

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

Action No. HBC 94 of 2004

**BETWEEN:**

**WILLIAMS ASSOCIATES LIMITED**

*Plaintiff*

**AND:**

**PASTOR NAIBUKA GONEWALL,**  
**PASTOR SANAILA SOQOVATA,**  
**PASTOR JOSIA TOKEA,**  
**PASTOR EMOSI TOROCA RATAVOLA,** and  
**REVEREND SULIASI KURULO** Trustees for Fiji of the  
**CHRISTIAN MISSION FELLOWSHIP** registered under the  
Religious Bodies Registration Act

*Defendants*

**Coram:** Hickie, J

**Counsel:** Mr I. Roche with Mr N. Prasad for the Plaintiff  
Mr I. Fa with Mr V. Prasad for the Defendants

**Dates of Hearing:** 28, 29, 30, 31 July 2008; 4 August 2008 (mention); and  
14 August 2008

**Dates of Submissions:** 30 October 2008 (Plaintiff)  
18 November 2008 (Defendant)  
5 December 2008 (Plaintiff in Reply)

**Date of Judgment:** 13 February 2009

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**JUDGMENT**

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**A. BACKGROUND**

**1. The Application**

[1] The Plaintiff, **WILLIAMS ASSOCIATES LIMITED**, filed a Writ of Summons and Statement of Claim on 16 March 2004 seeking the sum of \$77,081.15 (as well as interest and costs) which it says is the result of outstanding fees for services provided as

Quantity Surveyors in respect of the building of a place of worship known as the “World Harvest Centre” project at Kinoya, Nasinu.

- [2] An Amended Statement of Claim was filed on 3 March 2008 seeking:
- (a) the sum of \$77,081.15;
  - (b) plus also interest pursuant to clause 8.05.03 of the Conditions of Agreement;
  - (c) plus interest at 2 per cent per annum from the time of the breach of the said agreement till the date of judgment;
  - (d) plus interest on the judgment pursuant to section 3 of the *Law Reform (Miscellaneous Provision) (Death and Interest) Act* (Cap. 27); and
  - (e) indemnity costs.

## 2. The essential agreed facts

- [3] In late 1997, the Defendants engaged **EDWARD RUSHTON FIJI LIMITED** as its Project Manager to act for and on their behalf in the construction of the said “World Harvest Centre”.
- [4] On or about the 16 March 1998, the Project manager, EDWARD RUSHTON FIJI LIMITED, engaged the Plaintiff on behalf of the Defendants to be the quantity surveyors for the construction of the said “World Harvest Centre”.
- [5] Although there was no formal contract between the Parties, the terms of engagement of the Plaintiff by the Rushton Group (acting on behalf of the Defendants) was as set out in a letter dated 16 March 1998 from the Plaintiff, **WILLIAMS ASSOCIATES LIMITED** to **EDWARD RUSHTON FIJI LIMITED**:
- (a) **revising its professional fees to the sum of \$45,000.00** (inclusive of VAT) (Exh P1 – Doc.14);
  - (b) **and that “conditions stated in our previous letter dated 13<sup>th</sup> February 1998 still apply”**.
- [6] The Plaintiff’s “revised fees” were set out as follows:

Cost Planning Section item 4	\$9,600.00
Bill of Quantities Section A item 5	\$21,400.00
Post Contract Services Section A item 6.05 with particular reference to item 6.05.11 and exclusive of item 6.05.03, .05, .07	\$14,000.00
<b>TOTAL INCLUSIVE OF VAT</b>	<b>\$45,000.00</b>

[7] The “*conditions stated*” in the Plaintiff’s previous letter dated 13 February 1998 sated as follows:

*“We offer our services for our services for the position of Quantity Surveyors based upon the following conditions:-*

1. ***Basis of engagement shall be in the accordance with the Australian Institute of Quantity Surveyors Conditions of Engagement (1<sup>st</sup> January 1983) individual services***
2. ***The current construction cost of \$2,000,000.00 inclusive of VAT but exclusive of fittings furniture and equipment***
3. *The following services shall be executed by Nominated Sub-contractors and respective consultants shall provide estimates of cost as well as carrying out valuations and processing variations during the construction period as outlined in their scales of professional charges.*
  - (a) *Ventilation*
  - (b) *Electrical services including Telecom Fiji installation and computer wiring systems*
  - (c) *Sound communication and security systems*
  - (d) *Fire protection services*
4. ***Our fees are thus:***

<i>(a) Cost Planning Section A item</i>	<i>9,600.00</i>
<i>(b) Bills of Quantities Section A item 5</i>	<i>30,000.00</i>
<i>(c) Post contract services Section A item 6.05 with Particular reference to item 6.05.11 and exclusive of Items 6.05.03, .05 .07.</i>	<i>14,000.00</i>

**TOTAL INCLUSIVE OF VAT**

**\$53,600.00**

5. *Our hourly charges for the 'abortive' or miscellaneous work would be \$70.00 for qualified staff and \$15.00 for other staff, exclusive of VAT.*

*Yours faithfully*

**WILLIAMS ASSOCIATES LTD**” [My emphasis]

- [8] The construction of the said “World Harvest Centre” was completed on 8 May 1999 at a cost of \$5,235,288.05 (See Letter from Fletcher Constructions to Sepeto Tagilala dated 7 July 2000 - Exh P1 Docs.66 and 68).
- [9] Thus clauses 1 and 2 of the plaintiff’s letter dated 13 February 2008 come into play and perhaps in conflict. That is,
- (a) That the basis of the engagement of the Plaintiff as the Quantity Surveyor was stated as **SHALL be** in accordance with the **Australian Institute of Quantity Surveyors Conditions of Engagement dated 1 January 1983**; and
- (b) That the **cost of construction be \$2,000,000.00** inclusive of VAT.
- [10] Put simply, the Plaintiff argues that the AIQS Conditions of Engagement (which makes allowances for increased fees when the cost of construction exceeds certain figures) takes precedence over the Defendants’ view that the cost of construction was set at \$2 million (and the associated consultants’ fees be “pegged” to that amount) even though the ultimate cost of construction was just over \$5 million (\$4,759,352.79 exclusive of VAT).
- 4. The Plaintiff’s claim**
- [11] The Plaintiff claims:
- (a) That there is a sum of \$1800.00 (with interest) still outstanding from the unpaid bill initial fees of \$45,000.00; and
- (b) That there are additional quantity surveying fees of \$77,081.15 (with interest) due as a result of the increase in the overall cost of the project from \$2million to the final

revised contract sum of \$4,759,352.77 plus VAT \$475,935.28 = \$5,235,288.05 which is “*in accordance with the Australian Institute of Quantity Surveyors Conditions of Engagement (1<sup>st</sup> January 1983)*” and which was one of the conditions of engagement as set out in the Plaintiff’s letter dated 13 February 1998.

## **B. THE ISSUES**

### **1. The agreed issues**

[11] According to the “agreed issues” from the minutes of the pre-trial conference held on 4 April 2007, there were four issues to be determined:

- “1. *Whether there was a variation of the Contract of services between the Plaintiff and the Project Management Group and/or the Defendants?*
2. *Whether this was a breach of the varied Contract of Service?*
3. *Whether the Defendant had agreed to the excess of the fees quoted by the Plaintiff and whether the said excess was pursuant to the letters of the 13<sup>th</sup> of February and 16<sup>th</sup> March 1998 respectively and/or the Australian Institute of Quantity Surveyors Conditions of Engagement (1<sup>st</sup> January 1983)?*
4. *Whether the Plaintiff had performed services for the Defendant to the value of \$77,081.15 ... and whether such services were approved by the Defendant to be performed?”*

### **2. The Court’s view as to the two essential issues to be decided**

[12] Of the four agreed issues, the Court is of the view that it is in relation to the proof or otherwise of the latter two issues (in an abridged form) upon which the Plaintiff’s case either succeeds or fails; that is,

- (a) whether the excess of fees was part of the agreement which the Rushton Group entered on behalf of the Defendants with the Plaintiff on 16 March 1998 based upon the “*Australian Institute of Quantity Surveyors Conditions of Engagement (1<sup>st</sup> January 1983)*”; and
- (b) whether the Plaintiff performed those services.

## **C. THE PLAINTIFF'S CASE**

### **1. What the Plaintiff needed to prove**

[13] In light of the agreed facts, as Counsel for the Plaintiff said to the Court in his opening submissions, *“On one view the only matter we need to prove is the value of the works as completed.”* That is, as it is part of the agreed facts that the Plaintiff was engaged by **EDWARD RUSHTON FIJI LIMITED** acting on behalf of the Defendants (including that the fees payable to the Plaintiff by the Defendants was based upon the Australian Institute of Quantity Surveyors (AIQS) Conditions of Engagement dated 1 January 1983), then all the Plaintiff needs to prove is that they did the work claimed.

[14] The problem for the Defendants was that this was a community project with various people involved both on the construction side as well as on the community church side as Counsel for the Plaintiff signalled in his opening address:

*“The relevant actors for the purposes of these proceedings are namely four at least and perhaps five **EDWARD RUSHTON** was appointed the Project Manager, **ADISH NAIDU** was appointed the architect, my client **WILLIAMS ASSOCIATES** was appointed Quantity Surveyor and **FLETCHER CONSTRUCTIONS** came later as the builder and the Defendants ... **PASTOR NAIBUKE GONEWAI, PASTOR SANAILA SOOOVATA and OTHERS.**”*

### **2. Mr Tiko's evidence-in-chief**

[15] The evidence of **Mr TIKO** for the Plaintiff in his examination in chief was thus directed to the two issues as to whether the excess of fees was part of the agreement based upon the *“Australian Institute of Quantity Surveyors Conditions of Engagement (1<sup>st</sup> January 1983)”* and whether the Plaintiff performed those services.

[16] **Mr TIKO's evidence-in-chief on the AIQS Conditions of Engagement** was:

(a) That the Australian Institute of Quantity Surveyors (AIQS) Conditions of Engagement (dated 1 January 1983) is used as the standard scale within the profession as the basis for establishing fees;

(b) That the AIQS Conditions of Engagement has the following standard procedure for for establishing fees divided into three parts, the cost planning and estimating, the bill of quantities and the post contract work;

(c) That how the final account is prepared is according to the final cost of the project:

*“When the overall cost of the project is finalised then we make this adjustment to our fees. The fees is normally broken up into three – the cost planning and estimating, the bill of quantities and the post contract work. It is still based on the conditions of engagement that we mentioned in our previous letters. The buildings are categorised Category A, B and C depending where the building falls in and the overall cost of the project. So what we have done here we have worked on the net cost of the project - whatever we don’t get involved in like electrical or air conditioning or fire services , security objections and some other items which ... in our schedule of quantities ... that we don’t get involved - that is called the Provisional Sum so that is taken out. So when we establish the net cost of the project and then we do the adjustment and then the cost planning and then we look at the conditions of engagement where it falls in what sort of percentage and that is what we have done over here and then we reduce the cost of the original fees and come up with the final account.”*

[17] **Mr TIKO’s evidence-in-chief on the cost of construction and hence his company’s related fees as the Quantity Surveyor** was:

(a) That according to the AIQS Conditions of Engagement, the “World Harvest Centre” being a place of worship would come under “Category A” of the three categories of work or construction;

(b) That the quotation based upon the AIQS Conditions of Engagement was for the cost of the construction being \$2million such that the fees initially quoted by the Plaintiff was \$53,600 as set out in their letter of 13 February 1998;

(c) That **Mr WATISONI WAQA** from **EDWARD RUSHTON FIJI LIMITED** as the Project Managers (acting on behalf of the Defendants) then asked the Plaintiff if they could further reduce their fees which they did agreeing to a figure of \$45,000 for the construction costs of the project at \$2million which they confirmed in their letter of 16 March 1998;

(d) That **FLETCHER CONSTRUCTION (FIJI) LIMITED** was appointed as the building contractor as per an agreement (**Doc.24**) between the Defendants and **FLETCHER CONSTRUCTION (FIJI) LIMITED** dated 24 April 1998 (witness and

by a representative of **EDWARD RUSHTON FIJI LIMITED** as the Project Managers);

(e) That the Plaintiff commenced rendering their accounts to **EDWARD RUSHTON FIJI LIMITED** as the Project Managers such as set out in Tax Invoice No.3 dated 27 April 1999 (see **Doc.25**).

