IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA 1/10

BETWEEN	**APEX AGENCIES LIMITED**
	Plaintiff
AND	**THE ATTORNEY GENERAL on behalf of the GOVERNMENT OF THE COOK ISLANDS**
	Defendant

Hearing: 21 and 22 April 2010

Appearances: PJ Dale (New Zealand Bar) and A Manarangi for Plaintiff
Attorney-General (Mr Rasmussen), Solicitor-General (Mr Elikana) and A Frame (New Zealand Bar) for the Crown

Judgment: 19 May 2010 (NZT)

JUDGMENT OF THE COURT

Introduction

[1] On 11 December 2009, the plaintiff (generally referred to as *"Toa"* which label will be used in this Judgment) and the defendant (*the Crown*) entered into an agreement to settle certain litigation (*Settlement Agreement*). In the words of Mr Frame's submissions for the Crown (amended to correct typographical errors in the original):

> *"1.2 The Settlement Agreement was the result of a mediation recommended to Government by Mr Kit Toogood QC, and then Minister of Finance, Sir Terepai Maoate, and he and Mr Toogood were authorised by Cabinet on 30 November 2009 to pursue and conclude it. The Settlement contained two principal components. First, a payment by the Crown to TOA of $1.75 million in full settlement and, secondly a purported 'guarantee' that the Crown would top up the income of TOA in such way that TOA would make a profit of $1.2 million for each of the ensuing eight years."*

[2] The Crown does not seek to impugn the good faith of the negotiating teams that arrived at the Settlement Agreement and expressly says this in its submissions. The Crown acknowledges that the negotiators were attempting in good faith to settle Toa's claim against the Crown and did so honestly. On the materials before the Court that seems to be an entirely appropriate concession.

[3] The Court does not, in this Judgment, purport to determine whether the settlement was, from a commercial stand-point, a good or bad deal. Rather, the Court is construing a particular provision (clause 6(c) – described in Mr Frame's submissions above as the guarantee) in the Settlement Agreement and determining whether it is lawful or not. If it is unlawful, the Court then has to determine what consequences follow. While the court is not examining the quality of the deal, it will be necessary to examine the factual matrix within which the Settlement Agreement was reached. The reasons for this will be explained below. This exercise, however, is not a back-door means to assess the commercial efficacy of the Settlement Agreement.

[4] This Judgment, in exploring the factual matrix, will need to expose some of the logic which lies behind the Crown's entry into the Settlement Agreement. In fact, there were three different settlement agreements all entered into at the same time although this case is only directly concerned with one of them. A third party, Triad Pacific Petroleum Limited (*Triad*) was also involved in the settlement process and the background to this is discussed in the next paragraph. Triad is a competitor of Toa.

[5] In December 2008 the Crown had entered into a Heads of Agreement to purchase the tank-farm (and associated assets and operation) owned by Toa for $5.16m. The process leading to the Heads of Agreement is explained in a Judgment of this Court (see paragraph [42] below) issued in the judicial review proceedings now discussed. In early 2009 Triad sought judicial review of the Crown's decision-making in relation to this acquisition. Toa was later joined as a party to that litigation. In the meantime, Toa foreshadowed a substantial damages claim against the Crown for allegedly breaching the Heads of Agreement (which the Crown accepts is binding on it). The Heads of Agreement has not been settled. As will be seen shortly, it was a term of the Settlement Agreement that the Heads of Agreement was to be cancelled. Toa's foreshadowed claim was said by Toa to be worth

approximately $10.2m (the Crown does not accept this figure). The various settlement agreements entered into in December 2009 were intended to be a full and final settlement of all of these matters.

[6] The primary focus in this proceeding is upon the meaning of clause 6(c) in the Settlement Agreement entered into between the parties to this litigation. This is set out below in paragraph [27]. Both counsel tended to refer to this as a top-up provision (the Crown topping up Toa's profits as required). Notwithstanding that the Crown entered into the Settlement Agreement, it now says that clause 6(c) is unlawful because it is prohibited by section 59, Ministry of Finance and Economic Management Act 1995-1996 (*the Act*). Section 59, and its companion section, section 60, are set out at paragraph [54] below. Mr Frame drew attention to "The Public Law of Government Contracts" by ACL Davies who, at page 106, argues that if an authority subsequently realises it has exceeded its powers, it is only appropriate that it should raise the point. The Crown seeks to sever clause 6(c) from the Settlement Agreement but otherwise to uphold the terms of the settlement.

[7] Toa takes a different approach. This will be summarised below (paragraph [18] et seq). Contrary to the Crown, it argues that the Settlement Agreement stands or falls in its entirety. That approach potentially requires the Court to address a Consent Judgment entered by the Court in this proceeding on 23 March 2010. The Court then entered Judgment against the Crown in the sum of $1.75m being the first of the *"two principal components"* identified in paragraph [1] above.

[8] The case raises (directly or indirectly) interesting and sometimes difficult issues in relation to contracting by the Crown, contractual interpretation, statutory interpretation, the nature of a guarantee, ultra vires, severability of an unlawful provision in a contract, and setting aside a Consent Judgment. Ultimately, though, as with many Judgments, the dispute is resolved by reference to a number of straightforward conclusions. For a summary, see paragraphs [76] and [95] below.

Procedural history

[9] On 11 March 2010 Toa issued this proceeding on the basis that the sum of $1.75m had not been paid by the Crown in terms of the Settlement Agreement. The proceeding also referred to an anticipated dispute in

relation to clause 6(c). Toa sought an urgent hearing which was granted on 23 March 2010 (NZT) following a telephone conference with counsel.

