IN THE SUPREME COURT, FIJI ISLANDS AT SUVA

CIVIL APPEAL NO. CBV0002 OF 2000S
(Fiji Court of Appeal Civil Action No.ABU0014 of 1999S)

BETWEEN:

PACOIL FIJI LIMITED

Appellant

AND:

THE ATTORNEY GENERAL OF FIJI

Respondent

AND

CIVIL APPEAL NO. CBV0004 OF 2000S
(Fiji Court of Appeal Civil Action No.ABU0016 of 1999S)

BETWEEN:

THE ATTORNEY GENERAL OF FIJI

Appellant

AND:

PACOIL FIJI LIMITED

Respondent

Coram: Rt. Hon Justice Thomas Gault - Judge of Supreme Court
Hon. Justice Keith Mason - Judge of Supreme Court
Hon. Justice Robert French - Judge of Supreme Court

Hearing: Tuesday, 17th June 2003, Suva

Counsels: Mr. G. P. Shankar for Pacoil
Mr. R. Smith for Attorney General

Date of Judgment: Friday, 11th July 2003, Suva

JUDGMENT OF THE COURT

Pleadings

By its writ issued on 12 November 1992, Pacoil Fiji claimed declaratory relief and damages against the Attorney-General and Minister for Justice of Fiji and the Fiji Trade and Investment Board. The Minister was sued on "behalf of the Government of Fiji and/or Members of the Government, and the Cabinet of Fiji Government". The Board was described as "... a Board created and established by the Government of Fiji".

The claim was framed on the basis that the Minister and the Board had assured Pacoil that if it were to set up an oil blending plant in Fiji it would have "... 100% protection by the defendants against competition and that the defendants would prohibit the setting up of another factory, importation, sale or distribution of blending oil by anyone in Fiji".

Pacoil said it relied on these assurances and expended money to establish a factory, entered into supply contracts and imported machinery and apparatus. The Government of Fiji subsequently, on 4 October 1987, amended the ***Customs (Prohibited Imports and Exports) Regulations***. The Fourth Schedule to those Regulations comprised a list of goods, whose importation was prohibited other than by licence. By the amendment the oil and fluid product which Pacoil was proposing to manufacture was included in the Schedule – ***Customs (Prohibited Imports and Exports) (Amendment) (No 2) Regulations 1989***. Correspondence said to embody the relevant assurances was set out in the statement of claim including letters dated 30 September 1987, 9 November 1987 and 12 February 1988 from the Board.

Further letters were pleaded from the Board to Pacoil and included advice that its protection was to be altered in that "the Government has further approved licence protection for a period of three years with effect from 1 October 1992 for 50% of the

various lube products which your company intends to produce and market in Fiji".

Paragraph 13 of the statement of claim alleged that, having regard to the assurances given by the Minister and the Board, and the reliance placed upon them by Pacoil in acting to its detriment:

> *"... the actions and/or decisions of the defendants to reduce and alter the protection granted to the plaintiff and its period is wrong, unfair, unreasonable."*

Then it was asserted that the defendants, having given assurances and encouragement on which Pacoil, to their knowledge, relied and acted to its detriment "owed a duty of care to [Pacoil]". The duty of care so pleaded was:

> *"(a) to be reasonably careful not to do any act directly or indirectly which would destroy, alter, reduce or otherwise affect the encouragement, assurance and protection promised and/or granted by the Government;*
>
> *(b) that the defendants were under duty, after having given encouragement, assurance, promise and protection and getting knowledge that plaintiff relied on it, to take reasonable care to safeguard the interests of the plaintiff who was influenced, encouraged and assured by defendants' protection, advice and statements;*
>
> *(c) that the defendants were bound to do what is reasonably within their power, consistently with their promise and assurance to ensure that the assurance, protection and promise they made or granted to the plaintiff was not altered, affected or otherwise reduced."*

It was alleged that the reduction of the protection and its period had seriously affected Pacoil which had suffered loss and damage and would continue to suffer loss and damage by a direct result of the defendants' action and, alternatively, by acts over which the defendants had control and that they had encouraged and/or assisted "in the making of the said act". The relief claimed was expressed thus:

