IN THE COURT OF APPEAL, FIJI ISLANDS

MISCELLANEOUS NO: 1/2001

(CIVIL ACTION NO. 282 OF 2001 L)

CASE STATED

IN THE MATTER of the Constitution of the Republic of Fiji Islands; and

IN THE MATTER of an application under the High Court Rules 1988 and the High Court (Constitutional Redress or Relief) Rules 1998

BETWEEN: MAHENDRA PAL CHAUDHRY

PLAINTIFF

AND:

LAISENIA QARASE FIRST RESPONDENT

PRESIDENT OF THE REPUBLIC OF FIJI ISLANDS

SECOND RESPONDENT

ATTORNEY GENERAL OF THE REPUBLIC OF FIJI ISLANDS

THIRD RESPONDENT

Coram: Eichelbaum JA, Presiding Judge
Ward, JA
Handley, JA
Smellie, JA
Keith, JA

Hearing: 12 and 13 February 2002, Suva

Counsel: Messrs. Gavan Griffith, Q.C., Geoffrey Kenneth, Gyaneshwar Prasad Lala, Neel Shivam and Varun Shandil for the Plaintiff
Messrs. Stephen Gageler, SC, William Calanchini, Sainivalati Navoti and Ms Nehla Baswaiya for the first and third Respondents

Date of Judgment: 15 February 2002

JUDGMENT OF THE COURT

Introduction

Under s 99(1) of the Constitution the President appoints and dismisses Ministers on the advice of the Prime Minister. In September 2001, following his appointment the Prime Minister, the first respondent, wrote to Mr Chaudhry, the plaintiff, as leader of the Fiji Labour Party (FLP) inviting that party to be represented in the Cabinet. Mr Chaudhry replied purporting to accept the invitation. However the Prime Minister tendered to the second respondent, the President, certain advice which led to the appointment of persons as Ministers. The Prime Minister did not recommend the appointment of any persons from the FLP nor was any such person appointed. By an originating summons issued in the High Court on 25 September 2001, the plaintiff sought orders which would declare and give effect to the claimed right of the FLP under the Constitution to be represented in the Cabinet. Before this Court is a Case Stated by the High Court, dated 29 November 2001, posing a series of questions of law for our decision. This is not an appeal to this Court. The proceedings are in the High Court which will make the final decisions. Our function is to answer the questions of law, and we will address these in turn, but we first refer to some general considerations.

The first and third respondents opposed the declarations and orders sought by the plaintiff, while the second respondent (the President) properly advised that he would abide by the decision of the Court and took no part in the arguments. Reference in this judgment to the respondents' submissions or arguments is a reference to those advanced by the first and third respondents.

The decision of this Court relates, and relates only, to questions of law arising under the Constitution, which of course is the supreme law of the Republic. Courts asked to

interpret the Constitution deal with those issues as a matter of law. Courts do not make Constitutions, that is the function of Parliaments. As is well known the provisions with which we are concerned were enacted in 1997 after full consideration of all the issues by the Reeves Commission, followed by a further careful consideration by the Joint Parliamentary Select Committee (JPSC), debate in both Houses of Parliament, and approval by the Great Council of Chiefs.

The Constitution must be applied to current events and personalities, but is unaffected by them. The meaning of the Constitution in general and of s 99 in particular does not vary depending on the opinions or personalities of the politicians of the day. The duties imposed and the rights conferred by s 99 are the same whoever happens to be the Prime Minister or the leader of a party entitled to receive an invitation under s 99(5). The questions before the Court arise in the context of specific correspondence between particular individuals, the leaders of their respective parties; but it would make no difference if their roles were reversed, or if different parties or personalities were involved. The Constitution speaks and applies impersonally. The Court has no authority to bend or amend the text.

We turn to the main relevant provisions of the Constitution. Chapter 7 deals with Executive Government, and Part 3 of that Chapter contains the specific provisions relating to Cabinet Government. Governments must have the confidence of the House of Representatives (s 97). The President appoints as Prime Minister the member of the House who, in the President's opinion, can form a government that has the confidence of the House (s 98). Section 99 needs to be set out in full. It provides:

Appointment of other Ministers

99.- (1) The President appoints and dismisses other Ministers on the advice of the Prime Minister.

(2) To be eligible for appointment, a Minister must be a member of the House of Representatives or the Senate.

(3) The Prime Minister must establish a multi-party Cabinet in the way set out in this section comprising such number of Ministers as he or she determines.

(4) Subject to this section, the composition of the Cabinet should, as far as possible, fairly represent the parties represented in the House of Representatives.

(5) In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House.

(6) If the Prime Minister selects for appointment to the Cabinet a person from a party whose membership in the House of Representatives is less than 10% of the total membership of the House, that selection is deemed, for the purposes of this section, to be a selection of a person from the Prime Minister's own party.

(7) If a party declines an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister must allocate the Cabinet positions to which that party would have been entitled amongst the other parties (including the Prime Minister's party) in proportion, as far as possible, to their respective entitlements under subsection (5).

(8) If all parties (apart from the Prime Minister's party and the party (if any) with which it is in coalition) decline an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister may look to his or her own party or coalition of parties to fill the places in the Cabinet.

(9) In selecting persons from parties other than his or her own party for appointment as Ministers, the Prime Minister must consult with the leaders of those parties.