[18] **Mr TIKO's evidence-in-chief as to the "staggered" payment proposal was:**

(a) That a proposal was submitted to the Plaintiff from **EDWARD RUSHTON FIJI LIMITED** as the Project Managers in a letter dated 7 May 1998 (**Doc.26**) for a schedule of payments to assist the Defendants' cash flow problems as follows:

March 1998	\$3,300.00
April 1998	\$9,500.00
May 1998	\$5,300.00
June 1998	\$3,400.00
July 1998 to Feb 1999	\$2,587.50
March 1999	\$1,000.00
<b>April 1999</b>	<b>\$1,400.00</b>
<b>May 2000</b>	<b>\$ 400.00</b>
Total	\$45,000.00

The letter concluded:

*"At the end of the day, you still get the bulk of your fees upfront, **you get your total \$45,000 fees**, the Client is happy, the Project goes well and everyone is smiling. **No one is placed in a worse situation** as a Team and we all get our fair share in due time." [My emphasis]*

(b) That despite the proposal emanating from the Project Manager on behalf of the Defendants, **Mr TIKO's** evidence was that the final two payments were never received.

[19] **Mr TIKO's evidence-in-chief as to whether the Plaintiff performed the services they were contracted to do was:**

(a) That once the contract was signed then the work performed thereafter is termed as “post contract work”. In the present case, **Mr TIKO** claimed that his company measured the variations and the progress of claims and agreed when it was put to him by his Counsel that without his company’s participation as the Quantity Surveyors “*the claims by various construction companies and subcontractors could not be processed for payment*”;

(b) That the final account from the builders, **FLETCHER CONSTRUCTION (FIJI) LIMITED**, was prepared with the assistance of the Plaintiff as the Quantity Surveyors:

*“Q: Can you turn now please to a letter from your company to Edward Rushton dated 17<sup>th</sup> February 1999 and it is Document No.41 – Does that relate to the project contract sum?”*

*A: Yes.*

*Q: And had something happened in relation to the costing for the works being done by Fletcher Construction at that time?*

*A: That was the final tender sum.*

*Q: How did that final tender sum come about? Was the calculation done by your company or somebody else?*

*A: It was done by us in consultation with the Builder, Fletcher Construction. We have to go through all the variations and measures and price them and agree the costing with the Builder before we finalise the tender sum.*

*Q: There follows behind that letter 2 pages headed World Harvest Centre summary of project budget estimate, can you tell us please **who prepared those documents?***

*A: We did.*

*Q: Was that the basis upon which the figure referred to as the final tender sum in the letter was ascertained?*

*A: There was an estimate that was done in April 1998 and **when the tender came in at \$4,812,019.88 the Project Manager wanted to find out where was the variations to the change in or to how it ended up with the tender sum so we had to detail everything that was involved, the changes that were involved in the increase in cost to that \$4.8m.***

*Q: And what stage had the work reached at that point?*

*A: ...*

- Q: What sort of involvement on a weekly basis would that entail, can you tell us?*
- A: We measure the progress of the work to establish what should be paid to the Builder and we would measure in value the variations, if there is any consultants meeting, we would attend all those meetings.*
- Q: Can I show you Exh.2 – the copy I have anyway has a receipt stamp of 10<sup>th</sup> July 2000 from Williams Associates at the top and did you receive this document?*
- A: Yes.*
- Q: Did this have any bearing upon anything that your company had been doing or was about to do in relation to the fees calculations for the work?*
- A: **This was the final account that the Builder and Williams Associates agreed on before we type up our final account.***
- Q: **This is the figure that had been agreed between Fletchers and your company, am I right?***
- A: Yes.*
- Q: **As being \$5,235,288.05?***
- A: Yes.*
- Q: Over the page, if you turn over Exh.2 there is a **copy of a letter from your company dated 10<sup>th</sup> July 2000** – can you just explain what the point of the words in that letter are?*
- A: **The letter from Fletcher was sent to us and we just want to confirm because we hadn't really agreed we want to confirm with the architect whether the interest should be claimed by Fletcher for late payment or not.***
- Q: That is the reference of the last paragraph is it with regards to the interest being claimed on late payments by Fletcher “our fee proposal exclude for these services” – is that something to do with the costs claimed by Fletchers or the costs claimed by your company?*
- A: That was the cost that was claimed by Fletcher.*
- Q: On the last page I think a document entitled Final Accounts summary, is that right?*
- A: Yes.*
- Q: **Shows the same figures as it appears on the front page exclusive VAT, is that right?***
- A: **Yes.”***

(c) That in relation to the Plaintiff's claim for extra fees based upon increased construction costs, the Defendants were put on notice of this fact at least as early as 26 August 1999 and such account was eventually rendered on 14 July 2000 in the amount of \$77,081.15.

### 3. Mr Tiko's evidence under cross-examination

[20] In cross-examination, the most probing evidence concerned **Mr TIKO's understanding of the construction cost before and during the construction and his not raising the issue of seeking further payment:**

*Q: On 5 March 1998 – budget showed \$2.6million?*

*A: That is correct*

*Q: Your letter of 15 April 1998 - doc 19 says that?*

*A: That is correct*

*Q: Doc.21 of April 20 1998 is asking to get budget down?*

*A: Correct*

*Q: Doc.22 of 24 April 1998 is saying Fletcher \$3million costs going up?*

*A: That is correct*

***Q: Doc.26 of 7 May 1998 from Mr Waqa saying your fees not to exceed \$45,000?***

***A: That is correct***

***Q: Did you object?***

***A: No we did not object***

*Q: Doc.41 whose letter of 17 February 1999?*

*A: That is my letter*

*Q: You say cost \$4.8million?*

*A: Correct*

***Q: On 17 February 1999 you realised it would exceed \$2million?***

***A: Yes***

***Q: Did you agree to be paid \$45,000?***

***A: I didn't raise it at that time"***

#### 4. Mr Tiko's evidence in re-examination

[21] The further evidence of **Mr TIKO** as to the increase in his fees AFTER the construction had been completed was, as he explained in re-examination, as follows:

**Q:** ...your company wrote to the defendants on the 26<sup>th</sup> August 1999 (shown to witness) . **After that date and before today did the Project Manager communicate with your company to tell you that you could not claim any extra fees for the job?**

**A:** **No Sir.**

**Q:** *It was put to you this morning that you had made an agreement with the defendants for Quantity Survey work for the price of \$45,000 do you recall that?*

**A:** *Yes.*

**Q:** **What was your belief in relation to the formality or otherwise of that agreement?**

**A:** **That agreement was meant to be based on the \$2m project cost.**

**Q:** *In fact it is right can I just for a moment take you to Document 3 is that a letter from your company to ASA Naidu Architects of 10<sup>th</sup> November 1997?*

**A:** *That is correct.*

**Q:** *In relation to costing based on a current instruction cost of \$3million 500,000.00?*

**A:** *That is correct.*

**Q:** **You make reference in item 7 of that letter to what you describe as abortive or miscellaneous work". Could you enlarge on that?**

**A:** **If say for instance that project is not going to go ahead then we would charge the client the number of hours that we have done ...**

**Q:** *It was also put to you ... that it was you who costed the building at \$2m which a question you denied but you agree that you were asked to peg the fees?*

**A:** *That is correct.*

**Q:** *Based on \$2m figure?*

**A:** **We did not estimate the \$2m.**

**Q:** *In terms of the construction work which took place in relation to the church, I think its common ground that there was a series of cost overruns and who was responsible for those cost overruns?*

*A: I think it is the church themselves because they were wanting all those extras to be added on to the cost of the project.*

*Q: And the reflection of those costs overrun was in the amount that was billed by Fletchers?*

*A: That is correct.”*

#### **5. Mr Tiko’s further evidence when recalled under cross-examination**

[22] Due to a problem with the way the evidence was attempting to be led by Counsel for the Defendants through one of his witnesses offending the rule in *Browne v Dunn* (1893) 6 R 7, **Mr TIKO** was recalled by the consent of the parties and with the leave of the Court. In the further cross-examination, **Mr TIKO** clarified:

(a) That the account was prepared pre and post contract set upon the \$1million to \$2million construction figures divide into three main parts or “services” with the first two, *Cost Planning* and *Bill of Quantities* being pre-contract and the third being *Post Contract Service*;

(b) That a completely new account was rendered after the building had been constructed refiguring the entire account both pre and post contract upon the basis of a final new construction cost; and

(c) That the new costing was done in 2000 was mostly by the Quantity Surveyors and the builders **FLETCHER CONSTRUCTION (FIJI) LIMITED** and not **Mr TAGILALA** from the Defendants negotiating directly with the builders.

#### **D. THE DEFENDANT’S CASE**

##### **1. Pastor Emosi Toroca’s evidence-in-chief**

[23] The evidence-in-chief of **PASTOR EMOSI TOROCA** for the Defendants was, in summary:

(a) That he was the Administrator of the World Harvest Centre when it was being built and later became a Pastor in 2001;

(b) That construction of the Church started in 1998 and completed in April/May 1999;

(c) That the agreed fee with the Quantity Surveyors was \$45,000 hence why the Church rejected the additional claim;

(d) That at a meeting was held at Mr TIKO's office, at which he was present as was **Mr TIKO, MR TAGILALA** and **MR NAIDU**;

(e) That at the said meeting "*Adish Naidu instructed or told Tiko not to entertain their increase in fees*";

(d) That **MR TAGILALA** was recruited as the Director of Finance for World Harvest Centre and in that position finalised the accounts ion the construction of the Church;

(e) That to his knowledge neither **Mr TIKO** nor any of his associates were involved in finalising the final account for the World Harvest Centre.

## **2. Pastor Emosi Toroca's evidence during cross-examination**

[24] **PASTOR EMOSI TOROCA** was the only person called from the Defendants who was involved in the project from the time of inception until completion. His evidence under cross-examination was most revealing, and hence, it is important (for later findings which I will make) that it is set it out in full:

*Q: In August 1999 were you the Executive Administrator of the Christian Mission Fellowship?*

*A: Yes Sir.*

*Q: The receipt by you from Williams Associates was not the first time that you had heard that it intended to make a claim for extra fees?*

*A: Can you ask the question again?*

*Q: The receipt by you of this letter from Williams Associates was not the first time that you had heard of an intention by it to claim extra fees?*

*A: I cannot recall.*

*Q: Do you deny?*

*A: I can't recall, Sir.*

*Q: Do you remember receiving a letter in August 1999 from Williams Associates indicating that intended to claim extra fees?*

*A: I cannot recall, Sir.*

*Q: Could you have a look at Document 50, please [Letter 26 August 1999 from Plaintiff to Defendants] – do you recall receiving that letter?*

*A: No.*

Q: No memory at all, is that right?

A: No.