"(a) Declaration that the defendants are bound to honour, follow and continue with the promise and assurance of protection given to the plaintiff;

(b) Declaration that reduction of plaintiff's protection is wrong, unfair, unreasonable and/or in breach of defendants' solemn promise and assurance;

(c) Damages;

(d) Costs"

In the defence the Minister and the Board admitted many of the factual allegations but effectively denied their consequences and legal characterisation. In par 4 of the defence it was said:

> *"That the defendants deny the contents of paragraph 4 of the Statement of Claim as pleaded and in reply state that Government of the Republic of Fiji in 1987 gave protection against competition to Pacoil in respect of a waste recycling operation and not for oil blending industry. Further, that the defendants did not at any time encourage nor assure the plaintiff that they would prohibit the setting of another venture to carry out similar operation."*

A plea of estoppel was raised against this paragraph in par 1 of the Reply which said:

> *"As to paragraph 4 of the Defence the plaintiff says that the defendant is estopped from denying its approval for oil blending when the defendant through its agents and servants gave such approval to plaintiff orally and in writing and/or partly orally and partly in writing, and also encouraged the plaintiff to spend money to establish oil blending project and gave assurance for 100% protection."*

It appears from the pleading the only cause of action set up was negligence on the part of the Minister and the Board. Estoppel was raised in reply. There it had no intelligible role to play. The reply could simply have taken issue with or denied what was pleaded in par 4 of the defence. Nor did estoppel aid Pacoil in anyway in pleading its claim of negligence on the part of the Government.

The material facts

On 8 April 1986 Pacoil obtained approval from the Board for the establishment of a plant to "recycle" old lubricating oil into usable lubricants. The approval letter from the Board set out customs and income tax concessions, and stated that protection for the company against imports of lubricants would also be considered once Pacoil commenced production. The letter did not specify any level of protection. On 3 September 1987, the Secretary for Finance recommended to the Governor General that Pacoil's project should be supported by licensing imports of lubricating oil for a period of three years. Pacoil was advised on 30 September 1987 that protection for the recycling project would be by way of import licence.

On 24 November 1986 the Commonwealth Secretariat produced a report on the feasibility of a recycling unit in Fiji, and proposed that the operation incorporate "blending" as well. Oil-blending involves mixing various additives into a base of virgin mineral oil. Pacoil found that there was insufficient waste oil in Fiji to make a recycling project worthwhile, and in about 1988 the company decided to establish the oil-blending facility instead. Pacoil entered into commitments with overseas suppliers, and incurred expenses in developing its plant, and importing materials. The company proceeded in the belief that the Fijian Government would provide import protection for the blending operation.

A letter from the Board on 12 February 1988 was headed "Blending and Lubricating Oil Project". In it, the Board advised Pacoil that the State had approved "your above project", and set out a list of conditions and concessions. It ended with a statement that the State had approved protection by way of import licence on the importation of lubricating oil. A Legal Notice laying the foundation for that protection was eventually gazetted on 4 October 1989. It amended the 4th Schedule of the ***Customs (Prohibited Imports and Exports) Regulations 1986*** by adding an item comprising specified lubricants and oils. That Schedule prohibited the importation of listed goods, except in accordance with the terms of licences granted by the Permanent Secretary for Economic Development, Planning and Tourism.

After the Legal Notice was gazetted, Pacoil continued development of its blending facility, but in early 1992 learned of the possibility that the expected protection might not eventuate. This was because the change from recycling to oil blending had come to the attention of the Permanent Secretary for Trade and Commerce. On 12 March 1992 he wrote to Pacoil expressing concern about the major departure from the recycling project for which approval was originally given in 1986. He noted that most of the benefits to Fiji outlined in the Commonwealth Secretariat report stemmed from recycling, not blending, and advised that the Legal Notice did not provide Pacoil with an exclusive import licence. He sought further information justifying protection for the company. Pacoil replied on 17 March 1992, saying that it had never intended to deceive the State in any way, and that the Secretariat report dealt with two phases of production: Pacoil had simply embarked on the blending phase before the recycling phase because of financial viability.