Sections 3, 6 and 7 of the Constitution lay down certain principles which are relevant to its interpretation. Under s 3(a), in the interpretation of a provision of the Constitution, the Court must prefer a construction that would promote the purpose or object underlying the provision, taking into account the spirit of the Constitution as a whole. Section 6, described as the "Compact", sets out a number of principles for the conduct of government, within the framework of the Constitution and other laws. We will refer to these in more detail, but in brief, s 6(h) provides that in the formation of a government, full account is to be taken of the interests of all communities, s 6 (i) states that to the extent that the interests of different communities are seen to conflict, all the interested parties should negotiate in good faith in an endeavour to reach an agreement, and s 6 (l) refers to the equitable sharing of power amongst all communities.

In 1999, by the procedure provided by s 123 of the Constitution, the then President referred a number of questions as to the effect of provisions of the Constitution to the Supreme Court. While, directly, the questions related to the composition of the Senate, the section of the Constitution dealing with the appointment of the Senate (s 64) refers to and draws on s 99. Thus the Opinion of the Supreme Court answering the President's questions (*The President of the Republic of Fiji Islands v Kubuabola & ors, Misc 1/1999, 3 September 1999*) had to deal with aspects of the interpretation of s 99 and is relevant to some of the matters now before this Court. It is convenient to describe the Opinion as *the 1999 Supreme Court Opinion*. As the Supreme Court pointed out, the opinion of that Court pronounced in response to a reference by the President is necessarily authoritative as the true interpretation of the law and is binding on the President, the Government, the Parliament, the Courts (including of course this Court), the Great Council of Chiefs and the people of Fiji generally. At page 6 of its Opinion the Court said:

....a key concept embodied in the Constitution is power sharing. The questions referred to this Court are essentially concerned with how this concept operates in relation to the Senate and Cabinet....

Then at page 8, under the heading *The True Interpretation of the Rights regarding Senate Appointments* the Court said:

A central purpose of the 1997 Constitution is the sharing of power. The Republic of the Fiji Islands is declared in the course of the preamble to be a multi-cultural society. ..... political power is to be shared equitably amongst all communities: section 6(l). By section 99(3) the Cabinet is to be multi-party. Sharing of power means limitations of power. This concept of sharing permeates sections 64 and 99. For the purpose of determining the questions raised by the present reference, it must be given particular weight in resolving any ambiguity or deciding which of a number of possible interpretations must be adopted.

After quoting s 3(a), to which we have already referred, the Court continued:

It follows that there is a distribution of political power quite different from that which may be familiar under a traditional Westminster pattern. In a traditional Westminster - style democracy a Prime Minister who enjoys the support of the lower House can normally establish a Cabinet as he or she pleases. That is not the position in the Fiji Islands. Political power is divided among a number of groups, persons and parties; the share of each is in some way limited.(9)

Plaintiff's submissions

Mr Griffith QC centred his argument upon s 99 of the Constitution and in particular ss (3) to (9) inclusive. That group of subsections, counsel submitted, imposes a regime of multi-party government. The Prime Minister, it was argued, is not given a choice and an

invitation to join the Cabinet must be issued to all parties which meet the 10% threshold. Furthermore ss (5) does not envisage invitations hedged about with conditions. It follows that within Cabinet there may be groups with opposing views.

In support of his argument counsel for the plaintiff relied first upon the text of s 99 itself, secondly upon the Constitutional history which lay behind the section, and thirdly upon the Korolevu Declaration which was advanced as a contemporary document recording the deliberations of the founding fathers of the Constitution coming to grips with its practical application. Finally the correspondence between the Prime Minister and the leader of the FLP was called in aid. All these matters are referred to elsewhere in this judgment.

As to the effect of the Prime Minister's invitation and the correspondence it prompted, Mr Griffith advanced alternative arguments. First he contended that the Prime Minister's letter was, as it expressly described itself to be, an invitation pursuant to s 99(5), while the plaintiff's response was a clear acceptance. Alternatively Counsel argued if the invitation was conditional, then it failed to comply with s 99(5), the result being there had been no valid invitation. Either way, however, it was submitted the Constitution had been breached.

The consequences of the failure to observe the requirements of the Constitution were then examined. Stating there was no desire to "rake over the coals of the past," counsel for the plaintiff said that while the plaintiff was entitled to the mandatory orders

sought, he would be content with declarations which vindicated his position and ensured that the Constitution would be observed in the future.

Appropriately, no criticism was made of the President. He had acted, as required , on the advice of the Prime Minister. Nonetheless the point was made that if the advice given was invalid because the Constitution had not been observed, the whole process was thereby flawed.

It followed from the above submissions that the plaintiff urged the Court to indicate clearly by its decision and the answers it provides on the Case Stated that the FLP appointments to the Cabinet should now be made without further delay.

Replying to Mr Gageler SC's arguments for the respondents, Counsel submitted that reliance on the traditional Westminster model of parliamentary government was misplaced. Section 99, he said, was a deliberate departure introduced to promote multi-party government, and the respondents' contention that s 99 ought to be interpreted in terms of what would be workable under the traditional model should be rejected.

Addressing the respondents' reliance on the Reeves Report, Counsel submitted that the parliamentary history showed quite clearly a fundamental departure from the Report's recommendations. Parliament had adopted unanimously and without debate s 99(3) - (9) inclusive as the preferred mechanism for forcing co-operation as part of the process of making multi-party government work.

