RATU SOLOMONE NAQA and Ors v FIJI ELECTRICITY AUTHORITY (HBC0237 of 2002)

HIGH COURT — CIVIL JURISDICTION

5 WINTER J

26–29 September, 31 October 2005

Contract — interpretation — land dispute between parties — native lands — native 10 **land used as a water catchment area — meeting settlement for payment of $52.8 million — whether agreement reached to compromise on terms — whether Defendant's agents had authority to compromise claims — specific performance ordered — Constitution s 86 — Electricity Act (Cap 180) ss 6, 11A, 13.**

15 The Plaintiffs and the Defendant (parties) disputed the native land used as a water catchment area (catchment) of the Monasavu hydro power plant (hydro plant). The land on which the hydro plant was built was acquired by purchase. The catchment was not acquired, leased or submerged. As far as the Defendant was concerned, the landowners could use the catchment for agriculture, grazing and logging. However, agencies other than the Defendant prohibited the use of the catchment. The Plaintiffs felt offended and 20 aggrieved because of the restrictions and strengthened the idea to demand from the government compensation for the use of the catchment. The government did nothing to settle the grievances. Frustrated landowners took over the Wailoa power station, placed roadblocks and burned the administration block. They demanded greater payment for the catchment's use. A taskforce engaged by the Prime Minister made a report on the valuation 25 of the compensation claim and suggested leasing the catchment area to the Defendant. The cabinet approved payment without poundage to the Native Land Trust Board (NLTB). The NLTB prepared a lease and compensation offer (offer) to the Defendant.

The first meeting held between the parties regarding the compensation claim was unsuccessful as some mataqalis disagreed and filed a case. The Plaintiffs filed civil case 576 (case 576), sought a $38 million compensation claim and filed an injunction against 30 the NLTB from proceeding with the offer. In May 2000, a group of landowners and rebels shut down the hydro plant because of the unresolved grievances. The second meeting at Deuba produced a joint statement of understanding (JSU) to settle the grievances and to compromise case 576 for $52.8 million. The Plaintiffs rejected the Defendant's varied offer to settle. The Plaintiffs filed a second civil case, sought specific performance to 35 enforce the agreement at Deuba and claimed for damages. The case 576 was stayed pending the decision of the second civil case. The Defendant countered that no agreement was reached, that its agents had no power to settle the grievances in case 576, that there was no intention to be bound by the terms of the JSU and that the JSU was merely a progress report. The issues for determination were whether: (1) an agreement was reached to compromise case 576 at Deuba to settle the grievances; and (2) if an agreement was 40 reached at Deuba, the Defendant's agents had authority to compromise the claims in case 576 and settle the grievances.

Held — (1) The evidence established that an agreement was reached to compromise case 576 at Deuba to settle the grievances and because of the following:

45 (1) Mr Kasa Saubulinayau (Saubulinayau) was appointed by the chairman of the Defendant to form a negotiating team;
(2) the recruitment of the Qaranivalu;
(3) the drafting of an agenda including a compensation item;
(4) the arrival at Deuba of the Defendant's chief financial officer with comments on the construction of the offer settlement;
50 (5) discount calculations made with the assistance of Mr Donlan;
(6) the $10 million first offer and the $52.8 million subsequent counteroffer; and

(7) telephone calls between the negotiating team at Deuba and the Defendant's masters.

There was intention to be bound by the Defendant not only to a payment of a fixed sum but also to a structured payment.

5 (2) The Defendant's officers and servants present at Deuba portrayed an ostensible authority to negotiate a compromise on the terms of case 576 and the Plaintiffs reasonably relied on such ostensible authority. Moreover, the Defendant's board ratified and adopted the actions of Saubulinayau at Deuba and the settlement that was achieved. The settlement was published as part of the Defendant's annual report.

(3) A statutory corporation was a legal fiction. Its existence capacities and activities are 10 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 was bound by an act done when an officer who does it purports thereby to bind the corporation and that person was authorised to do so (directly or ostensibly) or the doing of the act was subsequently ratified.