On 1 April 1992 the Board wrote to the Ministry of Trade with a strong recommendation for continued protection. It noted that Pacoil had now established a factory, installed machinery and plant, and was ready to commence production, but now faced removal of protection. On 18 June 1992, the Board wrote to Pacoil advising that the State had approved the proposal for blending instead of recycling. Amongst other concessions, the letter included specific approval of licence protection for a period of three years. This was to take effect from 1 October 1992, and cover 50% of the various lubricant products that the company intended to produce and market in Fiji.

In response, Pacoil wrote to the Board on 24 June 1992 protesting that the 100% protection it had expected to receive had been reduced to 50%, and pointing out that this would drastically affect the planned operation. There was no reply. On 9 July 1992 Pacoil wrote to the Ministry of Trade saying it had no choice but to continue with the project, and that it would like to "work with the Ministry on the 50% import volume".

In August 1992, Shell Fiji Limited applied for judicial review of the decision to protect Pacoil claiming that the 50% protection arrangement between the Ministry of Trade and Pacoil was contrary to the Fair Trading Decree of 6 May 1992. The Ministry wrote to

Pacoil advising that in "order to stall the legal process" they had issued import licences for the final quarter of 1992 to all the oil companies in the usual way. Pacoil continued with steps to commission its plant. The exhibited correspondence conveys some loss of support for Pacoil from overseas suppliers and repeated postponements of a start-up date, but Pathik J held that it was ready to go into production by 19 April 1993.

The High Court judgment (liability)

Pathik J dealt with questions of liability in a judgment delivered on 14 March 1996. He found on the evidence that assurances were given to Pacoil after it was known that the plant would operate, at least initially, only in blending lubricating oils and that the development proceeded on the basis that the assurances were of 100% protection against competition from imports. The Judge accepted that the project was not viable without full protection.

The Judge referred to legal principles relating to estoppel and determined that the Government was precluded from resiling from the assurances of protection. He then referred to the issue of a duty of care claimed to be owed to Pacoil and to have been breached. After citing authorities directed to the principles governing liability in negligence (***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1963] 2 ALL ER 575, ***McNaughton Papers Group v Hicks Anderson*** [1991] 1 ALL ER 134, ***Williams v Attorney-General*** [1990] 1 NZLR 646, and ***Caparo Industries plc v Dickman*** [1990] 1 ALL ER 575), he held, on the facts, that Pacoil had established the existence of a duty of care owed to it by the Government to prevent the damage suffered as a result of the reduction of the percentage of protection. He found support for his conclusion in ***Bandari v Department of Local Government and the Environment*** (1993-95) The Manx Law Reports 47 as quoted in the Commonwealth Law Bulletin, July 1995, p874-6.

He found also that the duty was breached by failure in the approach of the Government to the matter of protection for Pacoil.

The Judge referred to the circumstances surrounding the decision to offer to grant the lesser 50% protection. He referred to the pressure on the Government with the threat of judicial review by reference to the Fair Trading Decree promulgated in 1992. He concluded:

> *"At that stage the Plaintiff had some difficulties in not being able to commission the plant and to go into production including the question of marketing. In other words there were numerous matters to be ironed out before commissioning. That being the situation, despite the fact that the defendants were committed to protection given to Plaintiff, in my view, it was not possible to completely stop import by refusing import licences to oil companies who were hitherto importing. So the next best thing in their wisdom was to grant 50% protection for three years to the Plaintiff. The question that looms large is as to what happens to the protection in these circumstances bearing in mind all the aforesaid expenditure in reliance upon 100% protection.*
>
> *In view of what I have stated in this regard the defendants are liable in damages up to the time the 50% protection was granted, namely 18 June 1992."*

We understand the Judge to have intended that damages would be assessed by reference to wasted expenditure incurred up to June 1992 in reliance on the assurances of import protection.

He granted a declaration that the reduction of the protection was "wrong, unfair, unreasonable and/or in breach" of the Government's "solemn promise and assurance". He directed also that damages be assessed up to 18 June 1992.

Court of Appeal judgment (liability)

Before the assessment of damages was undertaken in the High Court the Judge's findings on liability were tested in the Court of Appeal.