First and Third Respondents' Submissions

Mr Gageler for the respondents submitted that the question at the heart of the case relates not to the duty of the Prime Minister to establish a multi-party Cabinet but to the nature of the multi-party Cabinet he has to establish. The invitation under s 99(5) is the mandatory first step in what must be a bona fide attempt to find common ground between the parties involved. If the invitation results in sufficient agreement to establish that, a multi-party government will result but the respondents submitted that, if it fails, there is no obligation on the Prime Minister to include that party in his Cabinet. Subsection (3) places a duty on the Prime Minister to establish a multi-party Cabinet but the provision in ss (4) that the composition of that Cabinet must, as far as possible, fairly represent the parties represented in the House clearly envisages the possibility that the formation of such a Cabinet may not be possible.

The foundation of the respondents' argument lies in their contention that this is not a departure from the Westminster model but an addition to it. Read in the context of the Westminster system, s 99 must be based on agreement between the parties that make up the Cabinet.

The framework within which the government is formed is set out in Chapter 7 of the Constitution. Part 3 is headed "Cabinet Government". If that Part is read as a whole, the respondents contended it is clear the Cabinet must consist of Ministers who have reached some consensus in their policies because the political reality of Part 3 is that there can only

be Cabinet government if the parties commanding a majority of the House have a willingness to work together.

The respondents pointed out that the consensual nature of Cabinet government under section 99 is reinforced by other provisions of Part 3. Section 102 establishes the requirement of collective responsibility. The consequences are emphasised by the terms of the oath of office required by section 101 which precludes the disclosure in any way of the business or proceedings of the Cabinet. Similarly sections 107 and 108 require the Government to have the confidence of the House. These are fundamental requirements of the Westminster system of government in which the members of Cabinet are sufficiently in agreement to be able to support the decisions of Cabinet on the floor of the House. In turn, those decisions must be acceptable to the majority of the members of the House.

In the respondents' submission, the principles articulated in the Compact, particularly in paragraphs (g), (h) and (l), clearly support the interpretation of section 99 as envisaging a Cabinet on the Westminster model the members of which are in general accord.

The proposal of the JPSC for Cabinet government replaced the recommendations of the Reeves Commission with the structure which, as later amended, found expression in section 99. The respondents pointed to the difference between the draft Bill (at that time clause 98) which placed an obligation on the Prime Minister to ensure all parties qualifying for membership of Cabinet were represented in proportion to their numbers , and the final

form of s 99(5) which only required him to invite in good faith those parties entitled to be represented. This, the respondents suggested, is simply a procedural step towards performance of the duty under s 99(3) to establish a multi-party Cabinet. Section 99 gives no absolute right to be represented in Cabinet and, as a multi-party Cabinet will only be achieved if there is substantial consensus, the Prime Minister must be able to decline to accept some parties.

The respondents pointed out there is no provision preventing the Prime Minister from imposing conditions on the invitation. The *1999 Supreme Court Opinion* clearly established the right of the Prime Minister to reject a conditional acceptance. Their submission is that it established a requirement only to act reasonably. As there is nothing in the section to say the invitation must be unconditional, it should not be read in such a restrictive way, subject to the requirement of reasonableness

In summarising his case, counsel for the respondents suggested that, in a modification of the Westminster model, his interpretation was consistent with and workable in the overall framework established in Chapter 7 and was in accordance with the reasoning in the *1999 Supreme Court Opinion*. That framework arose, he pointed out, from the Reeves Committee's view that the South African model could not work in Fiji and the drafting history of the provision shows a desire not to adopt such a system in Fiji. Finally he submitted that the plaintiff's suggested interpretation of s 99 would lead to a period of constitutional experimentation which the country could ill afford.

Counsel asked the Court to find that the Prime Minister's letter of 10 September 2001 properly and reasonably made it clear that the guiding policies of the Cabinet would be those of his party. The response by the plaintiff in his second letter that same day, whilst purporting to accept the invitation, showed, by the reference to clause 4 of the Korolevu Declaration, that he intended to take the policies of the FLP into Cabinet. The respondents contended this was a condition so incompatible with the terms of the Prime Minister's invitation that it was reasonable for him to treat the response as declining his invitation.

The Constitutional History

The 1990 Constitution was promulgated to restore parliamentary democracy after the 1987 military coup. It was not the product of a consensus among the citizens of Fiji as a whole and the Reeves Committee stated that it did not meet the widely-shared desire for a system of government that took proper account of Fiji's multi-ethnic character . The authors of the 1990 Constitution acknowledged its interim nature by providing for its review within 7 years, i.e. before 25 July 1997. In September 1993 both Houses of Parliament unanimously resolved that a Commission of Inquiry should be set up to review the Constitution with appropriate Terms of Reference.

The Reeves Commission was established by the President on 15 March 1995 by a Commission which required it to "review the Constitution promoting racial harmony and national unity and the economic and social advancement of all communities" and "to

recommend constitutional arrangements likely to achieve the objectives of the Constitutional Review" (Report of the Fiji Constitution Review Commission Appendix B pp.754-5.)

The Commission made its report to the President on 9 September 1996. Its recommendations included in 9.148 that the time had come when most seats in the House of Representatives should no longer be reserved for particular communities but should be open seats with candidates being elected by voters of all communities. However recommendation 9.154 was that as a transitional measure there should continue to be some reserved seats. It recommended a House of Representatives of 70 seats comprising 45 open seats and 25 reserved seats including 12 for Fijians and 10 for Indo-Fijians. It said in 9.166 that it saw "that proportion of open seats to reserved seats as the bare minimum necessary to allow them to act as a spur to the development of multi-ethnic politics". Its recommendations in Chapter 2 "Strengthening the Constitutional Foundations" included: "The primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multi-ethnic governments"; "The Constitution should continue to be based on the Westminster system of parliamentary government", and that "Power-sharing should be achieved through the voluntary cooperation of political parties, or increased support for a genuinely multi-ethnic party". The Commission said (2.61) that "There was wide support for the idea that all ethnic communities should have the opportunity to play a part in the Cabinet", and (2.69) that:

...progress towards the sharing of executive power among all ethnic communities is the only solution to Fiji's constitutional problems. Constitutional arrangements which will encourage the emergence of multi-ethnic governments should be the primary goal.