Q: ***It is the addressed to the Executive Administrator, is that yourself?***

A: ***I did not see some correspondence.***

Q: *Were you Executive Administrator of CMF?*

A: *Yes Sir.*

Q: ***A letter addressed to the Executive Administrator of the Christian Mission Fellowship in Fiji dated August 1999 would have come to your attention, would it not?***

A: ***Since the church was just beginning there was no organised, I cannot really recall this mail.***

Q: ***Is the Post Office Box in August 1999, P O Box 16471, Suva?***

A: ***Yes Sir.***

Q: *And who was it who collected mail, delivered to the Post Office Box in August 1999?*

A: ***Different people collected mails at different times.***

Q: *Well who if you can be more precise in August 1999 collected mail from P O Box 16471, Suva?*

A: ***There was so many people which I cannot really mention.***

Q: ***So there was no system in relation to the receipt of mail?***

A: ***I cannot answer the question, Sir.***

Q: ***What about the receipt of donations by mail in August 1999 was there a system about that?***

A: ***I cannot answer that question, Sir.***

Q: *Are you able to tell us when it was that this meeting about which you've given some evidence at Mr Tiko's office took place?*

A: ***Sir, it is after 9 years I cannot really recall the kind.***

Q: ***You do not have a good memory, is that right?***

A: ***Yes I think I do.***

Q: *But fades after number of years, is that right?*

A: *Yes, I cannot recall it.*

Q: *Do you remember what day of the week it was that the meeting at Mr Tiko's office took place?*

A: ***Cannot recall.***

*Q: Maybe it was in the morning or afternoon?*

*A: **I cannot recall.***

*Q: How long does meeting take?*

*A: **I cannot recall.***

*Q: Who called the meeting?*

*A: Adish Naidu.*

*Q: Did he call you about the meeting?*

*A: Yes, that is why I accompanied him.*

*Q: I bet he called you on telephone?*

*A: I cannot recall, Sir.*

*Q: Did you go with Mr Naidu to Mr Tiko's office or did you meet Mr Naidu there at Mr Tiko's office?*

*A: **We went together.***

*Q: **Who drove?***

*A: **I cannot recall.***

*Q: Did anybody else go with you apart from Mr Naidu to the meeting?*

*A: Sepeti Tagilala.*

*Q: Did he travel with you to the meeting or did you meet him there?*

*A: I travel with him to the meeting.*

*Q: Did you contact Mr Tiko before the meeting in relation to its organisation or did somebody else do that?*

*A: I think it was the Architect not me.*

*Q: Can you tell us as best as you can recall what Mr Naidu said to Mr Tiko in relation to fees?*

*A: **Mr Naidu told Mr Tiko not to increase fees.***

*Q: **Were those his words?***

*A: **Yes Sir.***

*Q: **You have a clear memory of that, do you?***

*A: **Why I remembered that because that is the main focus of our going to Mr Tiko.***

*Q: Is the answer to my question then Yes?*

*A: Come again Sir.*

- Q: You have a clear memory of that is the answer to the question Yes?*  
*A: On the matter of the increase in fees, Yes because that is the main thing we went to Mr Tiko for.*
- Q: **What did Mr Tiko say?***  
*A: **I cannot recall, Sir.***
- Q: **Did Mr Naidu say anything else to Mr Tiko?***  
*A: **I cannot recall, Sir.***
- Q: How long did the meeting last?*  
*A: All I can say is not for long.*
- Q: 30 minutes?*  
*A: Yes I would agree with that.*
- Q: **Did you have a cup of tea?***  
*A: **I cannot recall, Sir.***
- Q: So the only thing that you can recall in relation to the meeting was Mr Naidu saying to Mr Tiko do not increase your fees, is that right?*  
*A: Yes, that is the main point why I was there.*
- Q: Were you responsible for making the payments to Williams Associates for their work as Quantity Surveyor in relation to the construction?*  
*A: No.*
- Q: Who was?*  
*A: The Project Manager before he died and Adish Naidu the Architect.*
- Q: **And if the Project Manager wanted a payment to be made by the Fellowship to Mr Williams to whom did he speak in the organisation to arrangement payment of the cheque?***  
*A: **To our President – He does not speak to me, he goes to the President.***
- Q: **Who were the signatories on the bank account?***  
*A: **The President, some guys that left the organisation, Joe Tamani and me.***
- Q: Did you ever counter sign cheques to Williams Associates for payment of fees?*  
*A: Yes Sir.*
- Q: How many?*  
*A: Quite a number but cannot recall how many.*

*Q: You have no idea then do you about whether or not the Fellowship still owes Williams Associates any money for outstanding fees?*

*A: As far as I am concerned Sir all the Consultants have been paid.*

*Q: I'm sure that is so, but you don't know, do you?*

*A: Can ask the question again?*

*Q: You don't know of your own knowledge from examining records whether there are any fees owing to Williams Associates in respect of its work as Quantity Surveyors on the job?*

*A: No Sir.*

### **3. Mr Sepeti Tagilala's evidence during examination-in-chief**

[25] The only other witness called on behalf of the Defendants was **Mr SEPETI TAGILALA**. His evidence in chief covered five main points.

[26] **As to his involvement, Mr TAGILALA** explained that he was an accountant by profession and was assisting the Church as its Director Finance and the Project Team Leader “*in our negotiations with the Consultants with Contractors of the building of the World Harvest Centre Church*”, his involvement, however, was after the building of the Church had been completed, in late 1999.

[27] **As to what he actually did in negotiating with the finalisation of the overall account, Mr TAGILALA** explained:

*“Q: And upon becoming involved what was the first thing that you did or the first brief that you had in relation to this project?”*

*A: **The first brief we had from the Church was (1) the Project Managers were not briefing or doing their role in advising the Church especially in matters regarding the costing and the finalisation of the account and (2) the Church was concerned that the cost overruns or the claims that were made by the sub contractors exceeded their expectations.***

*Q: Your brief was then in a nutshell to look into the financial affairs of the Church in relation to the Project and to bring finality to those matters, is that correct?*

*A: Yes Sir.*

*Q: So what did you then do to carry out these instructions?*

*A: There were a few functions that we undertook as an Accountant. (1) Was we tried to verify all the claims that were made by the sub contractors who had filed in and submitted their invoices and vouchers for payment. (2) We also tried to as a Project Committee we tried to identify all the defects and all the deficiencies of the contractors that were involved in building the World Harvest Centre Church. (3) We were also called in to look at the finalisation of the final contract sum of the Church.*

[28] After initially suggesting in his evidence in chief that it was the PROJECT MANAGERS, **EDWARD RUSHTON FIJI LIMITED**, who “*were not briefing or doing their role in advising the Church*”, **Mr TAGILALA** then shifted tack to accuse the Plaintiff as the Quantity Surveyors and the builders, **FLETCHER CONSTRUCTION (FIJI) LIMITED** for the costs of “blowouts” or “overruns” **and** that the costs were reduced by his Committee from the Church negotiating directly with the builders, **FLETCHER CONSTRUCTIONS**, to reduce the finalisation of the overall account from \$8million to approximately \$4.5 million, and, in the process, only seeing **Mr TIKO** on two occasions

[29] As to what he actually did in negotiating with the finalisation of the account with the Plaintiff, **Mr TAGILALA** explained:

*“Q: Now that Committee as far as you are aware what was their position in relation to extra claim for \$77,000?”*

*A: They disagree with that amount.*

*Q: And what was the proposed course of action you would take in relation to this if there was any?*

*A: Well as a Church the Committee said we have to meet up with Mr Tiko and discuss his new claim.*

*Q: Did you have a meeting with Mr Tiko?*

*A: Yes.*

*Q: And do you recall when that meeting took place?*

*A: That was on a Friday morning but I forgot the date but it was between Mr Tiko, Mr Adish Naidu, myself and Pastor Emosi Toroca.*

Q: *Where did this meeting take place?*

A: *At Mr Tiko's office.*

Q: *Do you recall that the meeting took place was this in 1999 or was this in 2000?*

A: ***This was in somewhere around 2000 – 2001, 2002 I can't remember.***

Q: *You can't remember?*

A: *Yes.*

Q: *But you remember the purpose what the purpose of the meeting was?*

A: *The meeting's main purpose was to discuss the new claim by Mr Tiko.*

Q: *And what was the result of that meeting if you recall?*

A: *According to my recollection Mr Naidu said that all Consultants pegged their fees on \$2million and when the variation arose none of the Consultants wanted to raise their fees on the new revised contract sum but it was only Mr Tiko that wanted this fees to be raised and **Mr Naidu said according to their meeting they all agreed including Mr Tiko that there was not going to be any fee increased irrespective if there was any variations.***

Q: *So that was the result of this meeting that you had with the Consultant?*

A: *Yes Sir.*

Q: ***Witness could I just show you document No. 14[16 March 1998] – is that document the agreed fees for Mr Tiko?***

A: ***Yes Sir***

Q: ***As far as you are aware that is the position of the Church in relation to its financial obligations to Mr Tiko for his services?***

A: ***Yes Sir.***

Q: *Has that amount been paid in full?*

A: *To my knowledge it has been paid in full.*

Q: *Throughout the course of the building project the Church continued to pay Mr Tiko according to the agreement to 16<sup>th</sup> March 1998?*

A: *Correct.*

Q: *I now take us to **Doc.1** which is the scale cost of fees for professional charges and conditions – You have had the opportunity to review Mr Tiko's claim of the 14<sup>th</sup> July 2000?*

A: *Correct.*

**Q:** *And Mr Tiko's claim seems to be that he is claiming fees of \$77,000 based on the contract price, is that correct?*

**A:** *On the final contract price.*

**Q:** *And do you see his claim to be a claim as if the contract had not started or otherwise? From your understanding if Mr Tiko was to make a claim on the new fees wouldn't that claim be the claim for the difference rather than for the whole amount?*

**A:** *For the difference – that is the variation.*

**Q:** *That is the difference between the original price and the final price?*

**A:** *Yes.*

**Q:** *So you say his claim should be really for the difference?*

**A:** *For the difference.*

**Q:** *And on reviewing the claim that he has put forward of the 14<sup>th</sup> of July is that claim based in your opinion on the difference or is it based on a whole new lump sum?*

**A:** *Whole new lump sum."*

[30] **As to the final account of the Plaintiff as well as Fletcher Constructions, Mr TAGILALA's** evidence was that much of the Plaintiff's claim had no supporting documentation (though Mr TAGILALA did note that *"I was not present during the [earlier] construction period"*) and that the final account with the builder, **FLETCHER CONSTRUCTION (FIJI) LIMITED**, was based upon two major reductions which the Church negotiated directly with the builders and the Architect, **Mr NAIDU**.

#### **4. Mr Sepeti Tagilala's evidence during cross-examination**

[31] **Mr TAGILALA's** evidence in cross-examination was revealing on five issues.

[32] **As to his record keeping of his involvement, Mr TAGILALA** explained that despite his involvement from around December 1999 until around 2003 or 2004, **he did not keep detailed notes nor did he keep a diary** though some letters he did for the Church were stored on his personal computer .