In a judgment delivered on 29 November 1996 the Court dismissed the Government's appeal and allowed a cross-appeal substituting 30 April 1993 for 30 June 1992 as the date

to which damages should be assessed. Because the Court of Appeal had been asked to review the trial Judge's findings of fact, the judgment contains a full review of the evidence and particularly the relevant correspondence. The Court held that the level of protection was never specified before the notification on 18 June 1992 that it would be 50%, but that full protection must have been in mind. The only different factual conclusion of significance the Court of Appeal reached was that the threat of judicial review proceedings by Shell was not a reason for the reduction of the protection to 50%.

The Court agreed that the Government was estopped from denying that Pacoil had been assured it would receive adequate protection for its oil blending project. As we have indicated with reference to the pleadings, estoppel in this context adds nothing to the finding of fact. It is worthy of note, however, that in dealing with estoppel and the extent to which the Executive Government could be constrained in the exercise of a statutory discretion by the doctrine of estoppel, the Court said:

> *"In the present case the Ministry of Trade recognized in 1992 that protection of the kind previously promised to Pacoil to ensure the viability of its business could be given without harming the public interest, the only question being as to the degree appropriate to achieve that end."*

The Court then proceeded to consider whether, in reaching its decision to reduce the protection to 50%, the Ministry owed a duty of care to Pacoil of the kind pleaded. After citing *Caparo Industries Plc v. Dickman, [1990] 2 AC 605 Rowling v. Takaro Properties Ltd* [1988] 1 All ER 163, *Comeau's Sea Foods Ltd. v. The Queen* (1995) 123 DLR (4th) 180 and *Meates v. Attorney General* [1983] NZLR 308, the Court concluded that there was the necessary "proximity" between the Ministry of Trade and Pacoil and that, in light of their dealings, the Ministry was under a duty of care to do what was reasonably in its power, consistently with its other responsibilities, to protect Pacoil. But it was held, contrary to the view of Pathik J, that there had been no breach of that duty in fixing the level of this protection at 50% for three years. The Court said:

> *"We are satisfied that when the Ministry of trade became aware of the significance of the change in the project from oil recycling to oil blending, with its anti-competitive implications, it acted reasonably and fairly in*

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calling for further submissions from Pacoil, which had the strong support of the Board. It made a decision in which the matters they raised were taken into account and weighed up alongside the public interest, which was rightly seen as an important consideration. The Fair Trading Decree of May 1992 reflected a new environment of competition and consumer protection. While the appellants disclaimed any reliance on that Decree as part of their case on appeal, it was nevertheless impossible for any state agency, charged with exercising a discretion in the field of Trade and Commerce, to ignore those considerations. We are satisfied that they were rightly taken into account in the decision to grant 50% protection."

The Court went on, however, to find a different breach of the duty of care as follows:

"But that is not the end of the matter; that protection was never implemented because of Shell's legal proceedings. Such a development from a competitor was within the Ministry's contemplation when the decision to give protection was made only a few weeks earlier; as Mr Rokovada said, they had in mind at that time the possibility of a court challenge, as well as fair trade and consumer interests. He could not explain what had happened about those proceedings and the inference is irresistible that faced with this challenge, the appellants simply abandoned the decision to grant protection for oil blending. We are satisfied that by doing so they were in breach of their duty of care to the respondent, which has suffered loss as a result."

In light of that finding, and on consideration of the cross-appeal against the trial Judge's limitation on damages to 30 June 1992, the Court concluded:

"We have concluded that the appellants' liability to pay damages arose essentially from the failure to implement the protection granted in June 1992. By the end of April 1993 it must have been clear that the appellants had no further intention of continuing that protection and the Company could justifiably form the view that it had been effectively withdrawn. Accordingly, adopting Pathik J's approach, we would substitute 30 April 1993 as the end of the period up to which the appellants should be liable for damages."

The Court made no mention of the factual finding of the trial Judge that the oil blending facility would not have been viable with only 50% protection. That finding was accepted by counsel in argument in this Court.

High Court judgment (damages)

In a lengthy judgment delivered on 16 April 1999, Pathik J undertook an assessment of damages. He awarded as special damages a total of $2,214,736 for principal and interest on loans raised by Pacoil to fund the project. For general damages he awarded as loss of profits (less tax) for three years the sum of $2,757,799 and for loss of use of the factory building from 18 June 1992 to 30 April 1993, including interest, $50,330.