It rejected a submission that Cabinet should be formed from all parties, in proportion to their representation in the Lower House subject to a minimum threshold (9.87). It recommended instead that the Constitution should maintain the system under which a government must have the support of a majority in the Lower House in the expectation that the proposed changes in the electoral arrangements would encourage the emergence of multi-ethnic parties or coalitions that could form a government (9.98). It continued (9.99):

This approach has the advantage of ensuring that, in normal circumstances, a united government will be in a position to secure the implementation of its policies. The concept of "winner take all", condemned in a number of submissions, will still apply, but it should no longer have its present effect of allocating government and opposition, not only between parties, but also between ethnic communities.

The report was tabled by Major General Rabuka, the Prime Minister at a joint meeting of both Houses of Parliament on 10 September 1996. The joint meeting referred the report to the JPSC, comprising 23 members from the six largest parties and the Prime Minister and the Leader of the Opposition. The JPSC submitted its report on 13 May 1997. Its recommendations included the following dealing with multi-party government:

G.1 The Reeves Commission had recommended that the primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multi-ethnic governments. In agreeing to this principle the JPSC has gone further and stipulates that the Constitution would include provisions that the Prime Minister must establish a multi-party Cabinet which would, as far as possible be a fair representation of all parties represented in Parliament. A constitutional threshold should be set to provide the basis of representation therein.

G.2 ...

G.3 ...

G.4 In the event that parties invited to join a multi-party executive government decline to take up the invitation, the Prime Minister shall have the flexibility to form a Cabinet from within his own party.

The JPSC rejected the formula of representation recommended by the Reeves Commission (H.9) and recommended that there be 46 communal seats and 25 open seats.

On 23 June Major General Rabuka, speaking in the Lower House of Parliament, moved the second reading of the Constitution (Amendment) Bill 1997. The Bill as introduced contained section 3 as it subsequently appeared in the Constitution and section 6 in its final form but without paragraph (l). Clause 50 which allocated the 71 seats in the House of Representatives became s 51 of the Constitution without amendment and clause 63 dealing with the composition of the Senate became s 64 without amendment.

Clause 98 which became the basis of s 99 of the Constitution contained six subsections. The first two are identical with the corresponding subsections in s 99 but the remaining four subsections were significantly different from the rest of the section as enacted. Subclause (4) provided for a threshold of 4% of the total membership of the House of Representatives as the basis for an entitlement to proportional representation in Cabinet. Although it conferred such an entitlement and ss (5) contemplated that the Prime Minister would invite minority parties to be represented in Cabinet it did not in terms require the Prime Minister to issue such an invitation. The Bill contained no provision equivalent to s 99(6) which provides that when the Prime Minister appoints to the Cabinet

a person from a party whose membership in the House of Representatives is below the 10% threshold, the representation of his own party in Cabinet will be reduced. Further the Bill contained no provision equivalent to s 99(7) which requires the Cabinet positions to which a minority party would be entitled, but for its refusal of an invitation from the Prime Minister, to be allocated amongst the other parties, including the Prime Minister's party, in proportion to their entitlements under s 99(5).

Clause 3 of the Bill which dealt with the interpretation of the Constitution differed in minor ways from the provision proposed by the Reeves Commission. Clause 5 contained the Compact between the people of the Fiji Islands along the lines proposed by the Reeves Commission (Report 676-7) but with significant differences. Paragraph (6) of the Compact as recommended by the Reeves Commission, broadly corresponds with s 6(g) of the Constitution. Both refer to a situation where "it is necessary or desirable to form a coalition government from among competing parties" but unlike paragraph (g) as enacted paragraph (6) referred not only to "their willingness to come together to form or support a government" but also to "the compatibility of their policies". Paragraph (l), which is quoted later, added a further principle to section 6.

In this second reading speech on 23 June 1997 Major General Rabuka said (Hansard 4437):

> ***The provisions of chapter 7 dealing with Cabinet government make a fundamental change to the formation of governments in Fiji. The provisions contemplate the formation of multi-party Cabinets in which parties whose membership in the House of Representatives reach a particular numerical threshold must be invited by the Prime Minister to participate in Cabinet. I should mention that this is one section of the Bill that is still under active discussion and the final form will***

depend on the consensus or agreement that will emerge from further consultation with the Joint Parliamentary Select Committee and from the general debate that will ensue in this honourable chamber.

The normal practice by convention is that the political party or coalition of parties that win the majority of seats in the General Election is invited to form a Government. Here, the intention is to go a little further. Clearly, we shall need to weigh very carefully the benefits of showing greater political goodwill in this way, and the practical importance of having a system of Cabinet government that is decisive in providing leadership and is able to maintain the discipline of collective Cabinet responsibility and unity. There is also the need to maintain a credible and effective opposition, not only to keep Government accountable but also to give the people an alternative choice of Government.