[33] As to his qualifications, the role he played and his understanding as to the role of a Quantity Surveyor, Mr TAGILALA explained:

*Q: You are an Accountant, you hold the Degree, you assumed as I understand your evidence the role of Project Manager in relation to the construction of the complex?*

*A: Yes Sir but **all the files that I work with were with the church because at that I was partly employed by the Church and the files were with the church not with my company.***

*Q: You were partly employed by the church is that in addition to this work?*

*A: Correct.*

*Q: And what were you doing with the church then?*

*A: I was the Director of Finance and Team Leader for the Project Committee Team of the church.*

*Q: **With your extensive qualifications you recognised though do you not that you are not a Quantity Surveyor?***

*A: No Sir*

*Q: **Nor are you a builder?***

*A: No Sir*

*Q: **Nor have you ever acted before in the capacity of building superintendent in relation to any constructions except perhaps your***

*A: I have had experience working on construction projects especially when I was in FTIB assessing tourism projects for construction purposes that is where my exposure came from.*

*Q: What does that mean?*

*A: Well I assess the foreign investment projects that were tendered in to foreign company proposals that were trying to establish hotel construction in Fiji.*

*Q: As to financial viability?*

*A: Correct.*

*Q: But as to much of construction and things of that sort?*

*A: Well basically we assess the viability in assessing all the documentation of the project that were submitted by foreign investors.*

*Q: But nothing to do with the mode of construction and the works?*

*A: Well basically I was also involved when I was working with KPMG we did some audit on establishment that did construction work as well.*

*Q: And what sort of establishment are you talking about?*

*A: I am talking about Carpenter properties as one of the largest property development companies here in Suva*

*Q: Your role as the head of the Team and tell me if this is incorrect, please was to examine, investigate, report upon and seek to bring into order excessive claims by sub contractors?*

*A: Correct Sir*

*Q: And nothing else?*

*A: Correct Sir*

[34] **As to how and where the revised construction sum was sourced, Mr TAGILALA's evidence was that it was from FLETCHER CONSTRUCTION (FIJI) LIMITED.**

[35] **As to how and where he saw the final account from the Plaintiff, Mr TAGILALA's evidence was that he first saw the final account somewhere between 14 July and the end of July 2000 when it was shown to him by PASTOR TOROCA as part of a larger Church file which had held correspondence with the Plaintiff up until December 1999:**

*“Q: Were there any other documents shown to you or in your possession at that time, that is the time of the meeting with Pastor Emosi in relation to costings by Williams Associates?*

*A: Correct.*

*Q: Were there other documents?*

*A: On the file*

*Q: What other documents were they?*

*A: Basically there were the documents that were filed in by Williams and Associates before he filed in this new document.*

*Q: Can you be a little clear about that – what do you mean?*

*A: I think the last time that I received the document from Williams & Associates which I saw in the file was somewhere around late 1999 or early January.*

*Q: What sort of document was that?*

A: *Basically they were the variations.*

**Q: *Bills of Quantities?***

**A: *Bills of Quantities***

Q: *Copies of which were provided is this right to the church as and when they were prepared, is that your understanding?*

A: *Come again, Sir?*

**Q: *Copies of which were provided as and when they were prepared to the church from time totime by Williams Associate?***

**A: *Correct but up until December 1999.***

Q: *And what is the significance of December 1999?*

A: *Well after December 1999 we did not see Mr Tiko again during our project meetings.”*

[36] **As to how and where the project meetings were arranged post-December 1999, Mr TAGILALA’s evidence was revealing in that the Plaintiff appeared not to have been invited and further only three to four per cent of what occurred was documented and retained:**

“Q: *Who organised the project meetings?*

A: *Sometimes it was us, sometime it was Fletchers Construction and at times we call in Adish Naidu or Vijay Krishna from E Morgan.*

Q: *Did you attend all those meetings yourself?*

A: *Correct.*

**Q: *Did you keep minutes of them?***

**A: *Basically some of minutes of those meetings are filed in this bundle of documents.***

**Q: *Was it your responsibility for keeping the minutes?***

**A: *No Sir.***

Q: *Who was?*

A: ***Well to be honest we did not take minutes during our meetings* but we just took notes on the discussion on various issues on costings and revisions and basically when we went back to our respective offices we typed up what transpired out of that meeting.**

Q: *Did you keep your notes?*

A: *Well my notes as I said is basically what I punched into the PC. All the notes that I took from the various meetings that I undertook with the various project consultants was what transpired in my letters during discussions on our meetings.*

Q: *So the answer is " No", you did not keep your notes?*

A: *Well these are actually the notes of our meetings. I believe the minutes are filed not very specifically but basically what transpired of all the meetings was documented.*

Q: *When you attended these meetings did you take notes yourself?*

A: *Correct.*

Q: *Upon what did you take the notes?*

A: *Basically as I am doing here just taking notes on pieces of paper*

Q: ***Did you keep those notes?***

A: ***No Sir***

Q: *What did you do with it?*

A: *After transcribing those notes into my formal letters I basically have the habit of just putting away those notes without keeping them.*

Q: ***And the documents you've produced this morning just that comprise all of the records kept by you deriving from notes taken by you at various meetings?***

A: ***No Sir***

Q: *So there are other records are they?*

A: ***Most I believe just about 3 or 4 per cent of the notes that transpired from the meetings that we've had with all the project consultants. Most of them were filed with the church because they were church files."***

[37] **As to the meeting with the architect, Mr NAIDU and Mr TIKO**, representing the Quantity Surveyors, **Mr TAGILALA's** evidence was evasive to say the least particularly when asked to recall details as to the alleged statements attributed by him to **Mr NAIDU**:

“Q: *Yesterday you gave evidence about a meeting which you said occurred on a Friday morning at Mr Tiko's office?*

A: *Correct, Sir.*

*Q: At which they were present, Mr Tiko, Mr Naidu, [Pastor] Emosi [Toroca] and yourself?*

*A: Correct, Sir*

*Q: How long did this meeting last?*

*A: Took about say roughly 30 minutes.*

*Q: Did you organise the meeting?*

*A: Adish organised the meeting for us to meet up with Mr Tiko and ourselves as church representatives.*

*Q: Did Adish notify you of the fact that there was going to be a meeting I mean how did it go?*

*A: Adish contacted Pastor Emosi and Pastor Emosi contacted me relating to the extra claims that was filed in by Mr Tiko.*

*Q: **And did you in the course of this meeting did you contribute did you say anything to anybody?***

*A: Before we came to the conclusion of the meeting we discussed amongst ourselves with Mr Tiko regarding the fees that he is claiming for.*

*Q: **So the answer to my question therefore is “Yes” you contributed, you spoke at the meeting, did you or not?***

*A: **Well we spoke to one another, correct.***

*Q: **And what did you say?***

*A: Well basically the gist of our meeting was on the issue of the extra \$77,000 claim by Mr Tiko.*

*Q: **And what did you say?***

*A: **I did not say anything because the decision that transpired out of that meeting was that Adish told us that according to their meetings of all the professional consultants that were involved in the project they pegged their fees at \$2million. Anything that went above \$2million they were not willing to claim on extra charges that was the understanding from that meeting.***

*Q: **Was Adish’s position at this meeting that he as the Architect did not engage Williams Associates as Quantity Surveyors and therefore he as Architect had no control over the questions of whether fees should or should not be charged?***

*A: According to my knowledge of what Adish told us that they themselves had the meeting amongst themselves this included the project architect, the structural and civil engineer, the services engineer and the quantity surveyor and what transpired from their meeting which verbally was assured to us by Adish during that meeting that they were going to peg*

***their fees at \$2million and variations departing from that \$2million was not going to be charged upon the church as a community gesture to the church.***

*Q: As it is?*

*A: Correct, Sir.*

*Q: Wasn't the position pointed out along this lines that Mr Naidu said or inferred that his company did not engage Williams Associates as Quantity Surveyor for the job and therefore he the architect did not consider himself as having any jurisdiction over the question whether or not extra fees should be charged.*

*A: According to my understanding of the case when Watisoni Waqa passed away as project manager and also Rushton getting out of the scene from Fiji, Adish was on the understanding as the Team Leader or the Project Consultant head during the Team which was confirmed by Mr Tiko during his interview here.*

*Q: Well at no stage in the course of that meeting I suggest did anybody say to William Associates you cannot charge any extra fees?*

*A: According to Mr Naidu when he said before us in the presence of Mr Tiko that there was not going to be any fee increase Mr Tiko did not react to that conclusion that Mr Naidu stated.*

*Q: What exactly did Mr Naidu say?*

*A: As I already explained.*

*Q: I would like you to tell me as best you can what Mr Naidu said, the words Mr Naidu used at this meeting in relation to the extra costs?*

*A: Mr Naidu said that as the other Consultant were not going to charge the Church for extra fees from the variations since they have agreed to with Mr Tiko that they were not going to charge the extra fees from the variation that Mr Tiko went ahead and charge the church again.*

*Q: Didn't he indicate at this meeting that it was really a matter between Williams Associates and the World Harvest Centre in relation to any question for additional fees?*

*A: We went through Adish Naidu as he was our project architect and advised on the certification of payment of bills to all Fletchers Construction and to all the Consultants that were involved in the project.*

*Q: Is that right in fact the architect was the person who did the certification of bills for payment in the cause of the works, is that so, isn't it?*

A: .....verification when the project manager passed away before fees were paid and in this instance Mr Tiko I believe copied this document as well to Mr Naidu.

Q: I'm sorry what you just said, I don't understand that?

A: Sir, I believe I answered that question already.

Q: **So far as Mr Naidu was concerned at that meeting was a matter of discretion between Williams and Associates and World Harvest Centre as to whether extra fees would be charged, is that not right?**

A: **We approached Mr Naidu as we were not happy that after seven months of hard work negotiating with Fletchers and with all the other sub contractors together then after seven months we received a fresh bill from Mr Tiko."**

[38] **As to the claim that Mr Tiko did not "do his job" as the Quantity Surveyor, Mr TAGILALA's evidence was that he had not studied the Plaintiff's final account nor most of the interim accounts and that even though they were negotiating with Fletchers they still paid interest on their final account :**

**Q:** *Your concern though as I understand your evidence was with the sub contractors and their excessive charges as you understand the position?*

**A:** **Not only that we concerned with excessive cost claims by the sub contractors but we were also concerned that this was the work that was supposed to be done by Mr Tiko himself which the Church was burdened with.**

**Q:** *What work? Are you saying he didn't do his job?*

**A:** **No, he did not complete his job.**

**Q:** *In what way?*

**A:** **Well he disappeared from finalising all the cost claims before we concluded on the final contract sum.**

**Q:** *When do you say the final contract sum was concluded?*

**A:** **We concluded it with Fletchers Construction on 7th July.**

**Q:** *2000?*

**A:** **2000.**

**Q:** ***Would you have a look at document 68 please [World Harvest Centre Final Account Summary from Williams & Associates dated 11 July***

2000] – you’ve seen that document before, haven’t you, describes itself as final count summary, does it not?

A: Correct, Sir.

**Q: Bears date 11 July 2000, does it not?**

**A: Correct, Sir.**

Q: Have you studied this document in any detail at any stage?

A: Correct, Sir.

**Q: Have you studied this document in any detail at any stage?**

**A: To be honest I did not.**

**Q: You don’t say though do you that the contents of this document, was prepared by you?**

**A: No Sir.**

Q: The final contract sum that you say was agreed between you and Fletchers appears in Exh.2 [7 July 2000] is that correct?

A: Yes.

Q: So it’s a fax to you dated 7<sup>th</sup> July 2000?

A: Correct.

Q: And sent to Williams Associates I think on 10<sup>th</sup> July 2000?

A: .....

Q: Does your copy of this document have a date received stamp at the top right hand corner?

A: Correct, Sir

Q: Williams Associates?

A: Correct, Sir.

Q: The final contract sum after revision exclusive of VAT was \$4,759,352.77?

A: Correct, Sir

Q: And the amount in question so far as this document was concerned was the interest charged and referred to in the 2<sup>nd</sup> last paragraph page 1]– “this shows currently outstanding amount only for contract works of \$1,529,889.13 plus interest?

A: Correct, Sir.

