IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0012 OF 1999S
(High Court Civil Action No.0232 of 1995)

BETWEEN:

MESULAME NARAWA
RAITUBE MATANABUA

Appellants

AND:

NATIVE LAND TRUST BOARD

1st Respondent

THE CONSERVATOR OF FOREST

2nd Respondent

THE MINISTRY OF AGRICULTURE
FISHERIES AND FORESTS

3rd Respondent

TIMBERS (FIJI) LIMITED

4th Respondent

THE ATTORNEY GENERAL OF FIJI

5th Respondent

Coram: Sheppard JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Wednesday 29th May 2002, Suva

Counsel: Mr I. Fa for the Appellant
Mr T.V.Q. Bukarau for the 1st Respondent
Mr Y. Singh for the 2nd, 3rd and 5th Respondents
Mr P. Knight for the 4th Respondent

Date of Judgment: Friday, 31 May 2002

JUDGMENT OF THE COURT

Introduction

The appellants commenced these proceedings against the five respondents by an originating summons filed on 10 May 1995. In the course of the proceedings it became

apparent that the right of the appellants to bring them was challenged. Accordingly the first respondent ("the Trust Board") applied to the court by summons for an order that the action be dismissed on the ground that the appellants had no standing to institute the proceedings.

That summons came before Fatiaki J on 8 March 1996. In a judgment delivered on 16 December 1998, the court held that the appellants had no standing to bring or continue the present action. It was accordingly dismissed with costs.

Following an appropriate application, on 26 March 1999 the judge granted the appellants leave to appeal to this court against that decision.

In his judgment of 16 December 1998, the Judge also held that no relief had been sought nor allegations of impropriety made against the third and fifth respondents. They were accordingly struck out of the proceedings. There is no challenge to that decision.

The proceedings

The proceedings concern two agreements entered into between the Trust Board and the second respondent ("the Conservator") of the one part and the fourth respondent ("Timber Fiji") of the other part. The first agreement, referred to as the Navua Concession Agreement is dated 7 November 1983, the second, referred to as the Navutulevu Concession Agreement is dated 31 January1985. These agreements granted timber concessions over 4,500 hectares in the case of the first agreement and 17,500 hectares in the case of the second agreement.

The Yavusa Burenitu of Serua comprises 11 mataqalis. Those mataqalis are the registered proprietors of the land to which the two agreements relate. The members of those mataqalis are thus the Fijian owners of the land for the purposes of the Native Land Trust Act (Cap. 134) ("the Act"). The first appellant was the Member of Parliament for Korovisilou

village. The second appellant holds the title of the Turaga Railevu and is the paramount chief of the Yavusa Burenitu of Serua.

The originating summons seeks relief on a number of grounds. In essence, it seeks declarations:

- that the Trust Board has failed to pay to the members of the Yavusa Burenitu the royalties to which they are entitled,
- that the Trust Board has breached its obligations under the Act in failing to administer the agreements for the benefit of the owners,
- that the Trust Board is in breach of its fiduciary duties to the owners,
- that Timber Fiji has committed breaches of the agreements,
- that a scheme of arrangement entered into between the Trust Board and Timber Fiji should be set aside on the grounds of non-disclosure and fraud.

In addition it seeks the following remedies:

- An order requiring the Trust Board to terminate the agreements,
- An injunction prohibiting the parties from dealing with the agreements,
- $8.5 million owing as royalty payments,
- Damages,
- Costs.

It is immediately apparent from the above summary that these proceedings should not have been commenced by an originating summons. Obviously, as has proved to be the case by the affidavits filed, seriously disputed matters of fact are bound to arise which can only be resolved by proceedings commenced by a writ of summons and statement of claim. The lack of a detailed statement of claim including full particulars of the allegations and setting out concisely the causes of action relied on has made the task of the Judge and of this court in determining issues arising on the application to strike out, more difficult. Counsel for the appellants has recognized that the form of the proceedings is inappropriate and has indicated his intention to apply for the proceedings to be converted to an action with writ of summons and statement of claim.

