IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0014 OF 1996
(High Court Civil Action No. 496 of 1992)

BETWEEN:

ATTORNEY GENERAL OF FIJI AND
MINISTER FOR JUSTICE AND FIJI
TRADE AND INVESTMENT BOARD

APPELLANTS

-and-

PACOIL FIJI LIMITED

RESPONDENT

Mr. D. Singh for the Appellants
Mr. G. P. Shankar and Mr. A. Singh for the Respondent

Date and Place of Hearing : 20 November 1996, Suva
Date of Delivery of Judgment : 29 November 1996

JUDGMENT OF THE COURT

On 14 March 1996 Pathik J gave judgment in the High Court at Suva for Pacoil Fiji Limited on its claim against the appellants, the Attorney General and the Minister of Justice (sued on behalf of Government Fiji and its Ministers and Cabinet) and the Fiji Trade and Investment Board, a Board established by the Government. He made the declaration Pacoil sought to the effect that in reducing its promise of protection against imports of lubricants, the appellants had acted wrongly, unfairly and unreasonably and were liable in damages for the losses Pacoil

sustained in its attempts to set up an oil-blending plant in reliance on that promise. He directed a separate hearing to assess the damages, but limited to the period up to 18 June 1992. The appellants contested His Lordship's factual conclusions and his findings of liability. The respondent cross-appealed against the limitation of the damages. As there was a strong attack mounted by the appellants against the Judge's assessment of the witnesses and their evidence, and a claim that he failed to have proper regard to the correspondence produced, we find it necessary to review the evidence in considerably more detail than is customary with an appeal.

Pacoil was previously known as K. R. Latchan Buses Limited and the only witness it called was the late Ratu William Toganivalu who was its Chairman of Directors. His brief evidence was supplemented by the record of correspondence passing between the Company and the Government agencies involved, put in by consent at the hearing. Pacoil's predecessor contemplated the establishment of an oil recycling plant in Fiji, and in a letter of 8.4.86 the Economic Development Board gave approval of the proposal, with customs and income tax concession, and stated that protection would be considered once the Company commenced production, subject to meeting certain conditions.

On 24 November of that year the Industrial Development Unit of the Commonwealth Secretariat produced a lengthy report on the

feasibility of a used oil refining unit in Fiji and the model proposed was one incorporating both blending and recycling. "Blending" is a process of mixing various additives into a base of virgin mineral oil, while "recycling" (as its name implies) involves the refining of waste used oil to form the base to receive the additives. The refining plant was more complex and expensive than that required for simple blending. The Company evidently had access to this report.

Ratu William said there was not sufficient waste oil in Fiji to make the project worthwhile, and about 1988 the Company decided to establish an oil-blending operation instead. He said it was given what he understood to be 100% protection for blending which would assure the viability of the project because nobody else could compete by importing lubricants. Relying on this promise he said the Company entered into commitments with overseas suppliers and incurred substantial expense in the construction of a building and plant and the importation of raw material.

The level of protection was never specified in the original letter of 8.4.86 from the Economic Development Board referred to above, and it dealt only with a waste oil recycling plant. On 3.9.87 the Secretary for Finance recommended to the Governor General that the project should be supported through protecting the Company's product by licensing imports of lubricating oil for

a period of three years. In its turn the Fiji Trade and Investment Board wrote to the company on 30.9.87 advising that the Government had approved protection by way of import licence.

Much of the subsequent correspondence was between the Company and that Board. Evidence was given on its behalf by Isoa Gavidi, he being a Director since September 1990. His knowledge of what had taken place earlier was based on the Board's records. The correspondence supports Ratu William's evidence that around 1988 there was a change of plan to oil-blending, with the intention of going ahead on that basis once the necessary import protection was assured. A Board letter of 9.11.87 recorded a meeting and a report on progress, noting completion of factory building costing $1.3m, and delays in field assistance promised by the Commonwealth Industrial Development Unit, while the release of loan funds from the Fiji Development Bank awaited approval of protection for the project.

In a further letter dated 12.2.88 headed "Blending and Lubricating Oil Project" the Board advised that the Government had approved "your above project" and set out a list of conditions and concessions, ending with a statement that the Government had approved protection by way of import licence on the importation of lubricating oil. It asked to be kept informed of progress so that necessary assistance could be provided.

Because of subsequent events in Fiji, a Legal Notice implementing this protection was not gazetted until 4.10.89; it consisted of an amendment to 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 goods except in accordance with the terms of licence granted by the Permanent Secretary for Economic Development Planning and Tourism. A perusal of the listed items indicates that they are aimed at the protection of local industry. This Schedule does not automatically afford total protection, the degree being in the discretion of the Secretary, depending on the level of competing imports he or she may see fit to allow into Fiji from time to time.