Court of Appeal judgment (damages)

Both sides appealed to the Court of Appeal on the assessment of damages. That Court made some changes to the interest rates to apply to the special damages assessed in the High Court. With reference to the general damages, the Court determined that Pathik J had misconstrued the Court of Appeal's earlier judgment on liability and so had assessed damages on an incorrect basis. The Court of Appeal therefore made its own assessment of the value as at 30 April 1993 of the business with an expected revenue stream protected by import licences to the extent of 50% for three years. In doing so it did not advert to the finding of Pathik J in his liability judgment that with 50% protection the business would not have been viable. The Court fixed general damages of $750,000. There was also a variation to the High Court assessment to allow for a failure by Pacoil to mitigate its loss.

The submissions on appeal

The main thrust of the appeal to this Court on behalf of the Government was on liability. It was submitted that the State can have no liability on the cause or causes of action as pleaded. In the course of argument Mr Shankar, for Pacoil, confirmed that his case did not rest on estoppel as an independent cause of action. It will be apparent from our earlier remarks that we consider this acknowledgment was properly made. The focus of the argument, therefore, became the cause of action in negligence. For Pacoil, Mr Shankar submitted that the Court of Appeal was wrong to depart from the decision of Pathik J. He went further and argued that his client is entitled to succeed in respect of the failure by the Government to provide 100% import protection as promised. He also made extensive

submissions on the subject of damages but, because of the view we have formed of the case, it is unnecessary to address them.

We were referred to a large number of authorities from many jurisdictions. Many represent the application of established principles to particular facts. A number reflect the differing approaches through common law countries to the governing principles in establishing a duty of care in novel situations. We do not consider such differences in approach affect the result in this case.

Decision

It is important to emphasise that the claim in this case is not in contract. At no time has it been suggested that the Government or any of its agencies undertook any obligation enforceable in contract to provide protection by way of import licensing for Pacoil's business.

Nor is this a case involving judicial review on public law grounds of any decision of a government official. It is no part of this Court's role to comment on whether, had a timely application for review been made, relief would have been granted.

We are concerned with a claim in the tort of negligence: for breach of a duty of care said to be imposed upon the government in introducing and operating an import licensing system in respect of lubricating oils.

It appears that no regulation prohibited importation of oil until the Notice of 4 October 1989 which amended Schedule 4 to the ***Customs (Prohibited Imports and Exports) Regulations.*** Schedule 4 deals with the prohibition on importation except under and in accordance with the terms and conditions of a licence granted by the Permanent Secretary for Economic Development, Planning and Tourism. The Customs Act 1986 authorized the making of regulations "to prohibit or restrict the importation into Fiji... of any goods of any

description" (s64) and to do so conditionally (s64(2)(c)). In *Murphyores Incorporated Pty Ltd. v. The Commonwealth* (1976) 136 CLR 1 Stephen J said (at 14):

> *"The very nature of the power to relieve against a prohibition imposed upon the import of classes of goods itself suggests that it may be exercisable having regard to a wide spectrum of considerations."*

See also per Mason J at 24.

These considerations would include economic and environmental factors applicable at the time the power is exercised.

Pacoil's case is that having given an assurance or promise of protection, and having put in place the necessary empowering regulation, the Government breached a duty of care by failing to exercise the licensing power in favour of Pacoil when it knew Pacoil had acted in reliance on the expected protection. Giving effect to the protection would have required the grant of licences to Pacoil and the denial of licences to parties that had been importing lubricating oils up to that time.

It is important to identify the nature and scope of the duty contended for. The Court of Appeal appears to have formulated it by reference to the following dictum of Cooke J (as he then was) in *Meates v. Attorney-General* (p.379):

> *"I think that there can be occasions when a reasonable person, on receiving such a request, promise or assurance from someone acting within the particular sphere of his authority, is entitled to assume that the speaker has taken and will take reasonable care to safeguard the interests of the person he has sought to influence, if that person acts as suggested. And if the speaker in authority has indicated that certain assistance or other benefits will follow, he will be bound to do what is reasonably within his power, consistently with his other responsibilities, to bring about that result. This is not an absolute duty or a guarantee, which belongs to the realm of contract. It depends simply on what a reasonable man would regard as his duty to his neighbour."*

The Court of Appeal considered that the duty upon the Permanent Secretary for Economic Development, Planning and Tourism, arising as a result of assurances given, was to do what was reasonably within his power, consistently with his other responsibilities, to grant or withhold licences to bring about a result consistent with those assurances.