**Q: And Fletchers claim that interest payment do they not?**

**A: They claim.**

**Q:** *And it was paid?*

**A:** *Correct, Sir.*

**Q:** *Whilst you are negotiating with Fletchers in relation to the sub contractors charges you is this right, you had access to Fletchers records for the purpose of carrying out that exercise, is that so?*

**A:** *Correct, Sir – Fletchers Construction was supplying us with documents on the claims that were done by their subs.*

**Q:** *And did you have cause to pay regard at any stage to the interim certificate advices that had been issued in respect of payments on the job?*

**A:** *Well the interim certificate advices were for the jobs that were already done and we have settled with those that were advising us that it was correct and we've settled that.*

**Q:** *The interim certificate advices in relation to payment to Fletcher Constructions did you pay any regard to them?*

**A:** *We did not pay Fletcher Construction any other interim advices until we've settled.*

**Q:** *Did you pay any regard to the interim advices, the documents that is, that had been issued in respect of payments to Fletcher Constructions?*

**A:** *Correct, Sir.*

**Q:** *You did?*

**A:** *Yes, Sir.*

**Q:** *So you are familiar with?*

**A:** *Correct, Sir.*

**Q:** *Can I just show you a bundle of documents from Exh.P5 [also oc.68]– just have a flick through those and tell us if you remember seeing these documents in the course of your negotiations with Fletcher Construction?*

**A:** *No Sir.*

**Q:** *Never seen?*

**A:** *No.*

**Q:** *And can I show here please a bundle of documents in each case entitled World Harvest Centre Financial Statement Numbered 1 – 11 and would you tell me after seeing them whether you've had regard to seeing these documents at all before?*

**A:** *This two documents here Financial Statement No. 9 & 10.*

**Q: Did see any of the others?**  
**A: No, Sir.”**

[39] **As to Mr TAGILALA’s** evidence in re-examination, it is the Court’s view that it really did not take matters any further other than confirming that he became involved in this dispute in late 1999 and reiterating his view that **Mr TIKO** had no involvement in the preparation of the final account with the builder, **FLETCHER CONSTRUCTION (FIJI) LIMITED**.

#### **E. THE INDEPENDENT WITNESS**

[40] The problem for the Defendants was compounded by the fact that the Project Manager, **Mr WAQA**, from **EDWARD RUSHTON FIJI LIMITED**, who appointed the Plaintiff as the Quantity Surveyor on the project, died in 2000.

[41] As a result of **Mr WAQA** being deceased (and no other person being called to give evidence from his firm), this added even more significance to the evidence of **Mr ADISH NAIDU** who was the appointed architect to the project. The evidence of **Mr NAIDU** was significant on five issues as follows:

(a) **That it was the Project Manager, Mr WAQA, who appointed each professional** and coordinated the work including liaising with the Quantity Surveyors who reported to them;

(b) **That there was a specific meeting concerning Williams and Associates and their claim for additional fees** at which he could recall that **Mr TIKO, PASTOR EMOSI TOROCA RATAVOLA** and **Mr NAIDU** were present where he made it “absolutely sure” that he did not have the authority to approve any payment and that this was “a matter between the Quantity Surveyor and the client” and, in particular, he did not think nor could recall his saying “*something to the effect that there would be no claim for extra fees by any of the professionals*” as not only were the consultants not under his jurisdiction “*each one of them have their own agreement with the client*”. nor could recall his saying “*that you can’t*”;

(c) **That the role of Mr SEPETI TAGILALA concerning the claim for extra fees by the Quantity Surveyors he could not recall – indeed, he could not even recall Mr TAGILALA’s attendance;**

(d) **The role of Mr WATISONI WAQA as the Project Manager and what occurred after his death including the claim for extra fees he could not recall;**

(e) **The resolution as to the claim for additional fees by Mr TIKO on behalf of the Quantity Surveyors was, as MR NAIDU recalled in his evidence in cross-examination, that “It would be fair to say that at that meeting there was no resolve to approve the increase in fees” hence his subsequent letter to Williams And Associates “saying that it is entirely up to them to deal with the client [Church] directly”.**

## **F. RESOLVING THE COMPETING CLAIMS**

### **1. The burdens of proof: the legal burden and the evidential burden**

[42] It must be remembered that while the Plaintiff has carried the ultimate ‘legal burden’ of proving its case on the balance of probabilities, both the Plaintiff and the Defendants have each carried “*the burden of proof in the sense of introducing evidence*”, that is, ‘the evidential burden’ on a particular issue during the trial.

[43] In this regard, I note the majority judgment of Barwick CJ, Kitto and Taylor JJ in the High Court of Australia in *Purkess v Crittenden* (1965) 114 CLR 164 at pages 167-168, (Austlii: [1965] HCA 34, 16 July 1965, <http://www.austlii.edu.au/au/cases/cth/HCA/1965/34.html>, at paragraph 4) when they said :

*“The expression ‘burden’ or ‘onus’ of proof ... ‘has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading - the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence’ (Phipson on Evidence, 10th ed. (1963) par. 92) ... The position is, we think, correctly stated by the learned author of the work to which we have referred when he says: ‘the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according as one scale of evidence or the other preponderates’ (ibid. par. 95)” [My emphasis]*

## 2. The evidential burden: the \$1800 allegedly outstanding under the initial agreed fees of \$45,000

- [44] In relation to the amount of the Plaintiff's fees of \$45,000 which the Defendants have agreed is all that was to be paid pursuant to the agreement of 16 March 1998, it is noted that a schedule of payments to assist the Defendants' cash flow problems was submitted by the Project Managers, **EDWARD RUSHTON FIJI LIMITED** (acting on behalf of the Defendants) to the Plaintiff in a letter dated 7 May 1998 (**Doc.26**).
- [45] In this regard, it is noted that **Mr TIKO's** evidence was that the final two payments of \$1400 in April 1999 and \$400 in May 2000 were never received.
- [46] **Document 50** in Exh1 (the agreed bundle of documents) was a copy of a letter dated 26 August 1999 from the Plaintiff to "The Executive Administrator, Christian Fellowship of Fiji, PO Box 16471, SUVA" which highlighted the \$1800 that had been outstanding at that stage for well over 12 months.
- [47] Despite the abovementioned letter being sent to the correct post office box and marked in bold and underlined "**Attention: Mr Emosi Ratavola Toroqa**", in his evidence **PASTOR TOROCA** at first said that he could not recall receiving any such letter to "*I did not see some correspondence*" and suggested that "*Since the church was just beginning there was no organised*" mail person and that "*different people collected mails at different times*". When pressed and asked to be more precise as to who actually collected the mail in August 1999 from that PO Box, he replied that "*There was so many people which I cannot really mention*". Further, when it was put to him "*So there was no system in relation to the receipt of mail?*" he replied "*I cannot answer the question, Sir*".
- [48] When **PASTOR TOROCA** was asked about who was responsible for making the payments to the Plaintiffs *for their work as Quantity Surveyor in relation to the construction*, again **PASTOR TOROCA's** evidence was evasive and entirely unsatisfactory. At first he claimed it was the Project Manager's responsibility and then

after his death it was the responsibility of the Architect, **MR NAIDU**. When pressed as to what happened when the Project Manager wanted a payment to be made by Church to the Plaintiff and to whom did the Project Manager then speak to in the Church to arrange for a cheque to be drawn and paid, said it was “*our President – He does not speak to me, he goes to the President*”. As to who were the then signatories on the Church’s bank accounts at that time, **PASTOR TOROCA’s** evidence was: “*The President, some guys that left the organisation, Joe Tamani and me.*” When asked whether he had ever countersigned cheques payable to the Plaintiff “*for payment of fees*”, **PASTOR TOROCA’s** evidence was that he had and when asked how many he replied: “*Quite a number but cannot recall how many*”. When it was then put to him that he had no knowledge “*whether there are any fees owing to Williams Associates in respect of its work as Quantity Surveyors on the job*”, he had to finally concede: “*No Sir.*”

- [49] **If PASTOR TOROCA conceded that he had no idea whether there were any outstanding fees owing to the Plaintiff, and Mr TAGILALA’s evidence concentrated on the final account of \$77,081.15, then this left the Defendants to call the other signatories of the Church’s bank account at that time, that is, the PRESIDENT OF THE CHURCH AT THAT TIME or JOE TAMANI.**
- [50] **As neither the PRESIDENT OF THE CHURCH AT THAT TIME nor JOE TAMANI were called by the Defendants, this then was a classic *Jones v Dunkel* (1959) 101 CLR 298 type situation, that is, that an inference could be drawn that the uncalled evidence of the said PRESIDENT OF THE CHURCH and/or JOE TAMANI would not have assisted the Defendants’ case.**
- [51] **Applying the evidential burden to the Plaintiff’s claim that there is still \$1800 allegedly outstanding under the initial agreed fees of \$45,000, that is, \$1400 from April 1999 and \$400 from May 2000, I note that Document 50 in Exh1 (letter dated 26 August 1999 from the Plaintiff to the Defendants claiming the accounts were outstanding for more than 12 months) as well as Doc.73 in Exh1 (letter dated 6 May**

2003 from the Plaintiff to the Sam Matawalu & Associates on behalf of the Defendants responding to the latter's request for a summary of the fees outstanding) **were relied upon by the Plaintiff to satisfy that evidential burden.** As these documents were part of the agreed bundle of documents and their creation was not disputed by the Defendants, I am satisfied, that they are genuine and that accordingly, the evidential burden then shifted to the Defendants to prove that the accounts were paid either in April 1999 and/or May 2000, or subsequently. This was not done. Indeed, the Plaintiff's letter of 6 May 2003 clearly sets out the payment schedule and receipt numbers and that the fees of 13 April 1999 and 23 May 2000 remained outstanding.

[52] To be clear on this issue, no documentary evidence was led by the Defendants from their own records to rebut the claim that the amounts had been paid (such as by way of Church accounting books, bank statements, cheque butts, invoices marked "paid", receipts dockets or even a witness such as one of the other named signatories of the Church's bank account at that time, that is, THE PRESIDENT OF THE CHURCH AT THAT TIME or JOE TAMANI, to testify they were the person or persons who paid the accounts.) Indeed, as noted above, a *Jones v Dunkel* (supra) type **inference can be drawn that the uncalled evidence would not have assisted the Defendants' case.**

[53] **Thus, it is the finding of this Court that the final two payments were never made, that is, of April 1999 for \$1,400.00 and May 2000 for \$400.00, and that, therefore, \$1,800.00 remains outstanding to be paid by the Defendants to the Plaintiff as agreed by the Defendants in their letter to the Plaintiff of 7 May 1998.**

### **3. The evidential burden: the agreement of 16 March 1998 and the conditions**

[54] The parties agreed that although there was no formal contract between them, the terms of engagement of the Plaintiff by the Project Managers, **EDWARD RUSHTON FIJI LIMITED** (acting on behalf of the Defendants), was as set out in a letter dated 16 March 1998 (**doc.14**) a condition of which expressly stated that "conditions stated in our previous letter dated 13<sup>th</sup> February 1998 still apply". It is not disputed that the previous letter from the Plaintiff to the Project Managers, **EDWARD RUSHTON FIJI**

- LIMITED** (acting on behalf of the Defendants) dated 13 February 1998 (**doc.9**) set out four conditions of engagement the first two of which stated that the “*basis of engagement shall be in the accordance with the Australian Institute of Quantity Surveyors Conditions of Engagement (effective from 1<sup>st</sup> January 1983) individual services*” and that “*the current construction cost would be \$2,000,000.00 inclusive of VAT but exclusive of fittings furniture and equipment*”.
- [55] In relation to the agreement of 16 March 1998, each side carried a burden of raising their interpretation of the conditions to a sufficient degree such that the other side had to meet it.
- [56] The Plaintiff’s interpretation was that there were two main conditions:
- (a) That it was subject to the *AIQS Conditions of Engagement dated 1 January 1983*;
  - and
  - (b) That *the current construction cost would be \$2,000,000.00 inclusive of VAT but exclusive of fittings furniture and equipment*”.
- [57] **The Plaintiff’s case** was that they rendered their account (at a discounted rate) to \$45,000 but upon the basis of the above conditions. Once the construction cost varied, then, they argued, there were entitled as part of the *AIQS Conditions of Engagement* to submit an amended final account based upon the substantial amount of increased work which they perform where construction cost of the building “ballooned “ from \$2million to over \$5million.
- [58] Despite a vigorous cross-examination of **Mr TIKO by Counsel for the Defendants**, it was **NEVER** put to Mr TIKO that the Plaintiff’s final account was **NOT in accordance with the Australian Institute of Quantity Surveyors Conditions of Engagement dated 1 January 1983**. Indeed, **Mr TIKO** laboriously explained in detail (as requested by Counsel) the costing according to that schedule.