Ratu William could not point to a specific undertaking for total protection, stating only that he understood this would be the case when they started production because this is what had happened with some other industries where the degree of protection was not specified, and he mentioned cement and match factories. After the Legal Notice was gazetted in 1989, steps were taken to complete an oil-blending factory which Ratu William says was finished at the end of 1992, and after some further delays was ready to go into production.

Around 1992 the change to oil-blending came to the attention of the Permanent Secretary for Trade and Commerce (Mr Luke

Rokovada) who also gave evidence on behalf of the appellants. He referred to the strong pressure from Pacoil for protection after the enterprise was revived following the issue of the Gazette Notice in 1989, and said there had been a major departure from the recycling project, to which approval had originally been given in 1986. On 12.3.92 he wrote to the Company expressing concern about the deviation, pointing out that the original intention was to recycle waste lubricants; and that while some imported base oil might be required in the initial stages, the project was never intended to be simply a blending operation. He added that most of the benefits to Fiji outlined in the Commonwealth Secretariat report stemmed from recycling; and that the Company had confirmed there was no medium-term intention of doing so, nor had any plant been purchased for this purpose. He advised that the Legal Notice did not provide Pacoil with an exclusive import licence, and sought further information that might have a bearing upon the justification for protecting the Company. Ratu William said only that the complaint about the change of plan was "not quite true", without elaborating further.

In its reply of 17.3.92 Pacoil protested that it had never attempted to deceive the Government in any way about the project, and that the concept all along was based on the Commonwealth Secretariat Report which consisted of two phases, the first being the blending unit and the second the refining unit. Because of

financial constraints the Company decided to embark on phase one; once this was established and viable, it could consider phase two. The letter went on to address other matters raised by the Ministry. Presumably there were some further discussions (Ratu William's evidence was very spartan on detail), and on 1.4.92 the Fiji Trade and Investment Board wrote to the Ministry of Trade with a strong recommendation for continued protection, notwithstanding the time which had elapsed since the original approval. It pointed out that the Board had been kept informed of the Company's progress, noting that it had now established a factory, and installed machinery and plant and was ready to commence production, but found itself in an awkward situation faced with removal of protection. The Board agreed that the Company had deviated from the original proposal of recycling waste oil, and was undertaking a blending operation from imported base oil and additives, but was strongly of the view that "this slight change in the Company's production process" should not be taken as a reason to remove protection, which should be continued for at least the first five years of production, with appropriate conditions ensuring quality, competitiveness etc.

On 25.4.92 Pacoil wrote to both the Minister for Trade and Commerce and the Minister of Finance, in the light of verbal information by the Secretary that there would be no import licence protection given to the blending plant. After detailing the steps taken since the project was first mooted in 1985, and

the discussions and correspondence with the Fiji Trade and Industry Board, the Company advised that the plant was ready for commissioning, and all it needed was Ministry approval on licensing for protection "to put everything in motion". It emphasised that the Company was encouraged to continue with the project by the Board and the Ministry of Energy, and by the assurances given of continued protection. On 12.5.92 the Board informed a Fiji Bank that approval for the blending project was still current and all concessions and approval of licensing protection were valid and would be available to the Company once it commence commercial operations.

On 18.6.92 the Board wrote to the Company (replacing an earlier letter of 9 June) in response to its submission for protection advising that the Government had approved the proposal for blending instead of recycling, and detailed the concessions and assistance to be extended for this operation, generally in line with what had been stipulated previously. There was a specific approval of licence protection for a period of 3 years with effect from 1st October 1992, for 50% of the various lube products which the Company intended to produce and market in Fiji. This was the first mention of a quantitive import protection and Mr Rokovada explained in his evidence that the whole nature of the project had changed, and the Government could be susceptible to a Court challenge if they gave Pacoil the full protection it was seeking; they had "to be mindful in terms of

fair trade and consumers". He added that since the Legal Notice was gazetted in 1989 they had been freely issuing licences to the industry as a whole.