He continued (4439):

The most important area where we have made our Constitution a positive instrument of inter-ethnic co-operation and national unity is in our acceptance of the concept of a multi-party Cabinet, providing for the representation and participation of the different communities in Fiji, both in Cabinet and in Parliament. ... We have to move away from the ethnic divide that for the past five years has been a divisive and unhappy feature of this Chamber. We cannot make any real progress in promoting national unity in Fiji unless and until we have representatives of all communities sitting together in Cabinet and sitting alongside each other on both sides of this Chamber.

On 2 July 1997 Major General Rabuka moved in Committee that subclauses 3, 4, 5 and 6 of clause 98 of the Bill be deleted and that ss (3) to (9) which became subsections of s 99 be substituted. This amendment was carried without debate.

Clause 98 of the Bill differed significantly from the provisions contemplated by the Reeves report. When it was amended in Parliament no attempt was made to amend what became section 6 to make paragraph (g) reflect s 99. However as counsel for the plaintiff submitted paragraph (g) is directed to the formation of a government, the process dealt with in s 98 and not with the appointment of a Cabinet, which is dealt with in s 99.

The principles referred to in s 6 cannot be enforced by the courts because section 7(1) provides that they are non-justiciable. However s 7(2) provides that they must be considered in interpreting the Constitution. In this case those principles are of no relevance because what became s 99 was extensively amended without s 6 being amended, because none of the principles in section 6 deal with the appointment of a Cabinet, and because as will become apparent in the next section of this judgment, in our view the meaning of s 99 is clear. The principles in s 6 may help to resolve the meaning of the Constitution where this is not clear. They cannot be used to alter the clear meaning of s 99.

The Interpretation of Section 99

Section 99, in particular ss(3) to (9), is at the heart of this case. Subsection (3) imposes the basic duty: "The Prime Minister must establish a multi-party Cabinet...". Section 194 (12) gives added emphasis to the word "must":

> ***For the avoidance of doubt, use of the word must in this Constitution imports obligation to the same extent as if the word shall were used.***

That duty of the Prime Minister is to be carried out "in the way set out in this section" - a reference to the later subsections, considered shortly. Subsection (3) concludes by empowering the Prime Minister to determine the number of Ministers who are to comprise the Cabinet.

Subsection (4) then states a further requirement about the Cabinet's composition. That composition should, as far as possible, fairly represent the parties represented in the House, again subject to the terms of the section. The composition will not necessarily reflect exactly the representation in the House for the following reasons. Subsection (5) excludes from the mandatory invitation those parties with less than 10% of the total membership of the House. Subsection (6) provides for the reduction of the share held by the Prime Minister's party to the extent that the Prime Minister appoints to the Cabinet a person from a party with less than 10% of the membership of the House. Subsections (7) and (8) provide for the re-allocation of Cabinet seats if parties decline the Prime Minister's invitation to be represented in the Cabinet.

A further qualification arises from the impossibility of exact arithmetical proportionality. The qualifying words (should, as far as possible, fairly) do not give the Prime Minister any discretion to depart from the requirements of s 99.

It is convenient to mention here a contrast between the wording of ss(3) and of ss(8). The latter expressly contemplates that the Prime Minister's party and another party may be "in coalition", while the former requires the Prime Minister to establish "a multi-party Cabinet".

Subsection (5) imposes a duty on the Prime Minister in support of the requirements of a multi-party Cabinet and proportionality stated in ss (3) and (4). The Prime Minister must invite any party with at least 10% of the membership of the House (a qualified party) to be represented in the Cabinet in proportion to its numbers in the House.

That duty is stated directly and simply . Whether viewed in isolation or in the context of s 99 as a whole, the words of ss (5) provide no basis at all for allowing the Prime Minister to impose any conditions on the invitations he must make. To repeat the precise terms, the Prime Minister "must invite [qualified] parties ... to be represented". Section 194 (7) which provides that those upon whom functions are conferred have power to do everything necessary or convenient to be done for or in connection with the performance of those functions does not help the respondents. Section 99 (5) does not confer a function, it simply imposes a duty.

Section 194(7) is however relevant to the Prime Minister's function of forming a Cabinet and to the process for the accepting or declining of the required invitation. For example, it would allow the Prime Minister to make reasonable requirements about the time, place and method for acceptance of the invitation.

The duty of the Prime Minister to issue the invitations is naturally and directly matched by the "entitlements" of qualified parties to be represented in the Cabinet (ss(7)).

To summarise, the words of s 99(5) read alone and with the other provisions of s 99 are plain. They require the Prime Minister to issue an invitation to qualified parties. No more. No less.

The argument before the Court however went beyond s 99 to the other provisions of Chapter 7, to the Constitution as a whole, and to broad propositions about Cabinet government under the Westminster system, as well as to the constitutional history which has already been reviewed.

Part 3 of Chapter 7 establishes Cabinet government. Sections 97, 98 and 102 provide that governments must have the confidence of the House of Representatives, the Cabinet is collectively responsible to the House for the governance of the State, and a Minister is individually responsible to the House for all acts done by or under the authority of the Minister in the execution of his or her office. The oath or affirmation for due execution of the Office of a Minister emphasises the collective character of Cabinet responsibility and Cabinet confidentiality. The Prime Minister must be a member of the House and Ministers must be members of the House or the Senate (ss98 and 99(2)). The provisions for the formation of new governments, the dissolution of Parliament, and the appointment and dismissal of a Prime Minister turn on whether or not the existing or proposed government or Prime Minister has the confidence of the House (ss 97, 98,107-109).