The circumstances of the case in which the dictum of Cooke J was expressed were different from those with which we are presented. In ***Meates*** the claim was in respect of negligent and misleading statements, although Cooke J thought it artificial to distinguish between statements and other actions. While he made reference to the need to be alert not to pitch the standard so high as to interfere in policy-making or inhibit the reasonably free and effective functioning of the administrative system, he did not address the extent to which a duty of care might be imposed as a fetter on the exercise of a statutory power.

In the present case the Court of Appeal took the view that because the Government had offered Pacoil 50% protection, it must have considered that was consistent with all competing considerations to be taken into account in exercising the licence granting power. That offer was made on 18 June 1992. We do not think it necessarily follows that the considerations would have been the same in 1986-88 when the representations grounding the alleged duty were made or in April 1993 when the breach of duty was said to have occurred. To hold the Permanent Secretary to undertakings given months, and perhaps years, before would be to constrain his or her licensing discretion and limit his or her ability to consider prevailing circumstances viz *Comeau's Sea Foods v. The Queen* (1997) 142 DLR (4th) 193,205. That is not a situation to which Cooke J was adverting.

That it would constrain or fetter the exercise of a statutory power or discretion points away from the appropriateness of a duty of care. Accordingly we consider it necessary to look at the matter more broadly.

It was always intended from as early as 1986 that the protection the Board said had been approved would be provided only once Pacoil commenced commercial production. In this context, so much of Pacoil's case as relies upon the 1986-88 correspondence as the

basis for a duty of care must amount to some assurance creating a duty about how the regulation-making power might be (a) invoked and (b) implemented. According to Pacoil, the "approval" was tantamount to an open ended promise to allow Pacoil (when it was ready to do so) to import oil and not to allow anyone else to do so.

A duty of care to make delegated legislation in favour of a private party is inconceivable. It is always difficult to establish a duty of positive action. A *fortiori* a duty to deliver an economic benefit as distinct from prevent damage to an existing property or other right. The duty here posited has the additional problem of fettering a law-making function that is multi-factorial and dependent on policy issues. It would not be fair, just and reasonable to impose a duty in these circumstances. The 1986-88 correspondence was open ended as to when protection would be given and as to its duration and details.

This was not exactly the duty said to have been breached in the present case, but it is difficult to see why the facts made any difference in principle.

What changed after 1989?

Pacoil completed its oil-blending factory in 1993. This was well outside the 12 month period stipulated in 1986 and outside the extension foreshadowed in the Ministry's letter of 6 December 1991. When the change to oil-blending came to the attention of the Permanent Secretary he wrote to Pacoil about it on 12 March 1992. He indicated "concerns (that) may impinge upon the import licence arrangement". And he pointed to significant deviations from the original spirit of the approval and the conditions of the concession outlined in the Board's letter of April 1986. Pacoil disputed many of the allegations in its letter of 17 March 1992, but at the very least it had been put on notice that its position was precarious.

On 25 April 1992 Pacoil wrote to the Minister arguing its case for import licence protection, providing a history of what it had done and referring to earlier assurances .
The trial Judge treated the Board's letter of 18 June 1992 as the breach of an antecedent

duty to provide protection to 100%. Subject to various conditions, the letter states:

> *"The Government has further approved licence protection for a period of 3 years with effect from 1st October 1993 for 50% of the various lube products which your company intends to produce and market in Fiji."*

Pacoil wrote protesting on 24 June 1992 and 9 July 1992. The Ministry gave a non-committal reply and asked for up to date information. Pacoil supplied some information in August 1992, still pressing for an assurance about the licensing position. On 17 August 1992 the Ministry informed Pacoil that Shell Fiji Ltd. had applied for judicial review and that this had "legal and liability implications upon Pacoil given that we have entered into an agreement to protect your company, which Shell's solicitor claims is contrary to the Fair Trading Decree." This letter further advised that in "order to stall the legal process" the Ministry had issued import licence for the final quarter of 1992 to the oil companies in the normal way. And in the meantime it was holding discussions with the Attorney General's Office to find a solution. The Court of Appeal described this letter as the "final blow." The letter sought further information from Pacoil. Pacoil replied complaining about the variation from the original 100% protection.

