover their costs and disbursements on the appeals.

FIJI COURT OF APPEAL

.....
Sir Moti Tikaram
President

.....
Sir Maurice Casey
Justice of Appeal

.....
Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Munro Leys and Company, Suva for the Appellant 1st and 2nd Appellant and 1st and 2nd Respondent
Messrs. G.P. Shankar and Company, Ba for the Respondent and the Appellant