[59] The basis of the Plaintiff's amended claim was set out in their letter of 14 July 2000 (**doc.69**). Indeed, as Counsel for the Plaintiff has set out in his Submissions in Reply:

*“In the AIQS, the Quantity Surveyor is entitled to charge for excess fees if the Quantity Surveyor prepares an amendment to the Bills of Quantities. The Defendants engaged the Plaintiff under these terms **and were aware or should have been aware of the terms in which they engaged the Plaintiff.**”*

I would only add to this the observation that if the Defendants claim they were not aware of these terms, then **they should have been aware of them** through their Project Manager.

[60] In addition, as Counsel for the Plaintiff has set out in his Submissions in Reply:

(a) That ***“the charge for excess fees is due to the failure of the Defendant or its agent, the Project Manager acting on its behalf to honour the terms of the agreement with the Plaintiff by causing or consenting to the numerous variations that resulted in the contract sum exceeding \$5million dollars”*** (see **doc.60** – Letter of 6 March 2000 from Defendants to Mr Watisoni Waqa, Manager, Edward Rushton Fiji Limited)

(b) That as to ***“whether Mr Tiko [from the Plaintiff] knew the constructions costs would increase or not is irrelevant to the issues at hand ... The Quantity Surveyor only advises and works on instructions from the architect”***;

(c) That the Defendants engaged the builders, **FLETCHER CONSTRUCTION (FIJI) LIMITED** ***“without tender ...before the full set of drawings and final contract sum was prepared”*** must mean that they have to accept the responsibility for the financial impact of that decision particularly when ***“the Defendants were advised by the Plaintiff that this would affect the final price but the Defendants ignored this advice”*** (See **doc.20** and **doc. 62**).

[61] On this issue, **document 30** was a letter sent by facsimile transmission from **DON LEW** of the Plaintiff to the architect, **ADISH NAIDU**, sent on 20 April 1998 as follows:

*“Adish  
Re our telephone conversation this morning*

*We wish to express our concern should Fletchers participate in a foundation laying ceremony this weekend for the following reasons*

1. *This will 'lock' the client in to a contract with Fletchers*
2. *The negotiated price with Fletchers was to be based upon Bills of Quantities – not on our estimate*
3. ***Documentation is not yet complete and several elements still have to be finalised or refined which will no doubt have an effect on the final amount***
4. *We still consider our latest estimate could be reduced if competitive tenders are called for*

*We reiterate any form of foundation laying ceremony is too premature at this stage.*

*Don*

***We still await***

*Structural drawings (30% still to come)*

*Services drawings (not sighted to date)*

*Architectural details inc specifications*

*What is structural ground floor level in relation to existing ground levels?"*

*[My emphasis]*

[62] **Document 62** “Minutes of meeting of Joint Project Committee” dated 31 March 2000 highlights that no contract sum was set prior to the entering into of the building contract which included a variation component.

[63] Clearly, on the above documents, the cost of the construction “blow out” had nothing to do with the Quantity Surveyor. For the Defendants to seek to escape their legal liability to the Quantity Surveyor upon such a basis is, in the Court’s view, a “red herring”.

[64] Indeed, as Counsel for the Plaintiff has noted in his Submissions in Reply:

***“That the Project manager was responsible as agents of the Defendants to ensure that the Defendants were reliably informed and advised and that information was communicated effectively by way of Financial Statements which were issued on a monthly basis during the construction period. An absence of this is not the fault of the Quantity Surveyor.”***

[65] On this point, **perhaps the Defendants should have been considering whether an action lay against EDWARD RUSHTON FIJI LIMITED as its Project Manager**

**some 8-9 years ago rather than continuing what would appear to have been a futile dispute with the Plaintiff?**

- [66] In addition, apart from the Plaintiff being wrongly blamed for any perceived inadequacies of the Project Manager, similarly the Plaintiff cannot be blamed for the construction cost of the building. If it increased, the Plaintiff's work increased and as such sought appropriate recompense as Counsel for the Plaintiff has also set out in his Submissions in Reply: "*... the substantial increase from the initial cost of construction from \$2million to over \$5million directly impacts on the initial contract of service agreed to by the Plaintiff*" and is covered by **the AIQS conditions 8.06.02** "*which binds the Defendants and include the payment of excess fees where the Surveyor prepares amendments to the Bills*".
- [67] To be clear on this issue, Clause 8.06.02 states:
- "Where, after Bills of Quantities have been prepared, **the Quantity Surveyor prepares amendments to the Bills** additional fees will be charged on the amount of both measured additions and omissions in accordance with Scale of Fees Clause 6.01."*
- [68] **The Defendants' case** was that whilst the Plaintiff's work was subject to the AIQS *Conditions of Engagement dated 1 January 1983*, it was set at \$45,000 (as reduced by them from the \$60,000 figure quoted in the Plaintiff's letter of 13 February 1998) and that although the construction cost went from \$2million to over \$5million "the variation in the construction cost did not vary the contract of service that was entered into between the parties" set at \$45,000 for a \$2million project. The problem with this submission is what does one do when the cost of the project exceeded at least double and a half the initial amount? Should the Defendants retain the benefits of a clear exploitation of the Plaintiff? Further, this submission does not deal with **clause 8.06.02 of the AIQS Conditions of Engagement** which, as the Plaintiff has correctly submitted "*binds the Defendants and include the payment of excess fees where the Surveyor prepares amendments to the Bills*".

- [69] No person was called as a witness on behalf of the Defendants either as an expert or a professional in this field (such as from the Fiji Institute of Quantity Surveyors) that the manner in which the Plaintiff had “gone about” the preparation of their final account whereby they prepared a new account for the entire “job” based on the new final construction cost was not the standard practice for a quantity surveyor and in accordance with the AIQS Conditions of Engagement dated 1 January 1983.
- [70] In addition, no oral evidence was called from the Project Manager, **EDWARD RUSHTON FIJI LIMITED**, to testify their firm disputed this condition or their understanding of this condition or that it was not the standard practice for a quantity surveyor and in accordance with the AIQS Conditions of Engagement dated 1 January 1983. Indeed, a *Jones v Dunkel* (supra) type **inference can be drawn that the uncalled evidence would not have assisted the Defendants’ case.**
- [71] **Significantly, it was also never put to Mr NAIDU, as the Architect for the project, that there was something untoward in what was done nor that it was not in line with the general ”commercial” or “professional” practice in this field.** All that was put to Mr NAIDU was that the other professionals involved did not do the same, that is, render new accounts.
- [72] **Thus, it is the finding of this Court that the conditions of agreement as set out in the letters of 16 March and 13 February 1998, were that a fee of \$45,000 was to be charged on TWO conditions:**
- (a) **That the construction cost be \$2million; AND**
- (b) **That it was subject to the AIQS Conditions of Engagement dated 1 January 1983.**
- [73] **Further, it is the finding of this Court that once the construction cost exceeded \$2million, then it was covered by the AIQS conditions Clause 8.06.02, that is, “Where, after Bills of Quantities have been prepared, the Quantity Surveyor prepares**

*amendments to the Bills additional fees will be charged on the amount of both measured additions and omissions in accordance with Scale of Fees Clause 6.01.*”

- [74] Two issues then remained, whether the Defendants were correct in their assertions:
- (a) That the Plaintiff agreed not to submit a claim for the additional fees; and
  - (b) That the Plaintiff did not do the work claimed.

#### **4. The evidential burden: whether the Plaintiff agreed not to submit a claim for additional fees**

- [75] The Defendants’ two witnesses raised during their respective evidence a claim that during a meeting in 2000 in the presence of the architect, **Mr NAIDU**, the Plaintiff (through **Mr TIKO**) agreed not to submit a claim for additional fees. This was not part of the Defendants’ *Amended Statement of Defence*.

- [76] Further, Counsel for the Defendants in his written Submissions, put a different view, claiming it to be “inferred”:

*“The two witnesses in their evidence told the court that at the conclusion of the meeting that was held in the presence of Mr Naidu, they had inferred from the actions of the Plaintiff that no demand for extra fees pertaining to the variations in the building costs would be made.”* [My emphasis]

- [77] Counsel for the Plaintiff dealt with this issue “head on” in his Submissions in Reply:

*“In response ... it is submitted that Adish Naidu confirmed the meeting convened between the interested parties, however **he clearly stated in evidence that seeking extra fees remains the prerogative of the consultant and that there was never any mention on his part that there were to be no further fees claimed.** It is submitted that little or no weight be placed on pastor Emosi Toroca’s evidence who we submit was a forgetful and unreliable witness. Similarly, Sepeti Tagilala’s [sic] gave no credible evidence and offered no supportive documentary evidence to back his claims. His evidence directly contradicts that of Adish Naidu ... whose evidence was never discredited in cross examination.”*

- [78] After reviewing the notes of the evidence adduced at the hearing, the Court can only reinforce the submissions of Counsel for the Plaintiff. The evidence of **Mr NAIDU** clearly did not support the Defendants’ evidence. Indeed, **to say that PASTOR**

**TOROCA** “was *a forgetful and unreliable witness*” (as Counsel for the Plaintiff has described him) was to put it kindly. As for **Mr TAGILALA**, the Court has already noted above in summarising his evidence on this issue that he was evasive to say the least.

[79] Thus, apart from the bald assertion of the Defendants’ two witnesses, there was no documentary evidence to support their claim. To be clear, only when the Defendants had raised sufficient evidence to support this claim, did the Plaintiff have to meet it. One can only speculate that if in the meeting involving **Mr TIKO**, **MR NAIDU**, **PASTOR TOROCA** and **Mr TAGILALA**, that **Mr TIKO** had agreed to abandon the Plaintiff’s claim for additional fees (as the Defendants’ two witnesses asserted), then why did the Defendants not send to the Plaintiff (with a copy to Mr Naidu) soon after the meeting either a letter or “Minutes” of confirmation as to what was discussed in the meeting? Indeed, this is exactly what **Mr NAIDU** did as he noted in his evidence:

*“It would be fair to say that **at that meeting there was no resolve to approve the increase in fees hence my letter to them saying that it is entirely up to them to deal with the client directly.**”*

[80] In addition, the Court notes that no disclosure was made by the Defendants in either in their Statement of Defence or in the Minutes of the Pre-Trial Conference (that is, the agreed facts or the issues to be determined) that it was alleged the Plaintiff had agreed not to submit a claim for additional fees.

[81] Therefore, the Court finds on this issue that as no evidence has been lead by the Defendants other than their bald assertions, they have failed to satisfy the evidential burden upon them in raising this issue and, as such, it was not an issue which required the Plaintiffs to lead any further evidence in rebuttal other than relying upon the documents which they had already disclosed and the evidence of **Mr NAIDU**.