[10] At the same time, and by consent, Judgment was entered against the Crown in the sum of $1.75m. This Judgment expressly reserved issues of interest and costs, together with the so-called guarantee, for further argument. The primary purpose of this Judgment was to avoid the need for a formal appropriation of the settlement monies (because Parliament was not sitting).

[11] Toa made an application for discovery as a result of which a Cabinet Minute was disclosed by the Crown. This is discussed below. The Crown retained privilege in some written legal advice received by it from Mr Toogood QC. This privilege has not been waived.

[12] In its Minute (No 6) issued 16 April 2010 the Court directed that the hearing should proceed on an entirely open basis and that the media should have access to the Court file. That right of access was exercised and the case was subsequently fully reported in the media.

[13] A timetable was agreed and the briefs of evidence of Messrs Porter and Leith (on behalf of Toa) were exchanged. The Crown did not prepare and exchange any briefs, and did not ultimately call any evidence.

[14] An agreed bundle of documents was prepared which contained two of the three settlement agreements together with the Heads of Agreement whereby the Crown agreed to purchase Toa's tank-farm.

[15] Detailed submissions and case books were supplied prior to the hearing.

[16] At the outset of the hearing, the Court was addressed by the Attorney in his capacity as principal law officer, representing the public interest. The Attorney submitted, *"the guarantee* [clause 6(c) of the Settlement Agreement] *purports to expose the public revenues of the Cook Islands to an unlimited and unappropriated contingent financial liability and is of a character that demonstrates why Parliament has seen fit to restrain and restrict the capacity of the Executive Branch of Government to enter into such agreements".* The Court is grateful for the Attorney's attention. He was given leave to withdraw following his statement and the hearing proceeded in the usual fashion thereafter.

[17] The Court is also grateful to counsel for the efficient manner in which they have prepared for trial at very short notice. Submissions were of a very high order and of considerable assistance. The parties have expressly requested that the Court produce its Judgment as soon as possible. No discourtesy is intended to counsel if all arguments are not fully discussed. The Court has focused on those arguments which appear to be central to the issues in dispute.

Overview of argument

[18] Toa argues that clause 6(c) is not a guarantee within the contemplation either of section 59 or section 60 of the Act. Toa uses *"guarantee"* in the strict legal sense of being a collateral contract in relation to another's liabilities. Mr Dale said: *"In essence, a guarantee is a binding promise of one person to be answerable for the debt or obligation of another if that other defaults"*. He refers to Lord Diplock's speech in *Moschi v Lep Air Services Limited* [1973] AC 331, 348. Toa submits that this is the sense of *"guarantee"* as used in both of sections 59 and 60.

[19] That, Toa says, is the end of the matter. No issue of lawfulness arises by reference to clause 6(c). Consequently, the Settlement Agreement is lawful in all respects and can be enforced by it.

[20] If it is wrong as to that, Toa argues clause 6(c) is a guarantee within the contemplation of section 60 (it says it is not caught within the prohibition of section 59 because that does not prohibit the Crown – as opposed to a person - from giving a guarantee). Section 60 provides that a guarantee can be valid if certain conditions are met. Although there is no direct evidence that these conditions were satisfied, Toa argues, in various ways, there is a proper basis for the Court to conclude that the conditions were satisfied.

[21] Finally, Toa argues that if the section 60 conditions are not satisfied, then clause 6(c) is unlawful and the entire Settlement Agreement falls away. Clause 6(c) cannot be severed. Toa would then be able to continue with its foreshadowed claim against the Crown for breach of the Heads of Agreement. The settlement with Triad does not prevent that occurring.

[22] The Crown, in reply, says that clause 6(c) contains a guarantee in the following sense of the word: *"An assurance to someone that in the event of something or things happening, the position of that person would be*

preserved in some specified way at the expense of the person giving the assurance." For the avoidance of doubt, the Court notes that the Crown does not allege that clause 6(c) is an *"indemnity"* as that term is used in section 59 of the Act. The Court does not know the reasons which lie behind this decision. Suffice it to say, the Crown squarely puts its case on the basis that clause 6(c) is a guarantee prohibited by section 59 of the Act.

[23] The above definition (see [22] above) was one of two alternative definitions of *"guarantee"* put forward by the Crown and was described as the wider of the two. The narrower, more legalistic, meaning was said to be that of a collateral contract of the sort contemplated in section 60. The contrast is explored in paragraph 3.1 of Mr Frame's submissions for the Crown. The Crown accepts that clause 6(c) does not fall within the narrow definition of *"guarantee"*. The narrow definition put forward by the Crown in relation to section 60 appears to be the same, or virtually the same, as that contended for by Toa in relation to both sections 59 and 60.

[24] The Crown says section 59 results in the obligation contained in clause 6(c) being unlawful (being *ultra vires* the Crown). Section 60, it then says, cannot apply, because clause 6(c) is of a different character to the guarantee contemplated by section 60 (which is of the narrower variety). In other words, the Crown argues that *"guarantee"*, although used in both sections 59 and 60, carries a different meaning as between the two sections.

[25] Consequently, says the Crown, clause 6(c) is unlawful because it is prohibited by section 59 and there is nothing to save it (section 60 cannot apply to it). Clause 6(c) should be severed from the Settlement Agreement because the Settlement Agreement remains *"coherent"* without it.

Interpreting a contract

[26] The Settlement Agreement, of course, is a contract and is to be interpreted in accordance with the usual authorities. The Court was not specifically addressed in relation to those authorities but it is common ground between counsel that New Zealand authorities such as *Boat Park v Hutchinson* [1999] 2 NZLR 74 leading up to the recent decision of the Supreme Court in *Vector Gas v Bay of Plenty Energy* [2010] NZSC 5 are relevant. It is clear from these authorities that the Court should investigate the factual matrix within

which a contract is concluded. This will help place in context the meaning of any provision, disputed or otherwise.