The legal position of a mataqali

There has developed in the High Court a difference of approach concerning the legal position of a mataqali, and the extent to which the members may have access to the courts.

It is now clearly established that where land is owned by a mataqali, an individual member cannot sue and recover damages personally where damage has been suffered by the mataqali. In *Meli Kaliavu & ors v Native Land Trust Board* (1956) 5 FLR 17 Hammet J said:

> "The plaintiffs are not the owners of the land in question. They are merely five members out of some 150 members who own the land. If any damage has been suffered by the mataqali as a result of any action by the Native Land Trust board for which they are liable in law to pay damages, the mataqali could undoubtedly recover them.
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> It is not, however, open to this member or that member to sue and recover such damages in their own personal capacity. It would be quite out of the question for this court to award damages personally to these five plaintiffs in respect of a cause of action (if there is one) open to the mataqali of which they are members."

This approach has been adopted in later cases, see, for example, *Naimisio Dikau No 1 & ors v Native Land Board & anor* CA No 801/1984 and *Waisake Ratu No 2 v Native Land Development Corporation & anor* (1987) Civil action no 580 of 1984. We agree with those observations.

Where, however, the personal rights of an owner, as distinct from the rights of the mataqali, have been directly infringed, that person can bring an action for a remedy resulting from such infringement: see *Serupepeli Dakai No 1 & ors v Native Land Development Corporation & ors* Civ App No 30/1982 FCA: CA 543/1979 and *Waisake* (above).

We pass now to consider the legal standing of a mataqali. A convenient starting point is the judgment of Rooney J in *Naimisio Dikau No 1*(above).He said commencing at p7:

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"The common law and the rules of equity cannot be applied to a system of land holding which is alien to and independent of the law of England as the received law of this Dominion. In the result there is in existence a system of legal dualism.

A mataqali cannot be equated with any institution known and recognized by common law or statute of general application. The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by a customary law separate from and independent of the general law administered in this court.

It was established by *Meli Kaiavu & ors v Native Land Trust Board* (1965) 5 FLR 17 that individual members of a mataqali have no locus standi to sue and recover damages in their own personal capacity or to obtain an injunction. Their right to obtain a declaration must similarly be circumscribed. Such rights as they may have as members of a mataqali are not founded on the common law or any statute."

The same judge returned to this issue in *Timoci Bavadra v Native Land Trust Board* Civil Action No 421 of 1998. The plaintiff applied for leave to institute a representative action under O 15 r 13. The Judge said at p 6:

"Even if the plaintiff could show that he had the support of the majority of the adult members of the land holding unit this would not necessarily give him or the people he represents the right to sue. That depends on the nature of a Fijian landholding unit. "

After referring to what he had said in *Naimisio Dikay No 1* (above), the Judge continued:

"I do not regard this as a satisfactory state of affairs. The indigenous law of the Fijian people, which is as much a part of their culture as the language, ceremonies and unique way of life, has no proper status in the country. This is so, notwithstanding that most of the land is owned by Fijians under a system of customary title."

At p 6 of the judgment the Judge said:

"If the plaintiff wishes to pursue this case further he has to establish, within the framework of the common law, that a tatoka (sic) or a mataqali has a right to

sue and be sued in the courts. It is, as far as the applied law is concerned, an alien institution, which is neither a corporation nor an unincorporated association"

In *Waisake Ratu No 2* (above), Cullinan J rejected this approach. He said at p 52 of his judgment:

"I do not consider that a mataqali or a tokatoka is an institution which is alien to the applied law of Fiji. I cannot see why the courts, without any ingenuity on their part, could not equate either of those bodies to an unincorporated association. The original coming together to form the group was no doubt the action of the present members' ancestors. Nonetheless they remain in free, communal association, the members thereof sharing a communal proprietary interest: while landholding may be individual in places, they are none the less communal proprietary rights, such as those over the veiku or forest. Such groups are of common agnatic descent, the individual membership and leadership and the physical location and proprietary rights of which are by statute recorded in the Register of Native Lands, preserved by the Registrar of Titles. Not only has the mataqali been recognized as a central proprietary unit by the statute law of Fiji for over a hundred years now (to the extent indeed that the law provides for the devolution of the lands of an extinct mataqali), so also have all the individual divisions of the Fijian people by the act of statutory registration. How then can any of those groups be regarded as alien to such statute law?"