[82] **Accordingly, the Court ultimately finds on this issue that the Plaintiff never agreed (nor could it be inferred as such from Mr TIKO’s actions) that the Plaintiff would not submit a claim for additional fees.**

**5. The evidential burden: whether the Plaintiff did the work for the additional fees claimed?**

- [83] The Plaintiff claims that it was involved for the whole of the project. The Defendants claim “*that the Plaintiff’s provision of services ... ended well before the building project was completed*” and “*reflected by the lead contractors liaising directly with the Defendants rather than [the] Plaintiff (See Fletcher Constructions letter to Sepeti Tagilal [sic] dated 07.07.00 – ABOD Doc 66)*”.
- [84] Indeed, Counsel for the Plaintiff in his initial written *Submissions on behalf of the Plaintiff* has referred the Court to **Doc.68** in Exh 1 (The Agreed Bundle of Documents - ABOD).
- [85] **Document 68** was prepared on 11 July 2000 by the Plaintiff. It is some 14 pages in length with a cover page summary followed by 13 pages of detailed “Architect’s Instructions” and “Variations without Architect’s Instructions” which, on the Court’s perusal, contains some 262 individual items.
- [86] Part of the cross-examination of **Mr TIKO** focused on the variance in the Summary of the Final Account from the Plaintiff of 14 January 2000 and that of 11 July 2000 and that it was only altered after receipt of the letter dated 7 July 2000 from Mr Robin Maginnity of Fletcher Construction. **Mr TIKO’s** evidence-in-chief had been that “*the final account that the Builder and Williams Associate agreed on before we type up our final account*”.
- [87] As the question of what work had or had not been performed and whether **Doc.68** provided sufficient details to explain such work, Counsel for the parties agreed at the end of the first day of the hearing that **Mr TIKO** would prepare a schedule overnight of various items to explain the work listed with the final account summary as a result of his company receiving the “architect’s instructions”. The following day a bundle of “architect’s instructions” was produced by the Plaintiff which became **Exh P3**.

[88] **Ex P3** contains the following sample:

- (a) Architects Instructions 28 – Issued 20<sup>th</sup> July 1998 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (b) Architects Instructions 30 – Issued 30<sup>th</sup> July 1998 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (c) Architects Instructions 34 – Issued 28<sup>th</sup> August 1998 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (d) Architects Instructions 35 – Issued 3<sup>rd</sup> September 1998 – Job number 9749 – Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (e) Architects Instructions 40 – Issued 17<sup>th</sup> September 1998 – Job number 9749 – Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (f) Architects Instructions 44 – Issued 27<sup>th</sup> October 1998 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (g) Architects Instructions 49 – Issued 19<sup>th</sup> November 1998 – Job number 9749 – Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (h) Architects Instructions 53 – Issued 15<sup>th</sup> January 1999 – Job number 9749 – Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (i) Architects Instructions 55 – Issued 16<sup>th</sup> January 1999 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (j) Architects Instructions 61 & 65 – Issued 9<sup>th</sup> March 1999 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (k) Architects Instructions 64 – Issued 11<sup>th</sup> March 1999 – Job number 9749 – Mission Fellowship – World Harvest Centre – Kinyoa Suva;
- (i) Architects Instructions 73 – Issued 24<sup>th</sup> May 1999 – Job number 9749 – Christian Mission Fellowship – World Harvest Centre – Kinyoa Suva.

[89] In addition, most of the samples in **Ex P3** consist of one page of “Architect’s Instructions” to which is attached “working drawings” done by the Plaintiff.

[90] Counsel for the Plaintiff took **Mr TIKO** through these items in some detail in his examination-in-chief. By contrast, the cross-examination by Counsel for the Defendants of **Mr TIKO** focused on the fact that the instructions were not prepared by the Quantity Surveyor and that they did not work to time sheets.

[91] In re-examination, **Mr TIKO** clarified these instructions as follows:

*Q: Now you are asked some questions about cost adjustments and Mr Fa asked you where are the Architect's Instructions do you recall that?*

*A: Yes.*

*Q: It was tendered to the court this morning a bundle of Architects Instructions in relation to various items appearing on your account of July 2000 do you recall?*

*A: That is correct.*

*Q: And in the context of the receipt by your company of any instruction from the Architect and the question of what work you did or did not do in relation to the instruction after receipt can you tell me whether there are other documents attached to each of those instructions?*

*A: The Architect's Instructions will be issued by the Architect and we would then measure and value the items that appear therein.*

*Q: The first one does that comprise more than one page?*

*A: The other pages sort of just workings.*

*Q: They are your working sheets are they?*

*A: One of my staff would have done that.*

*Q: And does that apply in relation to each of the instructions in the bundle of documents?*

*A: I haven't got all the workings here. I was trying to get architect instructions I've got the backup workings at the office.*

*Q: Does that represent a sample of some of the workings that were done by your company in relation to each of the Architect's Instruction received by your company?*

*A: Yes."*

[92] In addition, Counsel for the Plaintiff tendered a bundle of financial statements issued by the Plaintiff to the Defendants which became **Exh. "P5" – "Bundle of Interim Certificates and Calculations of Costings"**.

[93] **Ex P5** contains the following "Interim Certificate Advice" from the Plaintiff to the Defendants recommending amounts for payment:

- (a) "Interim Certificate Advice" No.1, 28 May 1998;
- (b) "Interim Certificate Advice" No.2, 30 July 1998;
- (c) "Interim Certificate Advice" No.3, 28 August 1998;
- (d) "Interim Certificate Advice" No.4, 28 September 1998;
- (e) "Interim Certificate Advice" No.6, 28 1 December 1998;
- (f) "Interim Certificate Advice" No.6, 28 30 December 1998;
- (g) "Interim Certificate Advice" No.8, 28 January 1999;
- (h) "Interim Certificate Advice" No.9, 8 March 1999;
- (i) "Interim Certificate Advice" No.10, 6 April 1999;
- (j) "Interim Certificate Advice" No.11, 6 May 1999;
- (k) "Interim Certificate Advice" No.12, 27 July 1999.

[94] **Ex P5** also contains the following "Financial Statement" summaries issued by the Plaintiff to the Defendant:

- (a) Financial Statement No. 1 – 13 October 1998 (6 pages);
- (b) Financial Statement No. 2 – 21 October 1998 (6 pages);
- (c) Financial Statement No. 4 – 1 December 1998 (10 pages);
- (d) Financial Statement No. 5 – 8 January 1999 (10 pages);
- (e) Financial Statement No. 6 – 29 March 1999 (13 pages);
- (f) Financial Statement No. 7 – 25 May 1999 (15 pages);
- (g) Financial Statement No. 8 – 23 July 1999 (14 pages);
- (h) Financial Statement No. 9 – 17 September 1999 (14 pages);
- (i) Financial Statement No. 10 – 19 October 1999 (14 pages);
- (j) Financial Statement No. 11 – 11 December 1999 (15 pages).

[95] When **Ex P5** was shown to **Mr TAGILALA** in cross-examination, he could not recall them:

*“Q: Can I just show you a bundle of documents from Exh.P5 [also part of doc.68] – just have a flick through those and **tell us if you remember seeing these documents in the course of your negotiations with Fletcher Construction?**”*

*A: No Sir.*

*Q: **Never seen?***

*A: No.”*

[96] In support of the evidential burden which the Plaintiff bears on this issue, no wonder after reviewing the above documentation tendered that Counsel for the Plaintiff has submitted that “there is **overwhelming evidence**” to support its claim. In addition, Counsel for the Plaintiff has submitted that:

*“ ... The preparation of Final Accounts and Certificate is the final responsibility of the Quantity Surveyor. Although Sepeti Tagilala ... claims to have prepared the Final Certificate, it is obvious from the certificate itself that it was prepared by Tiko of Williams and Associates on 11 July 2000. Further, the Plaintiff’s involvement is evident in the minutes of the Project Committee Meeting held at the World Harvest Centre on 12 January, 2000 where it was acknowledged that the final account was submitted by the plaintiff. (**ABOD 54**).”*

[97] **Applying the evidential burden as to whether the Plaintiff did the work for the additional fees claimed, I note Doc.68 and Exh Ps and Exh P5 were relied upon by the Plaintiff to satisfy that evidential burden.** As these documents were part of the agreed bundle of documents and exhibits tendered without objection, I am satisfied that they are genuine and that accordingly, the evidential burden then shifted to the Defendants to prove that the work claimed was not done.

[98] In attempting to satisfy that evidentiary burden which had then shifted to them, the Defendants relied upon their two witnesses **PASTOR TOROCA** and **Mr TAGILALA**. **PASTOR TOROCA** (whose evidence I have found to be most unreliable) denied receiving **Doc.50** (26 August 1999 putting the Defendants on notice

of a claim for extra fees due to the construction substantially exceeding \$2million). **Mr TAGILALA** conceded in cross-examination that he had **not studied** ***“in any detail at any stage”*** **Doc.68** (the Final Account from the Plaintiff to the Defendants of 11 July 2000) nor could he call **Ex P5** (the “Interim Certificate Advices” from the Plaintiff to the Defendants recommending amounts for payment).

[99] In addition, no documentary evidence was led from the Church’s own records to rebut the claim, though two exhibits from Mr TAGILALA’S home personal computer were tendered: **Ex “D1” “Working sheet negotiations with Fletchers prepared by Mr Tagilala”** and **Ex “D2” “Bundle of Notes from Mr Tagilala’s P.C.”** The Defendants seemed to have confused that their negotiations with the builder in reducing the overall debt which the Church owed them somehow meant that the Plaintiff did not do their work throughout the project as the Quantity Surveyors.

[100] Further, no oral evidence was called from the Project Manager, **EDWARD RUSHTON FIJI LIMITED**, nor the builder, **FLETCHER CONSTRUCTIONS**, to testify that their respective firms agreed with what was being suggested by the Defendants, that is, that the Plaintiff did not do the additional work claimed. As with other parts of the Defendants’ case, a ***Jones v Dunkel*** (supra) type **inference can be drawn that the uncalled evidence would not have assisted the Defendants’ case.**

[101] **Significantly, it was also never put to Mr NAIDU in cross-examination, as the Architect for the project, that the Plaintiff did not do the work claimed.**

[102] **Thus, it is the finding of this Court that the Plaintiff did the work for the additional fees claimed.**

**6. The persuasive burden: whether the Plaintiff has proved its case on the balance of probabilities?**

[103] As a result of the above evidential findings, the Court concludes that in relation to the persuasive burden, the Plaintiff has established its case by a preponderance of evidence, that is:

- (a) That it is entitled to \$1,400 outstanding since 13 April 1999;
- (b) That it is entitled to \$400 outstanding since 28 May 2000;
- (c) That it is entitled to \$77,081.55 outstanding since 28 July 2000.

## **G. THE LAW**

### **1. Whether the Plaintiff is estopped from claiming the additional fees?**

[104] Counsel for the Defendants has claimed in his written submissions that:

*“The doctrine of estoppel will not allow the Plaintiff to assert and argue that extra fees is owed to it ... the Plaintiff had made representation to the Defendants that the cost of the construction ... would be \$2M, nowhere before or during the construction did the Plaintiff indicate to the Defendants that the costs would be over and above \$5 million dollars. The Plaintiff only discloses this to the Defendants after the construction is completed which the Defendants had never expected as they had relied upon the \$2 million construction costs, which was represented to them by the Plaintiff as being the expected completion costs.”*

[105] In support, Counsel for the Defendants has cited **Jamnadas Sports (Fiji) Ltd v Stinson Pearce Ltd** [1994] FJCA 20 (Paclii: ABU0040J of 1992S, 24 May 1994, Kapi, Ward and Thompson JJA) and **Australian Conference Association Limited v Sela** (Unreported, Civil Action No.357 of 2005, 31 January 2007, Coventry J; Paclii: [2007] FJHC 62).