[27] Relevant provisions in the Settlement Agreement are now set out:

- Introduction 1: *"The Government and TOA entered into a Heads of Agreement dated 4th December 2009 for the sale and purchase of TOA's fuel depot on Rarotonga."*

- Introduction 2: *"Triad Pacific Petroleum Limited ("Triad") issued proceedings in the High Court of the Cook Islands under Plaint 2/09 to which the Government (represented by Deputy Prime Minister Sir Terepal Maoate and several government officials and agencies) were parties subsequently joined by TOA ("the Proceedings")"*

- *"1 It is agreed that the Heads of Agreement shall be cancelled and to have, and have had, no effect whatsoever."*

- *"4 The Government shall pay to TOA the sum of $1,750,000 (the "Sum") in full and final settlement of any claim whatsoever that has been made, or may have been made by TOA arising out of or in connection with the Heads of Agreement, in the following manner:*

  (a) the Sum shall be transferred to an account with the ANZ in the name of the Government on or before 18 December 2009;

  (b) the Government shall direct the ANZ -

    1. that the sum be held for the benefit of TOA;

    2. that the sum shall not be withdrawn from the account without the consent of TOA;

    3. on or before 31 March 2010, the Government will instruct ANZ Bank that the Sum be transferred to TOA as TOA directs."

- *"6 As soon as practicable, (in any event not later than 31 March 2010) TOA and the Government shall enter into a new Fuel Pricing Template ("the New Template") incorporating the terms of the current Fuel Pricing Template between the Government, TOA and Exxon*

Mobil ("the Old Template") as far as may be applicable and subject to the following variations:

(a) The terms of the Old Template shall be varied to include such terms of the Pricing Template agreements attached as schedules 1 and 2 to the Heads of Agreement together with such other terms as the Parties deem appropriate to provide certainty in the application of the New Template and the process for review thereof.

(b) The Parties shall agree on the detailed terms of an agreement for the application of the New Template.

(c) The New Template shall replace the 20% ROI guarantee and related provisions with a guaranteed minimum EBITDA (Earnings Before Interest, Tax, Depreciation and Amortization) of $1,200,000 per annum and such other provisions as may be necessary for the application of the guarantee, including, but not limited to:

(i) payment of an advance on the guarantee, subject to bi-monthly reconciliation of $100,000 per calendar month

(ii) the New Template shall be in force for a period of 8 years

(iii) Exxon Mobil shall not be a party to the New Template

(iv) TOA shall not, and TOA shall procure that Exxon Mobil shall not, make any claims or take any proceedings whatsoever against the Government or any of its officers, employees or agents, arising out of or in connection with the operation, application or interpretation of the Old Template or any predecessor fuel pricing arrangements."

[28] The Settlement Agreement was signed *"Sir Terepai Maoate on behalf of the Government of the Cook Islands"*.

[29] Notwithstanding that clause 6(c) uses the expression *"guarantee"* on three occasions counsel are agreed the use of the word itself is not determinative.

The Court is to look at the substance of the obligation. For all that, the Crown was inclined to emphasise the use of the language, against the background that lawyers were involved in drafting the Settlement Agreement. The Court believes this is only of limited relevance. Rather, the Court must determine the substance of the obligation.

[30] The expected operation of clause 6(c) was explained both in evidence and by way of submission. It can be summarised:

[a] if Toa makes a profit in excess of $1.2m in a given year it will repay to the Crown that excess;

[b] if Toa makes a profit of $1.2m in a given year that will be the end of the matter (it will keep the profits);

[c] if Toa makes a profit of less than $1.2m in a given year (or even a loss) the Crown will top-up the payment, up to a maximum of $1.2m. That is, the Crown's potential liability could exceed $1.2m in a given year.

[31] The above summary refers to Toa making a profit. In actual fact, the wording in the Settlement Agreement is more technical. The accounting expression *"EBITDA"* is used. That is not a synonym for net profit. Nevertheless, and for the purposes of summary, it is sufficient to speak of Toa's profit in order to explain the operation of the clause. That was how it was approached by counsel in argument.

[32] One way for the Crown to avoid paying the top-up and/or to ensure any excess is paid to it from Toa is to ensure a sufficient volume of fuel is purchased by it through Toa. Toa (both by counsel and in Mr Porter's evidence) is quite candid that that is the purpose of the provision. Shortly prior to the Settlement Agreement Toa was told that the Crown had entered into a contract with another party (understood to be Triad) for the purchase of fuel. Toa was concerned that unless there was some financial incentive on the Crown, the Crown would not purchase fuel through Toa.

[33] At this point it is necessary to explain the fuel template which is referred to in clause 6 of the Settlement Agreement. This was a pricing model in place up to and including the settlement and which the settlement was intended to supersede. The Court was shown a copy of the fuel template as at June 2006. There are three parties: Mobil Oil Australia, Toa, and the Government

Fuel Price Review Committee. The template is a complex model and the full workings of it were not explained to the Court. Mr Leith gave some evidence as to its operation but the Court does not pretend to have a full understanding of its operation. A full understanding does not appear to be necessary to address the issues in the present case.