The Court of Appeal considered the breach of duty was in failing to provide protection to the 50% level proposed. By then the regulation was in force so that the breach was said to be failure in implementation. But we can see no difference in principle. It is at the point at which licences are granted that the discretion is exercised by reference to prevailing circumstances. The dynamics of economic conditions and market behaviour necessarily dictate a wide discretion.

There was no basis for a duty to pass and then not to change the regulation. There was no contract to that effect, nor would such a promise be valid. A government cannot by promise or representation estop itself from changing the law (see generally ***Laker Airways Ltd. v. Department of Trade*** [1977] 1 QB 643 at 707, 709,728; ***Attorney-General (NSW) v. Quin*** [1990] 170 CLR 1 at 17-18 per Mason CJ). Similarly a government cannot have a discretion conferred to provide flexibility in the execution of economic policy constrained

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by the imposition of private law duties. That may be said even more emphatically when it is contended that the constraint is absolute (100%) and for a period of years.

In the *Comeau's Sea Foods* case Major J for the Supreme Court of Canada said (at 204).

> *"Where a Minister of the Crown is required by statute to exercise his or her discretion in reaction to immediate and pressing policy concerns, the Legislature can usually be taken to have intended that he or she be ultimately responsible to political authority. In most instances the issuance of the licence would be expected to follow its authorization in short order. Nonetheless, the time between the two does permit the Minister to assess his authorization in light of government policy or a change in circumstances.*
>
> ... ...
>
> *The sole ground of negligence alleged by the appellant was breach of the "defendant's statutory duty." In light of my conclusion that the Minister had the continuing authority to revoke the authorization and did so legitimately for the purpose of implementing government policy, the appellant cannot establish any duty on the Minster to actually issue the licences previously authorized."*

We agree. The Government cannot disable itself or hinder itself in performing a statutory duty or exercising a statutory discretion. This is subject to the possible exception that estoppel may be available arising from Executive conduct amounting to a representation if holding the Executive to its representation would not significantly hinder the exercise of the discretion in the public interest (***Quin's Case*** at 17-18). The case was not pleaded or run in that way. And even had it been so pleaded or conducted it could not support a cause of action sounding in damages.

We consider that the duties of care found in the courts below to have been breached are incompatible with the unfettered exercise of the relevant statutory power (to make a regulation) or delegated power (to grant an import licence).

The Court of Appeal approached the question of duty of care by reference to the principles in ***Caparo Industries v. Dickman***. Foreseeability of damage and "proximity" were satisfied.

The critical issue was whether it was fair, just and reasonable to impose a duty "to take reasonable care not to reduce the protection promised so as to render the project non-viable."

In ***Barrett v Enfield London Borough Council*** [2001] 1 AC 550 Lord Browne-Wilkinson said (at 559) that the decision as to whether it is fair, just and reasonable to impose liability on a particular class of would-be defendants depends on "weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered."

Factors involved include the availability of alternative remedies and the need to proceed incrementally and by analogy with decided categories [see *X (Minors) v. Bedfordshire CC* [1995] 2 AC 633 at 751]. In the present case Pacoil did not assert a contractual claim, nor did it seek judicial review. We are not suggesting that either remedy was available in the circumstances, but they are remedies that address the nub of Pacoil's complaint more directly than a tortured duty of care.

The present case does not involve damage to Pacoil's property. The essential complaint relates to the failure to deliver a benefit in the absence of any contractual or statutory obligations to do so. Pacoil had no right to mandamus to compel the making of the Regulation or the granting of the licence. Nor did it have any public law right to prevent the Government from granting import licences to Pacoil's competitors.

Not only were there no rights in public law, the duty of care relied upon necessarily conflicted with the due exercise of the Government's discretion in the public interest from time to time to (a) pass the regulation (b) repeal it and (c) decide when and to whom import licences might be granted and on what conditions.