The Company's reaction to that letter was to write to the Prime Minister on the 24.6.92 protesting at the Ministry's action in cutting down the 100% protection they expected to 50% and pointing out that this would drastically affect the planned operation. It said that if the intention of allowing only 50% had being indicated from the beginning, a large amount of plant and investment cost could have been saved, and it sought a review of the issue of protection. There was no evidence of any response to this plea, and on 9.7.92 the Company wrote to the Ministry of Trade in response to its 18 June letter in these terms:-

> *"We are astonished, at Government's change of commitment, to our project and the question of `Protection and Duration'. Our stance remains the same, a 100% protection is essential for a minimum of 5 years. However, we will be addressing the above separately again.*
>
> *We on our part have no chance (? choice), but to continue with the project, due to our investment cost and commitment to raw material suppliers, having placed confirmed orders. This was done at the Ministry's encouragement to expedite start up date.*
>
> *In the meantime, we would like to work with the Ministry of Trade, on the 50% import volume as follows. ..."*

and there followed queries on how the volume and types of oil

were to be established on this basis.

There was some further correspondence about new start-up dates for the project until the final blow fell on the 17.8.92 with a letter from the Ministry of Trade following a meeting with the Company two days before at which it had been disclosed that Shell Fiji Limited had applied for judicial review, claiming that the arrangement between the Ministry and Pacoil for 50% protection was contrary to the Fair Trading Decree made on the 6th of May 1992. The Ministry advised 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 normal way, and in the meantime were holding discussions with the Attorney General's office to find a solution, and would advise Pacoil of their outcome.

The Company continued with steps to commission the plant and start production. There was further correspondence with the Ministry in which it unsuccessfully sought advice about the status of the 50% protection. In its final letter of 12.3.93 Pacoil said it expected to start in mid April. Ratu William said the lack of any response from the Ministry about the protection frustrated their plans and led to these proceedings commenced on 12.11.92.

Comments on Pleadings and Evidence

In its statement of claim the Company appears to rely on the reduction of the licence protection to 50% for 3 years, notified in the Board's letter of 18.6.92, as the wrongful act or decision on which its claim for damages is based. As Ratu William said, even this protection was effectively withdrawn when the Ministry decided to issue licences to the whole industry for the last quarter of the year, recorded in its letter of 17.8.92. What was explained there as merely a holding operation while the position with Shell was sorted out became effectively the end of any protection for blending.

The Company's preparations had gone forward under protest up to that time and there was clearly no waiver of its claim to full protection, as submitted to us on behalf of the appellants, even though that point had not been pleaded by them. It was not prepared to embark on the oil blending operation while its competitors enjoyed unrestricted access to the market with imported products, and it never went into production for that reason. Nevertheless, it had entered into a long-term supply arrangement with Caltex and had engaged in marketing imported oil associated with that Company's name even before the 50% protection was granted. That company was to supply the base oil for blending once Pacoil's production started.

By way of defence the appellants contended that protection was granted in 1987 for waste oil recycling only, but the level was never specified and was not to be 100% as claimed. They said the arrangement lapsed with the change to oil blending, for which 50% protection for 3 years was granted in 1992, but was not availed of because Pacoil never went into production.

The Judgment

After reviewing the evidence Pathik J found that 100% protection had been given for the oil blending project, although insofar as the judgment may suggest that oil blending was the sole object of the original concept, we would respectfully disagree, and refer to the initial letter of approval of 8 April 1986 from the Economic Development Board and the evidence of Ratu William. It is not clear from the evidence how that level of protection would be implemented. Obviously a working-in period would be necessary during which competing products would be allowed into Fiji to make up any short-fall between demand and the new industry's production: it would be unrealistic to expect a total ban on competing imports from day one of the blending operation.

There is nothing in the correspondence or in the evidence to say that 100% protection was ever specifically promised. The only level mentioned was the 50% for the blending project after

the intervention by the Ministry of Trade and Commerce in 1992. However, the Government agency most closely concerned with Pacoil over the period the blending project was under development was the Fiji Trade and Investment Board. There is ample evidence that it supported and encouraged the Company, leading it reasonably to believe that it would receive, if not 100%, at least sufficient protection to enable the establishment of a viable operation. Mr Gavidi said there were industries where the protection was only 50%. Nevertheless it is clear from his letter of 1.4.92 to the Ministry of Trade and Commerce in support of the Company's submission that he must have had full protection in mind.

The evidence of Ratu William was that with only 50% protection for 3 years, the business would not be viable, and his evidence was not challenged on this point in cross examination. But it seems that at even this level of protection the plant may have been able to achieve some economic level of production: in its letter to the Prime Minister of 24 June 1992 the Company complained about the reduction in plant operating efficiency with high idle time, and stated only that had it known about this level of protection at the beginning, a large amount of plant investment costs could have been saved. It did not contend that the project would never have been started and, as noted above, it continued in its steps to commission the plant until the final blow fell after Shell's intervention in August 1992. There seems

to be a misunderstanding in the judgment about the effect of Shell's application for judicial review; Pathik treated it as the reason for the reduction to 50% in June 1992. But from the sequence of events disclosed in the correspondence Shell's action could not have been the trigger for that decision.