[34] Provisions of potential relevance are as follows:

- *"7. ROI: In view of the impending sale the ROI will remain unchanged at 25% before tax until after the sale to TOA is completed when it will change to 20% before tax."*

- *"13. Compensation for lost business: This issue relates to the situation where the dominant supplier loses volume to a competitor and as a result of the same costs being spread over a lower volume and market price increases. It was agreed that this is a complex issue that could only be addressed by a review of the overall fuel policy for the Cook Islands and should be left to the Review committee that is to be established by Government to consider."*

- *"17. Premium paid by Toa to Mobil of US$6.40 per barrel: There is an arrangement in place between Mobil and Toa that Toa will pay a premium to Mobil of US$6.40 per barrel on the continued supply of fuel after the Mobil/Toa sale. This premium which at current rates equates to about 6.49cents per litre is regarded as security for the continued supply and the continued application of the basis of this template. It also acknowledges Mobil's role which previously was dealt with within their ROI, is now excluded from the calculations. The premium acknowledges that TOA has no expertise in going direct to the market and accordingly represents also a procurement cost, which previously Mobil absorbed and recouped in their ROI. The committee has been advised by both Mobil and Toa that despite the payment of the US$6.40 per barrel premium there are savings to be made under local ownership and these should be reflected in future regulated prices. For the purposes of the template this premium shall be included in the LCT costs and shown as LCT Freight cost and Premium."*

[35] The expression *"ROI"* used in clause 7 is a reference to a return on investment. The effect of clause 7 is to give Toa a fixed return on its

investment. It was explained to the Court that such a provision is necessary to ensure the supply of fuel within a small economy. Without such fixed returns it might be difficult to induce potential participants to supply fuel within the Cook Islands.

[36] Mr Dale argues that the 20% guarantee return on investment provided for in clause 7 was replaced by clause 6(c) in the Settlement Agreement but that both provisions are to similar effect. Mr Dale puts it this way: *"In effect the Crown substituted its obligations under the tripartite agreement to guarantee a 20% ROI with the obligation to pay up to $1.2m".* Mr Frame disagrees. He says that the fuel template does not guarantee a particular profit – only a guaranteed return. That is, the fuel template does not address volume.

[37] The Court prefers Mr Frame's submission. The Court does not see that clause 6(c) in the Settlement Agreement is a simple substitution for clause 7 in the template. The template does not appear to deal with volume in a way similar to that (implicitly) incorporated within clause 6(c). Nevertheless, there is a sense in which Mr Dale's submission is correct. Clause 7 of the template can certainly be seen as a springboard which ultimately led to clause 6(c) of the Settlement Agreement.

[38] In evidence, Mr Leith (for Toa) said that the effect of clause 13 of the template was that if Toa did not supply any fuel in a given year, the Crown would need to pay it $1.1m. This arose out of a question put to him in cross examination by Mr Frame. Mr Frame did not pursue the answer but in submissions said that the answer was entirely inconsistent with clause 13. That is correct. Nevertheless, the Court has some discomfort at that submission because, having elicited the answer that he did, Mr Frame should have pursued the point in cross examination. Mr Leith made the point that the Crown's exposure to Toa under the pricing template was $1.1m and he contrasted this with the figure of $1.2m under the Settlement Agreement. That comparison, however, is not entirely accurate for the reasons set out at paragraph [30] above. That is because the Crown's contingent liability may exceed $1.2m.

[39] But that is not the only problem with this aspect of Mr Leith's evidence. What he said is fundamentally inconsistent with clause 13 and for that reason the Court does not accept it. In the final analysis, however, this conclusion does not appear to be material to the Court's decision.

[40] Mr Leith also gave evidence that shortly prior to the mediation (which culminated in the Settlement Agreement) he provided a spreadsheet to the Crown which calculated Toa's prospective claim against the Crown (for breaching the Heads of Agreement) of $10.2m. It then set out various scenarios whereby the Crown could compensate Toa. Included within these scenarios was one whereby the Crown did not pursue the Heads of Agreement (that is, it did not purchase the tank-farm from Toa). Toa suggested a form of settlement which would comprise a lump sum payment and a guaranteed figure per annum for a specified number of years. That is, Toa put forward the very framework that ultimately was reflected in the Settlement Agreement (although the various components of that structure were subject to downward pressure during the negotiation).

[41] It seems fairly clear, from the above summary, that in a broad sense clause 6(c) was intended to provide Toa with a sum certain of $1.2m per year irrespective of its actual performance and irrespective of whether it sold any fuel. This summary ignores any obligation on Toa to maximise its earnings before seeking the top-up (which will be discussed in more detail below – see paragraph [78]). Clause 6(c) is an assurance to Toa of a certain annual outcome and, equally, represents a contingent liability on the part of the Crown. There is no doubt it falls within the broad description of a *"guarantee"* advocated by Mr Frame and set out at paragraph [22] above. The Court's conclusion means that sections 59 and 60 of the Act need to be considered. It is not possible for the Court, at this preliminary stage, to conclude that clause 6(c) is lawful (because it is captured by at least one of the interpretations of sections 59 and 60 advocated by the parties). In order to reach a final view it thus becomes necessary to consider those sections.

Statutory interpretation and clause 6(c)

[42] The Act was passed in 1996. The Court was advised from the Bar that it followed a disastrous financial situation then facing the Government. The Court does not know the detail of this and it does not appear necessary to the interpretation exercise now undertaken. There is a passing reference to this situation in the decision of Nicholson J given on 15 September 2009 in *Triad Pacific Petroleum Limited v Maoate and Ors* (unreported, Plaint 2/2009), [124].

[43] The relevant interpretation legislation is the Acts Interpretation Act 1924. Section 5(j) of this Act is familiar to many lawyers. It is mirrored in Article 65(2) of the Constitution. This requires the Court to give the sections *"a fair large and liberal interpretation"*.