There is a formidable body of authority throughout the common law world that supports the approach adopted by Cullinan J. We are grateful to counsel for the appellants for references to authorities from the Supreme Court of the United States, the Supreme Court of Canada, the Judicial Committee of the Privy Council, and the High Court of Australia. As the law is in our view clear, it is unnecessary for us to cite from these authorities extensively.

In *in re Southern Rhodesia* [1919] AC 211, Lord Sumner observed:

"On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law"

In *Amodu Tijani v The Secretary of Southern Nigeria* [1921] 2 AC 399, Viscount Haldane said at 403:

> "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructory right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite legal forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.
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> "The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but maybe that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

The recognition by the common law of customary rights was discussed by the High Court of Australia in the leading case of *Mabo & ors v the State of Queensland No 2* 175 CLR 1. The essential conclusion of the High Court was that the common law of Australia recognizes a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands. On the recognition of native title and rights by the common law, Brennan J, delivering the judgment of the majority, said at p 61:

"Secondly, native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual.

. . .

Thirdly, when an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession, of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community's lands. The recognition of the rights and interests of a sub-group or individual dependent on a communal native title is not precluded by an absence of a communal law to determine a point in contest between rival claimants. By custom, such a point may have to be settled by a community consensus or in some other manner prescribed by custom. A court may have to act on evidence which lacks specificity in determining a question of that kind."

These and other authorities to which we were referred put beyond doubt the proposition that native customary rights and obligations may be recognized by the common law and enforced in the courts . More particularly, in the case of mataqali, it may, by representative action or by action brought by all those belonging to the mataqali as an unincorporated association, bring proceedings in the court seeking common law or equitable remedies for any breach of rights it is able to establish.

It follows from this that Rooney J was wrong in holding that a tokatoka or a mataqali are institutions alien to and not recognized by the common law. It also follows that we agree with the views expressed by Cullinan J in *Waisake Ratu No 2* (above) in the passage we have set out. We should add that counsel for the Trust Board responsibly accepted that Rooney J's approach could not be supported.

In the judgment to which this appeal relates, the Judge set out some of the passages in the judgments of Rooney J to which we have referred. In reaching his conclusion that the appellants lacked standing to bring these proceedings, he apparently relied, at least in part, on the principles stated by Rooney J. His doing so resulted in an error of law.

The representative action

We pass now to consider whether the Judge was right to conclude that the appellants lacked the standing necessary for them bring the proceedings in a representative capacity.

The Judge, in the concluding half of his judgment, referred to the following passage in the judgment of Rooney J in *Bavadra* (above) at p 7:

> "The plaintiff and his associates may be permitted to proceed if they can establish a common interest and a common grievance and if the relief sought is in its nature beneficial to all whom the plaintiffs propose to represent. I take the view that the establishment of such a premise presents formidable difficulties, unless the plaintiff can show that the constitution, management and functions (of the native land holding unit) are such that it meets that requirement."
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> Fatiaki J went on to say:
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> "I agree entirely with those comments and would only add that on the affidavit evidence before me it is not at all clear or established that the various mataqalis comprised within the Yavusa Burenitu have a common interest or purpose in the proceedings or that the relief sought, especially the cancellation of the concession agreements, would be beneficial to all."

On the above passages we have these comments. First, it is apparent that Rooney J was relying on the test enunciated by Sir Raymond Evershed M.R. in *Smith v Cardiff Corporation* [1954] 1 QB 210 at 220. We return to consider that and other authorities later.