The system of parliamentary government provided for in those provisions is recognised in the Compact which states certain principles on which the conduct of government is based:

> *(g) the formation of a government that has the support of a majority in the House of Representatives depends on the electoral support received by the various political parties or pre-election coalitions, and, if it is necessary or desirable to form a coalition government from among competing parties, depends on their willingness to come together to form or support a government;*
>
> *(h) in the formation of a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account is taken of the interests of all communities;*
>
> *(i) to the extent that the interests of different communities are seen to conflict, all the interested parties negotiate in good faith in an endeavour to reach agreement;*
>
> *(l) the equitable sharing of political power amongst all communities in the Fiji Islands is matched by an equitable sharing of economic and commercial power to ensure that all communities fully benefit from the nation's economic progress.*

As earlier recorded these principles are not justiciable except to the extent that they are made the subject of other provisions of the Constitution or a law made under it.

Part 3 provides for the appointment of the Prime Minister and the other ministers. The first step is taken by the President in the exercise of his or her own judgment. The President appoints as Prime Minister the member of the House who in the President's opinion can form a government that has the confidence of the House. If the Prime Minister's party does not have a majority in the House, the Prime Minister will have reached an agreement which satisfied the President that he or she can form a government that has the confidence of the House.

The Prime Minister then proceeds to establish a Cabinet. Under ss99(1) and (2) the President appoints and dismisses Ministers on the Prime Minister's advice: the President has no discretion. Ministers also lose office if the Prime Minister does (s105(1)(a) and (b)). Apart from the requirement that Ministers shall be members of one of the Houses, and the critical proportionality provisions, the only other constraint on the Prime Minister when forming the Cabinet, is that, if selecting persons from other parties, he or she must consult with the leaders of their parties (s99(9)).

Apart from the provisions for a multi-party Cabinet, the constitutional provisions just summarised appear as an orthodox statement of the Westminster system of parliamentary cabinet government. In brief, the Executive is drawn from Parliament, it must have the support or confidence of the House, it is collectively responsible to the House, its members are subject to related obligations of confidentiality, and it loses office if it loses the confidence of the House.

The question which arises from these provisions is whether they qualify the duty imposed by s99(5), and enable the Prime Minister to impose conditions on an invitation to be represented in Cabinet. We think not. The obligation placed on the Prime Minister is clear and precise. There is no ambiguity. There is no necessity for reading in any words. Any practical difficulties that may arise in the working of a multi-party Cabinet cannot affect the clear meaning of the words.

The 1999 Supreme Court Opinion makes it clear that a prime object of the Constitution is to promote the sharing of power. A construction which would allow a Prime Minister to impose a condition requiring a qualified party to agree to conform to the policies of the Prime Minister is contrary to the Opinion of the Supreme Court.

We therefore hold that s 99(5) obliges a Prime Minister to invite, in unconditional terms, parties which have 10% or more of the membership of the

House to be represented in the Cabinet in accordance with that provision. This means the invitation to participate in Cabinet may have to be issued across political lines. The text, the context, the history and the 1999 Supreme Court Opinion lead inexorably to this conclusion.

The Questions

We turn to the specific questions.

(1) Was the Prime Minister's letter of invitation of 10 September 2001 consistent with his obligation under s.99(5) of the Constitution?

The results of the General Election in August/September 2001 were:

Soqosoqo Duavata ni Lewenivanua (SDL)	*32 (45.1%)*
Fiji Labour Party (FLP)	*27 (38.0%)*
Conservative Alliance/Matanitu Vanua (CAMV)	*6 (8.5%)*
New Labour Unity Party (NLUP)	*2 (2.8%)*
National Federation Party (NFP)	*1 (1.4%)*
United General Party	*1 (1.4%)*
Independents	*2 (2.8%)*

It will be seen that no party had obtained a majority of the seats. However, on 6 September 2001 the first respondent, as leader of the SDL party, wrote to the President to the effect that he had formed a coalition and had also obtained the support of certain other members. In the result he commanded the support of a majority of the House. On 10 September 2001 the President appointed him as Prime Minister.

The Prime Minister's letter to the plaintiff, the subject of Question 1, is annexed as Appendix A. In brief, it commenced by referring to the requirement of s 99(5) of the Constitution, that the Prime Minister should invite all parties receiving at least 10% of the total membership of the House of Representatives to be represented in Cabinet. Then it extended an invitation to the plaintiff and his party "in accordance with the requirements of the Constitution".

Next the Prime Minister stated he had formed a coalition and had the necessary numbers in the House to govern. He continued that the policies of "my Cabinet" would be based fundamentally on the policy manifesto of the SDL as the leading party of a multi-party coalition. Pointing out that on a number of key issues his policies and those of the plaintiff were diametrically opposed, he said he did not think there was a sufficient basis for a workable partnership with the plaintiff's party in his Cabinet. He continued that there could be no compromise on these issues. He said his was the majority party and it was "simply inconceivable" that his party should allow a situation to arise where they became a minority in Cabinet. The Prime Minister said that he had set this out very clearly because in the present circumstances the requirement of s 99(5) was "unrealistic and unworkable".