[44] Mr Frame submitted that the Cook Islands Act, in relation to sections 59 and 60 anyway, was based upon the Public Finance Act 1989 (NZ). He referred to the 1992 amendment to the New Zealand legislation and contrasted the wording of the respective sections. The Court is satisfied that the New Zealand Act is the source of the Cook Islands provisions. Mr Dale did not seriously argue otherwise.

[45] Mr Frame referred to one New Zealand case dealing with the Public Finance Act: *Archives and Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607. The Court of Appeal makes some general references to appropriations and the role of Parliament in scrutinising Government expenditure (e.g., paragraphs [66] and [69]) but there is nothing which directly relates to the issues facing this Court.

[46] Mr Dale drew attention to the amended provisions in the New Zealand Act as they now apply (amendments dated 25 January 2005). These amendments are not reflected in the Cook Islands legislation. Mr Dale referred the Court to a decision of Wylie J in *Official Assignee v Fry* (High Court, Auckland, CIV 2009-404-439, 4 February 2009) decided by reference to the current New Zealand legislation. In that case an issue arose as to the ability of the Official Assignee to give an undertaking as to damages. The OA argued that, as a statutory officer appointed under the Insolvency Act and the State Sector Act, he was a functionary of the Crown and that giving such an undertaking would breach the equivalent of section 59 of the Act.

[47] The OA had submitted that the undertaking would be either a guarantee or indemnity without expressly saying which. Wylie J relied upon an earlier unreported decision (the parties did not provide the Court with a copy of this decision but the Court, following the hearing, located a copy which does not appear to support the proposition relied upon by Wylie J) to conclude that the undertaking as to damages was either a guarantee or indemnity as used in section 65ZC (broadly equivalent to section 59 of the Act). Consequently, it would have been unlawful for the OA to give the undertaking and the need to do so was dispensed with by the Court. It is not entirely clear to this Court

how that conclusion was reached and, without detailed argument as to the nature of an undertaking as to damages, the Court is reluctant to draw any particular conclusion from the New Zealand decision which, in any event, was a decision on the papers, apparently without the benefit of full argument.

[48] Mr Frame drew the Court's attention to the Hansard speeches in relation to the 1992 amendments to the New Zealand legislation. While the Court is prepared to accept such speeches can be relied upon for interpretation purposes it is reluctant to accept that the New Zealand speeches are necessarily available to interpret the Cook Islands legislation. Mr Frame argued, by reference to Hansard (NZ) that the legislation was primarily concerned with *"unappropriated expenditure"*. That is, the primary mischief addressed by the legislation was the consequence of expenditure for which there had been no appropriation by Parliament.

[49] The Court believes that is too narrow a view. It is ready to accept that the Act intended to promote financial prudency but it is seems artificially narrow to say its focus is upon appropriations (or not). That is, at least partly, because any contract entered into by the Crown potentially raises issues of appropriation. It cannot have been intended that there be a formal appropriation in relation to every contract entered into notwithstanding the general principle that there can be no spending of public money without Parliamentary approval. Mr Frame was inclined to accept that but then argued that particularly large contracts might raise the issue. He said it was a matter of fact and degree. All of that seems too vague and problem-making.

[50] In "Liability of the Crown" (2 ed, 1989), by PW Hogg, the learned author emphasises (p47) that no statutory authority is necessary to enable the Crown to enter into a contract. In practice, the Legislature does not authorise each individual payment, and appropriation statutes usually authorise broad categories of expenditure. For that reason, it is rare that an appropriation does not exist to meet an obligation incurred by the Government. Indeed, it is well established that the absence of an appropriation does not excuse the Crown from performance of a contract.

[51] In the Court's opinion it is better to rely upon the long title to the Act which emphasises it is an Act *"to establish effective economic, fiscal and financial management and responsibility by Government"*. This is consistent with

section 60(1)(c). This, it seems, is a more realistic assessment and a more useful benchmark against which to assess the purpose of the Act. It may be, however, that a final view need not be reached on this for reasons that should become apparent below. The Court believes that the issue may be more complex than that advocated by the parties. Moreover, section 61, which may also be relevant to this argument, was not addressed in submissions.

[52] Sections 59 and 60 of the Act appear in Part XII (sections 53-61). This part of the Act appears to use the expression *"Government"* interchangeably for *"the Crown"*. Mr Dale submitted this was deliberate but the Court accepts Mr Frame's submission that the terms are used interchangeably. The basis for this conclusion can be found in the definition of the Crown in section 2 where the Crown is defined as follows:

> *""Crown" means the Crown in right of the Government of the Cook Islands, and includes every department, instrument and agent of the Government...".*

[53] This language is used to capture two main concepts. First, that the Crown is divisible (*"in right of..."*) and, secondly, that the Cook Islands falls within the realm of New Zealand. Hence the need to speak in terms of the *"Government of the Cook Islands"* rather than *"the Cook Islands"* alone.