It is not necessary to determine the validity of an exclusive licence had it been granted to Pacoil despite the protests of Pacoil's competitors and their invocation of the Fair Trading

Decree. Matters never got that far. For Pacoil to establish a breach of duty in June 1992 or any later time (because Pacoil was unable to take up any licence before this) Pacoil must first show that the Government owed a private duty of care the content of which was wide enough to place the Government under an obligation to grant an exclusive import licence. No such tortious duty ever existed. Since that was the only basis upon which Pacoil put its case (and we do not imply that any other basis was open), the judgment for damages in its favour must be set aside.

Having reached this view, it is not necessary to consider the question of relief. We add, however, that even if the breach of duty found by the Court of Appeal had been upheld – that of failure to provide protection to 50% - Pacoil would have faced the insuperable difficulty of showing a causal link between that breach and its loss. That is because of the finding that with only 50% protection the project was not viable.

We therefore make the following orders:

In Appeal CBV0002/2000 (Pacoil Fiji Ltd. v. The Attorney General of Fiji Minister for Justice)

(i) Appeal dismissed with costs.

In Appeal CBV0004/2004 (The Attorney General of Fiji Minister for Justice and Anor v. Pacoil Fiji Ltd.):

(i) Appeal Allowed.

(ii) Set aside the Judgment for Pacoil for $2,778,088 and costs on the amount in the High Court ordered by the Court of Appeal on 7 January 2000.

(iii) In lieu thereof, order that Pacoil's claim be dismissed with costs.

... ...
Rt. Hon. Justice Thomas Gault
Judge of Supreme Court

... ...
Hon. Justice Keith Mason
Judge of Supreme Court

SUPREME COURT OF FIJI
SUVA

... ...
Hon. Justice Robert S. French
Judge of Supreme Court

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Messrs. G.P. Shankar and Company, Ba for the Appellant
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PACOIL FIJI LIMITED V. ATTORNEY-GENERAL

SUMMARY

The document I am reading is not the whole of the Court's judgment but a summary intended to help the parties and the public understand the decision.

The case relates to events between 1986 and 1993. Pacoil Fiji Limited, believing it had assurances from the Fiji Trade and Investment Board that protection from competition would be available, developed a facility for blending lubricating oils. To do this it borrowed heavily and invested time and money in assembling the necessary equipment and technical information.

Before it was ready to commence production, the nature of the proposed facility was changed from oil re-cycling to oil blending. Originally, for re-cycling the raw material was to be waste oil already in Fiji. The blending process was intended to use as raw material imported base oil. The change was seen to have implications bearing upon the grant of import licences for lubricating oils. As a result, the Government advised that protection from competition would be provided only to the extent of 50% of the products Pacoil proposed to produce and market. That decision proved unsatisfactory both to Pacoil and to competing importers. In the end licences were granted to competitors as in the past. Pacoil did not go into commercial production.

Pacoil sued the Government agencies contending that after having induced the development by its assurances of protection, the Government was under a legal duty of care to protect Pacoil in giving effect to the licensing system.

In the High Court, Pathik J gave judgment for Pacoil and awarded substantial damages for losses incurred through reliance on the assurances of protection.

In the Court of Appeal the judgment in favour of Pacoil was upheld but varied with a reduction in the damages awarded.

For the reasons set out in the judgment the Supreme Court has determined that, in the absence of any contract, the law does not impose a duty of care under the law of negligence upon a government agency on which there has been conferred the power to grant import licences.

The discretion to grant licences to import must be exercised to give effect to economic and other policies having regard to prevailing conditions. It would be inconsistent with the need for that wide discretion to impose by law a duty to grant or withhold licences over a period into the future for the benefit of a particular party.

The Court has therefore set aside the judgment of the Court of Appeal in favour of Pacoil. The full reasons are set out in the judgment which I now formally publish.

As there were two appeals, one on each side, the appeal brought by Pacoil is dismissed. The appeal by the Attorney-General, The Minister for Justice and the Fiji Trade and Investment Board is allowed. In each case judgment is entered for the Attorney General, The Minister and the Board.