Construction of documents of this kind is a question of law, see *Woodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741, 753. Undoubtedly, the letter was intended to convey the invitation required by s 99(5). As seen the primary position

of both sides was that it was, in fact, a valid invitation in terms of that provision, although for different reasons. By way of alternative, the plaintiff's argument was that the letter of 10 September was a conditional invitation and thus, according to the interpretation of s 99 we have adopted, contrary to the Constitution and invalid. Indeed in a subsequent letter dated 12 September, written after the plaintiff had replied to the invitation, the Prime Minster stated that Mr Chaudhry had not expressly accepted "the basic condition" that Cabinet policies would be based fundamentally on the policy manifesto of SDL. The 10 September letter however has to be construed objectively, the issue being how the recipient reasonably would interpret it. The objective interpretation, in our opinion, is that the letter contains the invitation required by s 99(5). In addition, it advised (or one might say, warned) the plaintiff of the way the writer intended the affairs of Cabinet to be conducted. The letter did not ask the plaintiff or his party to agree.

Some of the respondents' arguments suggest a perception of Cabinet government under the Constitution not consistent with the views on power sharing and limitations on power expressed in *the 1999 Supreme Court Opinion*. Section 99 provides for a mode of Cabinet government significantly different from the traditional Westminster model. Descriptions of the latter, however authoritative in other countries, cannot control the meaning of s 99, nor can the potential difficulties, real or imaginary, of a Cabinet constituted in accordance with that provision, if unambiguous.

The respondents argued that s 99 does not contemplate that any party will have an absolute right to Cabinet participation. The formation of a multi-party Cabinet will occur, they said, only if the relevant parties are able to reach a consensus that makes this practicable.

We agree with this only to the extent that the section does not provide that the recipient of an invitation under s 99(5) must be represented in Cabinet. A

recipient may wish to remain in opposition, and the potential leader of the opposition may prefer the privileges of that office. What s 99(5) confers however is the right to an invitation in terms of the section.

We answer Question (1) Yes, because the invitation was unconditional.

(2) If the answer to (1) is No:

(a) did the Prime Minister breach any constitutional or other legal duty by proceeding to advise the President on the appointment of Ministers?

(b) was the appointment of Ministers on 12, 19 and 26 September 2001 invalid?

In view of our answer to Question 1, (a) does not require an answer. During the hearing counsel informed us that they no longer required the Court to answer question 2(b).

(3) (i) Following his receipt of Mr Chaudhry's second letter dated 10 September (the Acceptance letter) was the Prime Minister required, by s.99 of the Constitution or otherwise, to tender such advice to the President as would lead to the appointment of a cabinet in which the FLP was represented in proportion to its numbers in the House of Representatives?

(ii) Alternatively, was Mr Chaudhry's second letter conditional, which could be treated by the Prime Minister as if Mr Chaudhry had declined the Prime Minister's invitation?

Since the Prime Minister's letter of 10 September was an unconditional invitation as required by s 99(5) coupled with information or a warning, there is no difficulty in construing the plaintiff's response as an unconditional acceptance. His letter, also dated 10 September, is attached as Appendix B. His statement that the FLP's participation would be in accordance with the Constitution added nothing since its participation would necessarily have to be in accordance with the Constitution. The Korolevu Declaration is a political compact and neither the first respondent nor his party were signatories. The letter stated it was an acceptance of the Prime Minister's invitation, but like the Prime Minister's letter, it went on to give additional information. As with the Prime Minister's letter however this did not make the letter conditional. The plaintiff's reply did not ask the Prime Minister to agree to anything.

Thus our answer to (i) is yes, and to (ii) is no.

(iii) Did the PM have a discretion in the matter?

Since there was a valid invitation followed by a valid acceptance, consequential steps must be taken in accordance with ss (3), (4), (6) and (9) of s 99. By virtue of ss (3) the Prime Minister has a discretion as to the total number of Ministers, but the composition of the Cabinet is governed by ss (5), and the representation of the FLP

must be in proportion to its numbers in the House. In that respect the Prime Minister does not have a discretion.

Our answer is that the Prime Minister has no discretion but is required to tender to the President the advice referred to in Question (3)(i)

(iv) If Mr. Chaudhry had declined the Prime Minister's invitation, could the Prime Minister then proceed in accordance with section 99(8) in the formation of his Cabinet?

As Mr Chaudhry did not decline, an answer is not required.

(4) Following his receipt of the Acceptance letter, was the Prime Minister required, by s.99(9) or otherwise, to consult Mr Chaudhry in relation to the selection of members of the FLP for inclusion in the Cabinet?

The answer is Yes.

(5) Has the Prime Minister breached any constitutional or other legal duty by

(a) advising the President to appoint a Cabinet that does not contain any FLP members; or

(b) not consulting Mr Chaudhry in relation to the selection of members of the FLP for inclusion in the Cabinet?

It follows from our previous conclusions and reasoning that in both instances the answer is yes, the Prime Minister breached a constitutional duty.

(6) Is the Prime Minister presently in breach of any duty imposed by the Constitution or other law in:

(a) not advising the President to appoint FLP members as Ministers; or in

(b) not consulting Mr. Chaudhary in relation to the selection of members of the FLP for inclusion in the Cabinet?

Again, it follows from our previous conclusions and reasoning that in both instances the answer is Yes, the Prime Minister is in breach of a duty imposed by the Constitution.

(7) Were the appointments of Ministers by the President on 12,19 and 26 September 2001 invalid?

(8) In establishing a multi-party cabinet as requested under section 99(3) is the Prime Minister obliged to invite a party or parties which do not meet the required percentage entitlement?

(9) If the answer to (5)(a) or (b) or (6)(a) or (b) is yes, does this Court have power to grant relief in the terms of orders C and D in the Originating Summons?

(10) If the answer to (2)(b), (5)(a) or (b), (6)(a) or (b) or (7) is yes, does this Court have power to grant relief in the terms of order E in the Originating Summons?