[54] Sections 59 and 60 of the Act are as follows:

> *"59. Authority for the giving by the Crown of guarantees and indemnities – Except as expressly authorised by any Act, it shall not be lawful for any person to give a guarantee or indemnity that imposes an actual or a contingent liability on the Crown."*
>
> *"60. Power to give guarantees and indemnities - (I) The Minister on behalf of the Crown may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of any person, organisation, or Government but only with the approval of -*
>
> *(a) Cabinet; and*
>
> *(b) on the advice of the Financial Secretary; and*
>
> *(c) where such guarantee or indemnity is consistent with the fiscal responsibility objectives of this Act.*
>
> *(2) The Minister shall state at the next sitting of Parliament following the granting of a guarantee or indemnity why it was*

> *necessary in the public interest to grant the guarantee or indemnity as the case may be and shall provide an assessment of the risks associated with the guarantee-:or indemnity.*
>
> *(3) Any money paid by the Crown pursuant to any guarantee or indemnity given under this section shall constitute a debt due to the Crown from' the person, organisation, or Government in respect of whom the guarantee or indemnity was given, and may be recoverable as such in any Court of competent jurisdiction."*

[55] Sections 59 and 60 appear sequentially in that part of the Act entitled *"Loans and Securities"*. The other sections, in the main, deal with loans. Sections 59 and 60 are the only two that specifically address guarantees or indemnities. Both parties agree that indemnities are not relevant and so the Court does not address them further. That aside, the arrangement of sections 59 and 60 within the Part does suggest a close relationship between the two sections whereby section 59 is the broad prohibition and section 60 is the saving provision. On that approach, logically, *"guarantee"* should have the same meaning in each section.

[56] Such a structure would follow that structure also apparent, for example, in sections 53 and 54. In section 53 there is a general prohibition on the Crown raising a loan which is then saved in section 54.

[57] A number of issues arise from section 59 which are summarised and then discussed. The issues are:

- the express carve-out by reference to *"any Act"*;
- the reference to *"any person"* rather than *"the Crown"* and, in addressing that, the relevance of the heading to the section which does refer to the Crown;
- whether the expression *"guarantee"* is qualified or in any way defined by reference to *"an actual or a contingent liability on the Crown"*.

The express carve-out

[58] Mr Dale argues that if section 59 was intended as a general prohibition, with section 60 operating as the saving provision allowing guarantees in certain circumstances, then the Act should have said *"this or any Act"*. Mr Frame argues that *"any Act"*, as a matter of common usage, must include this Act as well as any other Act.

[59] The Court finds that Mr Frame is correct. This follows from the clear relationship between sections 59 and 60. As a matter of grammar, too, *"any Act"* must also include *"this Act"*. If the Legislature wanted to exclude any reference to the Act, then it could have said *"any other Act"*.

Any person

[60] Mr Dale argues that the reference to *"any person"* specifically excludes the Crown. That is, there is no general prohibition on the Crown giving a guarantee – only *"a person"* doing so.

[61] Mr Frame argues that section 59 prohibits the Crown from giving a guarantee. He says the Crown can only act through agents and the wording in the section is intended to reflect that.

[62] Once again, the Court prefers Mr Frame's submission. It makes little sense, in an Act obviously concerned with financial prudency, to draw a distinction between guarantees entered into by persons and guarantees entered into by or on behalf of the Crown. On Mr Dale's approach, there is no limit on the Crown giving a guarantee. In that case, there would be no obvious point in section 60 because the Crown, without limit, could give a guarantee.

[63] Mr Frame's argument, too, is consistent with the section heading to section 59 which speaks in terms of the Crown giving the guarantee. Mr Dale submitted that little weight should be given to this but the Court rejects that submission. In "Statute Law in New Zealand" (4 ed, 2009), Burrows, at pp235-236 the learned author state that section headings can be taken as an indication of what the section is all about.

[64] The Court proceeds on the basis that section 59 prohibits the Crown giving a guarantee. The nature of that guarantee is now addressed.

Is "guarantee" qualified by the subsequent reference to liability of the Crown?

[65] *"Guarantee"* is a word long understood by lawyers in a particular sense. Mr Dale refers to a history going back as far as the Statute of Frauds of 1677. He refers to the Contracts Enforcement Act (NZ) and the definition in section 2(1)(d) where a guarantee is defined as *"every contract by any person to answer to another person for the debt, default, or liability of a third person"*.

[66] Halsbury (20 Halsbury (4 ed) 101) defines a guarantee as: *"A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated."* This definition has received judicial approval and is discussed (also with approval) in "Law of Guarantees" Andrews & Millet (4 ed, 2005) at paragraph 1-004.

[67] These definitions correspond with the narrow or strict sense of *"guarantee"* as used by counsel in this case. The Court believes the meaning of the word *"guarantee"* is so well established that if the Legislature (including the New Zealand Legislature) had intended a different and wider meaning (something in the nature of an assurance or undertaking) then it would have specifically said so.

[68] As it happens, Mr Frame effectively says as much. He argues that, for section 59, *"guarantee"* takes its meaning from the subsequent expression *"that imposes an actual or contingent liability on the Crown"*. This, he says, justifies a larger meaning than the strict sense discussed above. Mr Frame contrasts this with the wording in section 60 which, he says, reflects the usual sense of *"guarantee"*. Therefore, working backwards, he says that *"guarantee"*, as used in section 59, means any assurance that results in an actual or contingent liability on the Crown.

[69] Mr Frame relies on *Heisler v Anglo-Dal Limited* [1954] 2 All ER 770 to argue that *"guarantee"* is sometimes used in a looser sense as part of everyday parlance. That case, however, takes the matter little distance. It is trite that *"guarantee"* is sometimes used loosely. In that case, the Court was considering a contract drafted by *"commercial men"* rather than lawyers. But we are here talking about a statute and a statute specifically designed (at the least) to ensure the financial prudence of the Crown. In those circumstances one might reasonably think that the draughtsman would take some care in the use of language and have close regard to how lawyers might use the term *"guarantee"*.

[70] There are a number of other difficulties with Mr Frame's argument.

[71] First, the argument ignores the linking between sections 59 and 60, a linking that Mr Frame otherwise emphasises. In those circumstances, there would need to be very clear language before the Court concludes that *"guarantee"* means something different in each of the two sections. The Court does not

believe it is clearly stated that there are different meanings as between the two sections.