His Lordship found there was overwhelming evidence that on the strength of the approval and protection granted, the Company spent considerable sums of money in erecting a factory building and importing plant and raw materials. He accepted that although there were delays in commissioning the plant, it was ready to go into production by 19.4.93. There was ample evidence to support these conclusions. There may have still been some minor unresolved questions of distribution and marketing to be cleared up, but there was no suggestion in the evidence that these could not have been resolved if there had been an acceptable final decision about protection.

As explained at the outset of this judgment, we have explored the evidence in considerable detail, in response to the criticism by appellants' counsel that His Lordship paid too much regard to Ratu William's evidence and too little to that from their own witnesses, in the light of the correspondence and other documents produced. In our view the evidence substantially supports the conclusions of fact and the inferences drawn from them by His Lordship, and our only major point of difference is

with his conclusion about the effect of Shell's intervention, noted above.

Pacoil pointed to the encouragement and assurances of protection given by the appellants, which to their knowledge were relied on and acted upon by it to its detriment. The Company claimed that the decision to reduce the promised protection amounted to a breach of the appellants' duty not to act in a way which would reduce or destroy that protection, and to take reasonable care to safeguard its interests. It relied on principles of estoppel and negligence in support of its claim for declarations and damages. Pathik J concluded that it had made out its case under both headings but, for reasons discussed in the cross-appeal below, he decided that the appellants should be liable in damages only up to the time the 50% protection was granted, namely 18 June 1992, and gave judgment accordingly with the damages to be assessed later.

Conclusions

(a) Estoppel

We are satisfied that the Fiji Trade and Investment Board's conduct from 1988 onwards amounted to a representation of an undertaking that Pacoil would receive adequate protection for the establishment of its oil blending project, whether or not it was to be as much as the 100% claimed; and that it knew Pacoil was

relying on this when it proceeded with the construction of the building and plant. The Board also knew that if the undertaking was not honoured, Pacoil was very likely to suffer a substantial loss. The Board was an agency of the Government in this situation, which is bound by its conduct. Those matters give rise to a classic example of estoppel (see the discussion of this topic in Waltons Stores Ltd v Maher (1987-88) 164 CLR 387). As a result the appellants cannot now be permitted to deny that protection up to the degree indicated above was to be given when the plant became operative.

Such an undertaking however, cannot bind the executive government for an indefinite time to an indefinite degree. In Attorney General (NSW) v. Quin (1990) 170 CLR 1, 17, Mason CJ discussed the extent to which the doctrine of estoppel can be invoked to prevent a public authority doing its public duty. He cited with approval from the judgment of Gummow J in Minister for Immigration v Kurtovic (1990) 92 ALR 93, 111 to the effect that in the case of a statutory discretion there is a duty under the statute to exercise a free and unhindered discretion and an estoppel cannot be raised to prevent or hinder its exercise. The legislature intends it to be exercised on the basis of proper understanding of what is required by statute. (In the present case the discretion was one to be exercised under statutory regulations, but the principle must be the same). Mason CJ added that these comments did not deny the availability of estoppel

against the Executive arising from conduct amounting to a representation if "holding the Executive to its representation does not significantly hinder the exercise of the relevant discretion in the public interest".

In the present case the Ministry of Trade recognised 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 apropriate to achieve that end. It therefore becomes necessary to determine whether, in reaching its decision to reduce the protection to 50%, the Ministry owed a duty of care to Pacoil of the kind alleged in the pleadings, and if so, whether it was in breach thereof. That brings us to the topic of negligence.

(b) Negligence

Dealing with the claim based on negligence, Pathik J found that Pacoil had established a breach of the duty of care owed to it by the appellants in reducing the promised protection to 50%, causing the business to become non-viable. There have been numerous cases at all levels of authority dealing with the factors giving rise to the existence of a duty of care. We need only cite the following passage from Lord Bridge's speech in Caparo Industries v. Dickman [1990] 2 A.C. 605, 617 - 618; [1990]

1 All E.R. 568, 573 - 574 as an appropriate summary for present purposes:-

> *"What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."*

Having regard to the dealings between the Fiji Trade and Investment Board and the Company, and the way in which the former encouraged and fostered the project, we are satisfied that the relationship between them was one of "proximity". The further question arises whether it is "fair, just and reasonable" to impose a duty on the appellants to take reasonable care not to reduce the protection promised so as to render the project non-viable. It is on this aspect that difficulties arise in relation to the June 1992 decision, which was the one primarily attacked

by the respondent. As Government entities, the Ministry and the Board had the public interest to consider as well as that of Company. It is clear from the Ministry of Trade's letter querying protection for oil blending that this factor was regarded as a matter of importance and this was also reflected in Mr Rokovada's evidence to which we have referred.