(11) If the plaintiff succeeds in any of these matters, nonetheless should the Court extend him relief?

Counsel informed us that no answers were required to these questions.

We direct that our answers and the reasons for them be returned to the High Court. Council agreed that costs should be dealt with in the High Court.

Eichelbaum JA

Ward JA

Handley JA

Smellie JA

Keith JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. G.P. Lala and Company, Suva for the ~~Appellant~~ Plaintiff
Office of the ~~Attorney~~-General, Chambers, Suva for the Respondents
Solicitor

132

7 48

PRIME MINISTER
SUVA, FIJI

Telephone : (679) 211 201
Facsimile : (679) 307 806

A

10th September, 2001

APPENDIX A

1

Hon. Mahendra P Chaudhry
Leader
Fiji Labour Party
SUVA.

Dear Sir,

It is a requirement under section 99-(5) of the Constitution that the Prime Minister, once appointed, should invite all parties that receive at least 10% of the total membership of the House of Representatives to be represented in Cabinet.

This morning I have accepted appointment as Prime Minister at the invitation of His Excellency the President. In this capacity, I now extend an invitation to you and your party in accordance with the requirement of the Constitution.

I should, however, be candid in stressing that I already have the necessary numbers to maintain and sustain our position in the House of Representatives as a viable, stable and effective Government.

This is the annexure marked 'A' referred to
in the Affidavit of MAHENDRA PAL CHAUDHRY.
Sworn this 25th day of SEP. 2001 before me

A Commissioner for Oaths

A 49

I have already formed a coalition with like-minded parties and individuals based on consensus and voluntary agreement.

The policies of my Cabinet will be based fundamentally on the policy manifesto of the Soqosoqo Duavata ni Lewenivanua, as the leader of this multi-party coalition. Our policies and your policies on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed. Given this, I genuinely do not think there is sufficient basis for a workable partnership with your party in my Cabinet. Indeed, for my party, there can be no compromise on these issues. We have been given a clear and decisive mandate by the people who have voted my party in with the largest representative group in the House of Representatives. As such, we have no mandate to make any changes or adjustments to the policies on which we have been elected.

There is also the make up of the House of Representatives as the outcome of the General Elections. We are the majority party and it is simply inconceivable that we should allow a situation where we become the minority group in a Cabinet we have been entrusted both by His Excellency the President and by the people to lead. What Fiji needs is a stable Government and the Soqosoqo Duavata ni Lewenivanua is fully capable of delivering that with its coalition of like-minded parties and individuals.

50

I have set this out very clearly because in the present circumstances, the requirement under section 99(5) of the Constitution is both unrealistic and unworkable.

However, I give you and the whole country a firm assurance that we shall govern Fiji in the best interests of all its people.

Yours faithfully,

[L Qarase]
Prime Minister

136

FIJI LABOUR PARTY

National President: Mrs. J. Koroi
Secretary-General: M.P. Chaudhry

Peace Freedom Justice Democracy

REF: FLP-PC/01/09/2

APPENDIX B

(3)

10th September, 2001

Hon Laisenia Qarase
Prime Minister of the Republic of the Fiji Islands
Prime Minister's Office
Government Buildings
Suva
FIJI ISLANDS

This is the annexure marked "C" referred to in the Affidavit of MAHENDRA PAL CHAUDHRY Sworn this 25th day of Sept 2001 before me

A Commissioner for Oaths

Dear Prime Minister,

(7) (8)

Reference is made to your letter of offer to FLP for representation in the Cabinet and to my letter bearing even date delivered to you earlier today. I have much pleasure in informing you that the FLP Parliamentary Caucus has had mature deliberations on your said offer of today and has authorised me to inform and advice you that the FLP accepts your invitation under Section 99 (5) of the Constitution of the Republic of the Fiji Islands to be represented in the Cabinet.

I thank you for your invitation and FLP looks forward to working together with your party to rebuild Fiji in a spirit of national reconciliation.

My party's participation in Cabinet and in government will be in accordance with the provisions of the Constitution and with that of the Korolevu Declaration – Parliamentary Paper No 15 of 1999.

I wish to kindly bring to your attention clause number 4 of the Declaration which reads as follows:

"4. The manner in which the Cabinet conducts its business.

(a) Cabinet decision making in Government should be on a consensus seeking basis especially with regard to key issues and policies.

(b) Parties represented in the Cabinet may express and record independent views on the Cabinet decisions but Members of the Cabinet must comply with the principle of collective responsibility.

All Correspondence to be addressed to the Secretary-General
P.O. Box 2162, Government Buildings, Suva, Fiji Is. Phone: (679)308602 Fax: (679)307829

52

(c) Consensus seeking mechanisms in cabinet should include the formulation of a broadly acceptable policy framework, the establishment of Cabinet committees to examine any major disagreements on policy issues and the establishment of flexible rules governing communications by ministers to their respective party caucuses."

Furthermore, I reserve my right to address you further at an appropriate time during our consultations, which you no doubt will be initiating very shortly, with regard to the other matters raised in your letter.

I advice you that I am available to start the consultative process as envisaged in the Constitution and particularly in regards to the appointment of Ministers, Assistant Ministers, Senators, policy formulation and in the matters pertinent to minority parties in the Parliament.

I look forward to meeting you to initiate our consultation process urgently.

Yours sincerely,

Mahendra Chaudhry
PARLIAMENTARY LEADER/FIJI LABOUR PARTY LEADER