[106] Interestingly, in their *Amended Statement of Defence*, the Defendants had not specifically pleaded any such defence by way of equitable relief. On this issue, the decision of the High Court of Australia in **Dare v Pulham** (1982) 148 CLR 658 (Austlii: [1982] HCA 70, <http://www.austlii.edu.au/au/cases/cth/HCA/1982/70.html>) is worth noting:

*“6. Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it (**Gould and Birbeck and Bacon v. Mount Oxide Mines Ltd. (In liq.)** [1916] HCA 81; (1916) 22 CLR 490, at p 517 ; they define the*

*issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial (Miller v. Cameron [1936] HCA 13; (1936) 54 CLR 572, at pp 576-577 ; and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. **Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings (Gould and Birbeck and Bacon (1916) 22 CLR, at pp 517, 518 ; Sri Mahant Govind Rao v. Sita Ram Kesho (1898) LR 25 Ind App 195, at p 207 ). But where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed (Mummery v. Irvings Pty. Ltd. (1956) [1956] HCA 45; 96 CLR 99, at pp 111, 112, 127 ), though a failure to amend particulars to accord precisely with the facts which have emerged in the course of evidence does not necessarily preclude a plaintiff from seeking a verdict on the cause of action alleged in reliance upon the facts actually established by the evidence (Leotta v. Public Transport Commission (N.S.W.) (1976) 9 ALR 437, at p 446; 50 ALJR 666, at p 668 )(at p664)."***

[107] Similarly, there was no claim by the Plaintiff in its *Amended Statement of Claim* for unjust enrichment by the Defendants or a claim in *quantum meruit*. Instead, Counsel for the Plaintiff has simply put in his *Submissions in Reply*:

*"It is submitted that **the principle of estoppel does not apply in this case as the terms of engagement were clearly stipulated in the letter of 16/3/98 (ABOD:14), 13/02/98 (ABOD 9) and 30/01/98 ... shall be in accordance with AIQS ... In any event, the Defendant engaged the Plaintiff on the basis of AIQS which clearly outlines that should there be variations in the Bills of Quantities, the Quantity Surveyor is entitled to fees in excess.**"*

[108] The Court agrees with the submission of Counsel for the Plaintiff. Not only was equitable estoppel not pleaded by the Defendants in their *Amended Statement of Defence*, it is just not applicable to the present case. The terms of engagement of the Plaintiff by the Project Manager, **EDWARD RUSHTON FIJI LIMITED** (acting on behalf of the Defendants), was set out in the letter dated 16 March 1998 from the Plaintiff, **WILLIAMS ASSOCIATES LIMITED** to **EDWARD RUSHTON FIJI LIMITED** and specifically stated that the "*conditions stated in our previous letter dated 13<sup>th</sup> February 1998 still apply*" and such conditions being that the basis of engagement shall be in the accordance with the AIQS Conditions of Engagement (1<sup>st</sup>

January 1983) individual services AND the current construction cost to be \$2,000,000.00 inclusive of VAT. If the Defendants did not understand what they had agreed to through their Project Manager **EDWARD RUSHTON FIJI LIMITED** then that was a matter between them and not for the Plaintiff to be penalised.

## **H. INTEREST**

### **1. Interest claimed as set out in Exhibit P4**

[109] In **Ex P4** the Plaintiff tendered to the Court that the total amount outstanding inclusive of interest up to and including 28 July 2008 when the hearing commenced of their claim is:

- (a) \$1,400.00 outstanding since 13 April 1999 (plus \$3,213.16 interest);
- (b) \$400.00 outstanding since 28 May 1999 (plus \$1,000.91 interest);
- (c) \$77,081.55 outstanding since 14 July 2000 (plus \$89,209.60 interest)

[110] It is noted that in their claim set out in **Ex P4** there is a typographical error on the second page which has then led to a calculation error. The total amount of interest charged up to 28 July 2008 on the \$1800 outstanding from the original \$45,000 billed is listed on page one as **\$4214.07** but then on page two as **\$2,414.07**. Therefore, the total amount claimed should be \$172,505.22 NOT \$170,505.22.

[111] As the Court has found that **the agreement between the parties as set out in the letters of 16 March and 13 February 1998 was that it was subject to the AIQS Conditions of Engagement dated 1 January 1983** AND there was no challenge from the Defendants in either *Amended Statement of Defence* or during the hearing challenging the validity of the AIQS Conditions of Engagement (1<sup>st</sup> January 1983) such as that some or all of its terms may be unconscionable, nor was there a challenge to the claim set out in **Ex P4**, **then the interest component of the Plaintiff's claim pursuant to that Agreement as set out in Ex P4 should be allowed.**

### **2. Interest claimed as set out in Exhibit P4**

[112] In their *Amended Statement of Claim*, the Plaintiff is seeking in relation to interest:

- (a) Interest pursuant to clause 8.05.03 of the Conditions of Agreement to accrue at a rate of the current overdraft rate fixed by the Reserve Bank PLUS 2% per annum; and
- (b) Interest at 2 per cent per annum from the time of the breach of the said agreement till the date of judgment; and
- (c) Interest on the judgment pursuant to section 3 of the *Law Reform (Miscellaneous Provision) (Death and Interest) Act* (Cap. 27).
- [113] In relation to the other interest claims of 2 per cent per annum from the time of the breach of the said agreement till the date of judgment and interest on the judgment pursuant to section 3 of the *Law Reform (Miscellaneous Provision) (Death and Interest) Act* (Cap. 27), despite these items being pleaded, they were not addressed by the Defendants either in their *Amended Statement of Defence* (other than the total claim being dismissed) or in their written submissions.
- [114] According to Section 3 of the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act* [Cap 71]:
- “... **the court may**, if it thinks fit, order that there shall be included in the sum for which judgment is given **interest at such rate as it thinks fit on the whole or any part of the debt** or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment”*
- [115] I note that this is a matter which should have been resolved soon after it occurred or at least by the end of 2000, and, if not, then soon after the Statement of Claim was filed, rather than the Plaintiff having to wait for nearly some 10 years since the first claims arose and just under 9 years since the substantive claim to be vindicated through the Court’s determination. Normally, I would see no basis as to why I should not allow interest on the combined sum of \$81, 495.62 awarded.
- [116] In my view, however, the Agreement already had sufficient provision to cover the question of interest and to allow such claims “on top of” the interest which the Court is allowing pursuant to the agreement would, in my view, be excessive.

[117] **Therefore, it is the finding of the Court that it is fair and reasonable to award interest as claimed in Ex P4 which was part of the Agreement but not a further 2 per cent per annum from the time of the breach of the said agreement till the date of judgment and also on the total judgment sum awarded.**

## **I. COSTS**

[118] In relation to the costs of the current proceedings, I note that in their *Amended Statement of Claim* filed on 3 March 2008, the Plaintiff is seeking indemnity costs. In their respective submissions neither Counsel has dealt with this issue, though Counsel for the Plaintiff has confirmed in his Submissions in Reply that “*the Plaintiff ... seeks judgment as pleaded*”. As noted above, the Plaintiff’s *Amended Statement of Claim* includes a claim for indemnity costs. Their *Reply to Amended Statement of Defence* states: “*The Plaintiff repeats its prayers in the Amended Claim.*”

[119] As I have discussed in a number of recent cases, it is my view that for indemnity costs to be awarded, there would need to be conduct which could be pointed to by the Plaintiff whereby the Defendants “had acted wholly unreasonably in connection with the hearing” and **such conduct would need to be “reprehensible conduct”** to signify the Court’s condemnation as to the way the Defendants have conducted the litigation: see ***Singh v Naupoto*** (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008, Hickie J – costs); Paclii [2008] FJHC 193, <http://www.paclii.org/fj/cases/FJHC/2008/193.html>); and ***Rokotuiviwa v Seveci***, (Unreported, High Court of Fiji at Suva, Civil Action No: HC374 of 2007, 12 September 2008, Hickie J); Paclii: [2008] FJHC 221; <http://www.paclii.org/fj/cases/FJHC/2008/221.html>) citing ***Police Service Commission v Naiveli*** (1995) HBJ 029 of 1994, 4 September 1995, Scott J; and Civil Appeal No. ABU0052 of 1995S, 16 August 1995, Casey, Ward and Handley JJA); see also ***Dewa v University of the South Pacific*** (Unreported, High Court of Fiji at Suva, No.HBJ0007J of 1994, 4 July 1996, Pathik J) (Paclii: [1996] FJHC 125, <http://www.paclii.org/fj/cases/FJHC/1996/125.html>); ***Heffernan v Byrne & Ors***, (Unreported, HBM 105 of 2007, 24 October 2007, Pathik J - Application for Recusal

dismissed for want of prosecution) (Paclii: [2007] FJHC 138, <http://www.paclii.org/fj/cases/FJHC/2007/138.html>); and 11 April 2008 (Application to Strike Out Motion for Constitutional Redress granted) (Paclii: <http://www.paclii.org/fj/cases/FJHC/2008/154.html>); and *Heffernan v Byrne & Ors*, Civil Appeal No.ABU0027 of 2008, Hickie JA, 29 May 2008 (Application for Leave to Appeal withdrawn) (Paclii: [2008] FJCA, <http://www.paclii.org/fj/cases/FJCA/2008/7.html>).

[120] I will make no decision at this stage on the question of costs (including indemnity costs) and will allow the parties time to file further brief submissions on this issue. The Plaintiff may wish to include in those submissions whether Order 62 rule 7(4)(b) of the High Court Rules should apply and a gross sum awarded pursuant to that Rule.

## **J. CONCLUSION**

### **1. Plaintiff is successful in their claim**

[121] It is clear that Plaintiff should be paid their outstanding accounts. That this matter was allowed to “drag on” for some 9-10 years does not reflect well on the Defendants or their advisers. It may well be that by its very nature of being a community organisation combined with this being a construction project involving various contractors that some of the intricacies may not have been fully understood by the Defendants. But that is why they engaged a project manager and, perhaps, where they should have been looking for answers in that direction rather than simply not paying the outstanding accounts of the Plaintiff.

[122] To be fair, perhaps there was confusion in the minds of the Defendants (particularly when the project manager died in early 2000). But this is when the Defendants might have considered seeking further answers from the **EDWARD RUSHTON FIJI LIMITED** and if they were no longer in Fiji, then their New Zealand principals. Perhaps they did. No evidence of such was tendered. Further, just because representatives from the Defendants took an approach to the massive debt by which they were able to have the builder and others agree to reduced fees did not mean that

the Quantity Surveyors had to also “fall into line” or that that the Quantity Surveyors had failed to do their job. Indeed, it is clear from the voluminous evidence tendered that the Quantity Surveyors should have been paid their outstanding accounts some 9-10 years ago.

## **2. Orders**

[123] In view of the findings which the Court has made, the formal Orders of the Court are:

- 1. That judgment is awarded to the Plaintiff.**
- 2. That the Defendants are liable to the Plaintiff for the following amounts outstanding inclusive of interest up to and including 28 July 2008 when the hearing commenced of their claim, that is:**
  - (a) \$1,400.00 outstanding since 13 April 1999 (plus \$3,213.16 interest);**
  - (b) \$400.00 outstanding since 28 May 1999 (plus \$1,000.91 interest);**
  - (c) \$77,081.55 outstanding since 14 July 2000 (plus \$89,209.60 interest);**
  - (d) Making a combined total judgment sum of \$172,505.22.**
- 3. That the Defendants are to pay the Plaintiff the judgment sum of \$172,505.22 within 28 days.**

I will now hear the parties as to a timetable to file and serve submissions as to costs.

Thomas V. Hicke

**Judge**

**Solicitors:**

**Muror & Co, Barristers & Solicitors, Suva, for the Plaintiff**

**Fa & Company, Barristers & Solicitors, Suva, for the Defendants**