In Rowling v. Takaro Properties Limited [1988] 1 All E.R. 163, 172 Lord Keith discussed considerations which might militate against the imposition of liability on a government agency and among them he said it is not to be forgotten that a Minister exercising a statutory discretion is acting essentially as a guardian of the public interest. He also pointed out that in such cases the processes of judicial review are available to the aggrieved party, and that was the course Shell embarked upon in challenging the decision to give 50% protection to Pacoil. We were not given any explanation why the latter did not mount a similar challenge. Instead, it seems to have confined itself to making submissions to the Prime Minister.

In Comeau Sea Foods Ltd v. The Queen (1995) 123 DLR (4th) 180 (referred to by Mr Singh), Stone JA, a member of the majority in the Federal Court of Appeal, drew attention to Lord Keith's comments about the availability of administrative law remedies, and considered this should be taken into account in concluding whether a prima facie duty of care should be negatived. The case

was one in which the Canadian Minister of Finance, acting under legislation, had authorised the issue of fishing licences, but revoked them four months later. The other two members of the Court did not take the same view of that remedy, and we note that leave to appeal to the Canadian Supreme Court has been granted. Judicial review, with its attendant cost and delay, may not have been a practicable remedy for the Company in the circumstances of this case. Without the benefit of a full argument on the point we are not disposed to take it into account as a factor relevant to the existence of a duty of care.

We think the appellants' situation in the circumstances pertaining to the June 1992 decision can be summarised in the following extract from the decision of Cooke J (as he then was) in **Meates v. Attorney General** [1983] NZLR 308, 379, which was a case involving a claim by shareholders who had suffered loss from relying on Government assurances that their interests would be safeguarded if the company continued in business after receivership. In dealing with negligence involving breach of a duty of care he said:-

> *"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 rasonable 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."*

Under the 4th Schedule to the Customs Import and Export Regulations, protection is to be implemented through the issue of import licences by the Secretary for Economic Development etc. However, it is clear from the whole tenor of the correspondence and the other evidence that the ultimate decision on the level of protection rested with the Ministry of Trade. As a Department of Government it must be regarded as affected by the relationship of "proximity" existing between the Government's agent (the Fiji Trade and Industry Board) and the Company. Accordingly, in its dealings or decisions about protection, it was under a similar duty of care to the Company as that discussed by Cooke J in the foregoing passage from Meates v. Attorney General.

To be noted particularly in that passage is the obligation on the speaker to do "what is reasonably within his power, consistently with his other responsibilities". 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 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 nevetheless 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.

For these reasons, and with respect to Pathik J, we do not think there was sufficient evidence to support his conclusion that the Ministry acted in breach of the duty of care it owed to Pacoil in fixing the level of protection at 50% for 3 years.

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.

Cross Appeal

As noted above the respondent challenged the Judge's decision to limit the damages payable by the appellants up to the time the 50% protection was granted, namely 18 June 1992. In his judgment he referred to the delay which had taken place in the commissioning of the plant and with marketing arrangements, stating that there were numerous matters to be ironed out:-

> *"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 3 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."*

Although the respondent in its notice sought a variation in the order requiring the appellants to compensate it for continuing losses after judgment, Mr Shankar informed us that it

would accept a limitation to the date of the High Court judgment of 14 March 1996.

In the extract quoted above, Pathik J seems to accept that the appellants did their best to deal with the situation facing them when they made the decision to grant the 50% protection. Such a conclusion is consistent with our own view that the Ministry of Trade acted reasonably and did not breach its duty of care in attempting to balance the competing interest of the company, its competitors and the public. In addressing the extent of the compensation the respondent should receive, His Lordship took into account the part its own delays and difficulties played in contributing to the impasse which had arisen with Shell's proceedings.

We think that His Lordship sensibly adopted the pragmatic approach to damages which this case called for, bearing in mind that although the plant was evidently ready for commissioning in April 1993, there were still unresolved problems about marketing and production. The ability to mount a profitable operation during the 3 years of the protection granted from June 1992 may be very much open to speculation.

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 result is that the appeal is dismissed, but the respondent's cross-appeal is allowed to the extent specified, namely damages up to 30 April 1993, and damages are to be assessed accordingly. The respondent will have costs to be taxed if not agreed.

Sir Moti Tikaram
President Fiji Court of Appeal

Sir Maurice Casey
Judge of Appeal

Sir Edward Williams
Judge of Appeal