[72] Secondly, a guarantee (in the narrow sense) imposes an actual or contingent liability on the party giving the guarantee. That is, a guarantee in the strict sense of the word has that result. So does a guarantee in the wider sense used by Mr Frame. There is no obvious need to work backwards from the consequence to argue that the starting point is somehow broader if all other indications are to the contrary (as the Court finds). The subsequent reference to *"an actual or contingent liability"* is just as consistent with a wide, as it is a narrow, meaning of *"guarantee"*.

[73] Thirdly, the definition given by Mr Frame (see paragraph [22] above) is so broad as to be capable of capturing all sorts of commitments entered into by the Crown including straightforward contracts. A number of examples were canvassed during the course of argument. It adds nothing to the Judgment if these examples are now discussed. The simple fact remains that the wording put forward by Mr Frame is so broad that the Crown's day-to-day operations would be handicapped beyond any sensible notion of financial prudency.

[74] For these reasons the Court rejects Mr Frame's argument. Section 59, in the Court's opinion, refers to a guarantee in the narrow sense advocated by Mr Dale.

[75] It is common ground that clause 6(c) is not a guarantee in the narrow sense. The Crown is not purporting to guarantee, to a third party, Toa's performance. Rather, the Crown is promising to top-up Toa if certain conditions are met. It is an assurance of a certain outcome but it is not a guarantee in the strict sense. The Court agrees with counsel that clause 6(c) is not a guarantee in the strict or narrow sense.

[76] The consequence of this conclusion is that clause 6(c) is not a guarantee prohibited by section 59. That means that clause 6(c) is not unlawful. It can be enforced. Neither party argues that the Settlement Agreement is void for uncertainty and both parties are confident they will be able to negotiate the terms of the new template once the Court has resolved the status of clause 6(c).

[77] While the Court was not addressed in relation to the consequences of such a finding, some boundaries need to be sketched out. These can be no more than provisional views because the matter was not argued. However, the Court needs to make its conclusions clear so there is no argument, later, that it has implicitly endorsed a certain outcome when it has not.

[78] The Settlement Agreement plainly contemplates a continuing relationship between Toa and the Crown. The fact that a new pricing template is to be finalised proceeds on an assumption there will be a continuing relationship between the parties. Recent jurisprudence emphasises the good faith nature of such relationships and the readiness of the Court to imply terms to deal with cooperation. See for example "Law of Contract in New Zealand" (3 ed) by Burrows, Finn and Todd at chapter 2.2.6 and "Good Faith" by Justin Smith (NZLS Seminar, July 2007): "The Law of Obligations – "Contract in Context"". In reaching a conclusion as to the lawfulness of clause 6(c) the Court is not endorsing any notion that Toa can sit back and treat clause 6(c) as if it were a cash-box. Toa cannot run its business down and then simply ask the Crown for a top-up. If the business ceases for reasons unconnected with the Settlement Agreement, it is hard to see how Toa could otherwise insist on payment of the top-up.

[79] However, these are provisional views only and expressed simply to avoid any doubt as to the scope of the Court's order. They may be issues that will arise in future litigation if, for example, Toa seeks to enforce the top-up in any given year. The Court is not inviting further litigation but simply stating a relevant consideration.

Remaining issues

[80] In light of the Court's conclusion that section 59 only prohibits a guarantee (in the narrow sense), and that clause 6(c) is not such a guarantee, the Court is not required to consider the remaining arguments. Nevertheless, should the matter go further, some observations should be made. The following topics need to be addressed:

- if clause 6(c) is a guarantee in the narrow sense is it saved by section 60?
- if clause 6(c) had been found to be unlawful would the Court have severed it from the Settlement Agreement?

- if clause 6(c) had been found to be unlawful what consequences would there have been for the Consent Judgment in relation to $1.75m?

[81] Interest and costs are outstanding issues but, by consent, these are reserved for further argument and will be specifically mentioned at the conclusion of this Judgment.

Section 60: is clause 6(c) saved?

[82] Mr Frame argues that clause 6(c) would not be saved by section 60 because there is no evidence that it was approved by the Cabinet and given on the advice of the Financial Secretary. He did not contest whether it was consistent with the fiscal responsibility objectives of the Act. Mr Frame argues that such approvals cannot be given in advance. That is, any guarantee needs to be approved after the event.

[83] Mr Dale argues that the necessary approvals can be found in the Cabinet Minute which has been introduced above and which will be discussed in more detail shortly. He rejects any notion that such approvals need to be given after the event. He also says that the advice to be given to Parliament (see section 60(2)) is not a pre-condition and does not impact upon the Settlement Agreement. Rather, it is an independent obligation of the Minister and not something with which the Court needs to be concerned. Mr Frame does not appear to contest that proposition.

[84] The issue, then, is whether the Cabinet Minute is sufficient evidence of the approvals required in section 60(1)(a) and (b). The Court believes that such approvals were given and that the Cabinet Minute is evidence of this. This is now explained.

[85] The relevant portions of the Cabinet Minute dated 30 November 2009 are as follows:

> *"Approved*
>
> *(a) that Government enter into a Mediation Agreement with Triad Pacific Petroleum Limited and Apex Agencies Limited (trading as TOA Petroleum), and such other parties as he deems appropriate, in relation to the issues arising in the High Court proceedings under the number Plaint 2/09;*
>
> *(b) To lead, on behalf of the Crown, a negotiating team in the mediation comprising the Deputy Prime Minister (as Team Leader) and the Special Consultant, Christopher (Kit)*

Toogood QC (main speaker), with the Solicitor-General and the Financial Secretary in attendance as observers;

(c) To use his best endeavours in conjunction with the Special Consultant to settle the High court proceedings in the best interests of the people of the Cook Islands, upon terms consistent with the legally privileged advice of the Special Consultant received and considered by the Cabinet;

(d) The terms of any settlement agreement reached by the negotiating team shall be binding upon the Crown without more, except to the extent that the approval of the Cabinet is necessary under the provisions of section 4, Government Loans and Contracts Act 1968.