15 (4) Regarding ostensible authority, the Fiji Electricity Authority 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, the plaintiffs were entitled to accept the ostensible authority portrayed.

Determination made.

Cases referred to

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Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd [1985] 2 NSWLR 309; *Armagas Ltd v Mundogas SA* [1986] AC 717; [1986] 2 All ER 385; *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; [1964] 1 All ER 630; *J L Stanley Ltd v Fuji Xerox NZ Ltd* (unreported, HC Auckland, CP 479/96, 5 November 1997); *Loan Investment Corporation of* 25 *Australasia v Bonner* [1970] NZLR 724; *May & Butcher Ltd v R* [1934] 2 KB 17; [1929] All ER Rep 679, cited.

Bobux Marketing Ltd v Raynar Marketing Ltd [2002] 1 NZLR 506; *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433; *Seven Cable Television Pty Ltd v Telstra Corporation Ltd* (2000) 171 30 ALR 89; [2000] FCA 350, considered.

R. Burbidge QC, *G. Radburn* and *P. Wood* for the Plaintiff

R. Fardell QC and *Barnes* for the Defendant

35 **Winter J.**

Introduction 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 40 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 45 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 FEA were concerned, the landowners could use the catchment area for traditional purposes, agriculture, 50 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 and 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 recognised 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 Wailoa 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 well 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 lease rent paid up front	$10,010,176
Timber premiums compensation	$ 1,406,188.38
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 $38 million (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 19 May 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 toll on both the FEA 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.

5 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 Monasavu 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.

10 The meeting produced a Joint Statement of Understanding (JSU) that said for a payment of $52.8 million the Monasavu Mataqali 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 Mataqali would support the FEA in its vital role of power generation. There were some 15 reservations in the Joint Statement. The document is attached as App 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 20 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 Byrne J pending a decision in this case.

25 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 30 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 35 accepted before it was withdrawn. The following issues fall for my determination:

(i) Was an Agreement reached at Deuba on 11 August 2000 or alternatively later to compromise the claims described in Civil Action 576 and thereby settle the Monasavu grievances for all time.

40 (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

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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 50 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 *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 (*Fletcher*). 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 the bargaining process and resultant contracts are different between the two types of agreement.

A purely commercial arrangement may involve a complex set of interrelated 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 summarised 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 3 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 450 Blanchard J said:

> Those provisions, it seems to us, had such substantial financial implications — for 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.
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> 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 (at 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 KS Easter (Holdings) Pty Ltd* [1985] 2 NSWLR 309 at 337, McHugh JA drew attention to Corbins observation in *Contracts*, vol 3, p 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 *Seven Cable Television Pty Ltd v Telstra Corporation Ltd* (2000) 171 ALR 89; [2000] FCA 350 at [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 is it also difficult to detach any particular provision form 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 & Butcher Ltd v R* [1934] 2 KB 17; [1929] All ER Rep 679, 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: compare Professor McLauchlan in "Rethinking Agreements to Agree" [1998] 18 *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 to be bound been present, there was enough in the document to render it enforceable. The problem was that the intention had not been established (at 453–7).

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 organised scheme to pay over some $14 million. 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 $1 million 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 $14 million 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: Volavola, 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 emphasises 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 the 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 Saubulinayau 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 Saubulinayau prior to 11 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 $2356.64 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 forma negotiating team.
- The recruitment of the Qaranivalu.
- 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 $10 million and the subsequent counter offer of $52.8 million.
- 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 $5 million 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 FEA 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 turn: Ex 1 vol 1 tab 11 of appendix.

The "JSU"

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 to court) that would first: 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 second: "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 $52.8 million. 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 emphasises that the FEA is paying the $52.8 million to settle the court action. That is all the aspects of Case 576. 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 $5 million. 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 $52.8 million 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 cl 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 O 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 belonged to the State and did not create a use by the FEA of the catchment area: compare amended statement of defence Case 576, paras 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: compare 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 vol 2 tabs 40 and 42. At Deuba the bystander would view cl 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 $52.8 million 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 $52.8 million: Ext 1 tabs 16, 18 and 33. The FEA Board and Cabinet approved this payment. The figure of $52.8 million 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 the case falls to be determined by conventional legal principles and not by reference to traditional ceremonies. This is not an 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: s 86 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 an 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 11 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 the 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 11 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 s 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 s 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 authorised 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 & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 530; [1964] 1 All ER 630. In that passage, although Diplock LJ confined his observations to the ostensible authority of an agent to bind his principle to a contract the same rules apply to officers acting for statutory authorities: see *Armagas Ltd v Mundogas SA* [1986] AC 717 at 732; [1986] 2 All ER 385.

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: s 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 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 $10 million then the subsequent offer of $52.8 million 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 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, Ex 1 tab 36, p 218.9 and again Ex 1 tab 44, p 261. That position was confirmed by Mr Dean to the Director of Energy by two letters written in January 2001: Ex 1 tab 45, p 266 and tab 46. Similar advise was given by Mr Dean to the Ministry of Works and Energy by letter of 2 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 $52.8 milion remains constant in documents from 11 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 Raynor Marketing Ltd* [2002] 1 NZLR 506, his Honour Thomas J 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 *J L Stanley Ltd v Fuji Xerox NZ Ltd* (unreported, HC Auckland, CP 479/96, 5 November 1997) 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 agreements 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 s 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 land 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 grievances and the subject land and its future use or alienation must proceed upon mutual confidence and good faith. Fairness, honesty and reasonableness all well recognised in the law must augment the formation, formulation and interpretation of such contracts.

The legal formalism that lead to the *Fletcher* decision is perhaps acceptable for a complex oil and gas agreement where astute commercial negotiators can be left alone to 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 reached 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 to the findings I have made and quite independent of them, I imply good faith into the negotiating process and the contract with the 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 recognises that 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 $52.8 million 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 FEA 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 that 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 of 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, 1986. The courts will usually order specific performance where damages are an inadequate remedy: *Loan Investment Corporation of Australasia v Bonner* [1970] NZLR 724. 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 O 80 r 8. 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 p 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 1 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.

Second, 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 $5 million 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 $5 million and 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 million due on 30 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 Sch 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 para 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 O 80 and its subrules. The settlement is substantial and must benefit the Plaintiff Mataqalis for a considerable time. Evidence was lead 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 $52.8 million in the following manner.

(3) The Defendant will pay into court the sum of $5 million as a first payment by the 30 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 and interest due for payments from 2002 to 2005 calculated at App B.

> That total sum of $4,404,751 to be paid in to Court by the 30th 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 4th of November, 2005. Thereafter the calculated figure will be deemed correct.

(5) The Plaintiff will file and serve by 11 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 Mataqali.

  (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) In the interim all settlement proceeds will be received by the court and held pending my final order giving practical effect to the disbursement of funds.

(6) I declare that the FEA has no obligation to lease any catchment area for the Monasavu hydro scheme.

(7) I declare that no indexation of future payments is required.

(8) Costs are reserved. An application is to be filed by 11 November, with replies by 18 November. There will be a hearing on costs on 25 November 2005 at 9.30 am.

Date	Capital	Rate	Amount	Fee	Net Int.	Balance
30/9/02	1,000,000			40,000		960,000
29/9/03		10%	96,000	3840	92,160	1,052,160
30/9/03	1,000,000					2,052,160
29/9/04		8.82%	181,000	7240	173,760	2,069,520
29/9/04	1,000,000	0.00%				3,069,520
30/9/05		9.32%	285,465	11,418	274,047	3,343,567
30/11/05	1,000,000					4,343,567
30/11/05	4,343,567	8.81%	382,668.25 (or $1048.41 per day) $63,953	2769	61,184	4,404,751

Determination made.