(e) The Cabinet discussions and decisions to be highly confidential."

[86] The legal advice referred to in subparagraph (c) above is the advice for which privilege is claimed by the Crown. The document was not disclosed and the Court has not seen it. Mr Dale asks the Court to draw adverse inferences. The only inference the Court needs to draw is that the ultimate settlement was on terms consistent with the legal advice. The Crown did not suggest otherwise and, even if it did, it would be hard put to sustain such a submission in the face of maintaining a claim for privilege.

[87] The Cabinet Minute was copied to both the Solicitor-General and the Financial Secretary. Both of these gentlemen attended the subsequent mediation. It was said they were only observers at that mediation as if, somehow, they had an insignificant role. It was also said that they were not at the airport in the early hours of the morning when the Settlement Agreement was eventually signed. The Court does not believe anything turns on these factors. It would be a most unusual state of affairs if both were present during the meditation and did not intervene if they otherwise believed a disaster was brewing. Equally, it can be presumed that the Financial Secretary was conversant with the Act and his powers and obligations with respect to it.

[88] The Court believes that the Cabinet Minute amounts to a clear approval by Cabinet in terms of section 60(1)(a). The Court also believes that the involvement of the Financial Secretary in this process supports a conclusion that the settlement occurred on the advice of the Financial Secretary in terms of section 60(1)(b).

[89] The Court does not believe that the approval must, as Mr Frame advocates, be given after the event. Subclause (d) of the Minute makes it clear the Cabinet approval was intended to be binding without more. There was then an exception referred to (section 4, Government Loans and Contracts Act 1968) but there is no suggestion from counsel that that exception is relevant. Indeed, it is difficult to see this section applies because of the definition of *"Government contract"*.

[90] Mr Dale advocates several different species of estoppel to address the issues discussed above. The Court does not think it necessary to get into those aspects of the law. It believes there is more than sufficient evidence before the Court to conclude that sections 60(1)(a) and (b) were complied with. On that basis, and assuming that clause 6(c) was a guarantee within the terms of section 60, the guarantee referred to in clause 6(c) would be lawful.

[91] Mr Frame argues, by reference to section 60(3) that the Crown has a right of subrogation against Toa if it is called upon to honour the top-up. This is a most unattractive argument. The Court believes there is considerable weight in Mr Dale's submission that the right of subrogation would be limited in the present case.

Is clause 6(c) severable?

[92] The short answer to this question is that the Court believes it would not be severable. The Court believes clause 6(c) is an integral part of the settlement. Mr Frame emphasises clause 4 of the Settlement Agreement in which the sum of $1.75m is said to be in full and final settlement of Toa's claim. He argues, therefore, that clause 6(c) is of an incidental nature. With respect, the Court believes this is entirely an argument of form rather than substance. The factual matrix points overwhelmingly to clause 6(c) being an integral part of the settlement. If nothing else, the potential dollar sums involved point to such a conclusion.

[93] At this point, further reference can be made to *Heisler v Anglo-Dal* (supra). At page 775 Romer LJ made it clear that the relevant provision in that case was such an important ingredient in the agreement as a whole, that it was inseparable and that its invalidity would vitiate the entire contract. That conclusion appears entirely appropriate in the present case.

Setting aside a Consent Judgment

[94] The Judgment for $1.75m was entered by the Court with a consent of the parties. The stated purpose of this was to avoid the need for a specific appropriation for this sum (bearing in mind that Parliament is not currently sitting). It appears clear from argument that the basis upon which each party gave its consent differed. There was no complete meeting of the minds. The Court would have taken little persuasion to set aside the Consent Judgment assuming jurisdiction to do so. There was not, however, full argument on this and, without more, the Court can only state a tentative conclusion.

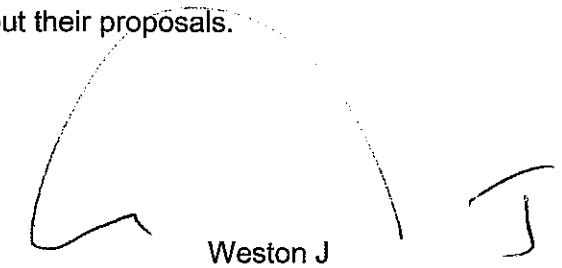
Conclusion

[95] Shortly put, section 59 of the Act prohibits the Crown giving guarantees in the strict or narrow sense. Clause 6(c) is not a guarantee within the contemplation of section 59 and, consequently, is not prohibited by it. Clause 6(c) is lawful and the settlement agreement, as a whole, can be enforced by Toa.

[96] For the reasons set out above the Court is prepared to grant the relief sought by the plaintiff. That is, the Court declares that the Settlement Agreement is binding upon the Crown. There is a declaration that the Crown should fulfil its obligations pursuant to clause 6 and enter into a new template agreement on the terms set out in clause 6 of the Settlement Agreement.

[97] The Court suggests that counsel endeavour to agree a form of Judgment and then submit it for the Court's approval. If there is a dispute, the Court will hear the parties further.

[98] Questions of interest and costs are reserved for further argument. The plaintiff also seeks damages. It is not clear what status this claim has and, for the avoidance of doubt, any such claim is also reserved for further argument. Counsel should agree a way forward and submit a memorandum to the Court setting out their proposals.



Weston J