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Secondly, he does not state any reasons why the establishment of the elements necessary to permit a representative action presents formidable difficulties. We assume that this is because of his erroneous belief that customary rights will not be recognized or enforced by the courts. Thirdly, Fatiaki J gives no reasons for his apparently tentative view that the various mataqalis did not have a common interest or purpose in the proceedings, nor, apart from the reference to the cancellation of the agreements, does he give reasons for concluding that the relief sought would not be beneficial to all.

Representative actions are governed by O.15 r.14 of the High Court Rules:

> (1) Where numerous persons have the same interest in any proceedings. . . the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

Under the rule, therefore, the only requirement is that the persons intended to be represented have the same interest in the proceedings. However, cases decided under the comparable rule in England have discussed other criteria.

The test enunciated by Sir Raymond Evershed M.R. in *Smith v Cardiff Corporation* (above) has been frequently followed:

> "It must be shown . . . that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all."

In *John v Rees* [1970] 1 Ch 345, 368, Megarry J observed that the rule ". . . is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice." He referred to Fletcher Moulton J's observation in *Markt & Co v Knight Steamship Co*[1910] 2 KB 1021 at 1039 that a plaintiff suing in a representative capacity does not have to obtain the consent of those he purports to represent.

Counsel for the Trust Board submitted that if an individual litigant who is a member of a proprietary unit wants to pursue an infringement which by its nature is a communal right, he needs the majority support of the proprietary unit which he seeks to represent before he can pursue such proceedings. We do not accept this submission. The authorities upon which he relied do not support the majority contention, and there is nothing in the rule to suggest that this is a requirement. On the contrary, the cases make it clear that the person seeking to bring an action in a representative capacity does not have to obtain the consent of those he purports to represent, either all or some of them, see *Markt* (above).

Conclusion

We have concluded that the appellants should be permitted to bring these proceedings on a representative basis for these reasons.

First, all the members of the mataqalis have a common interest in ensuring that the agreements are being properly administered by the Trust Board, and that they receive whatever is due to them from the agreements. If, as the appellants allege, the agreements have not been properly administered and Timber Fiji is guilty of breaches for which damages are payable but have not been claimed, the members will also have a common grievance. Whether in fact that is so can only be determined at the trial. Similarly, if the causes of action are made out, the relief obtained is likely to be beneficial to the members or at least most of them.

Secondly, it is apparent from the affidavits filed that a substantial number of the members of the mataqalis support the appellants in their action. It is also apparent that a substantial number do not. But they appear not to be advocating a different course of action, rather they favour taking no action at all. If the action succeeds, they will share in the fruits of it. It if does not, they will not be liable for costs.

Thirdly, as we have pointed out, the appellants have no other course open to them. They cannot sue personally. They cannot bring an action as an unincorporated association because they would not obtain unanimity. As Megarry J pointed out in *John v Rees* (above) the representative action is a procedure the purpose of which should be to achieve justice. In the absence of any other remedy available to the appellants, the interests of justice will be served by allowing the action to proceed.

Fourthly, the persons seeking to represent the members of the mataqalis are persons of standing. The court accepts that the paramount chief of the Yavusa Burenitu of Serua representing all the mataqalis and a former member of Parliament are likely to have acted responsibly in bringing the proceedings.

Fifthly, the rule provides that some of the class can be excepted from those represented. If some of those who do not support the action wish to be excluded, an application to the court can be made to achieve that result.

The result

The appeal is allowed. The order made in the High Court dismissing the proceedings is quashed. We order that the proceedings be converted into an ordinary action and that the appellants file a statement of claim within 21 days of the date of this judgment.

We recommend to the Chief Justice that this action be put into the charge of a High Court judge who can exercise some firm case management to ensure that it is brought to trial as soon as possible, particularly in view of the inordinate delay that has already occurred. In all the circumstances and without intending any disrespect to the Judge whose decision this judgment overturns, it would be preferable for the case to be in the charge of a different judge.

The appellants are entitled to costs which we fix at $2,000 plus filing fees and disbursements including preparation of the authorities volume to be fixed by the Registrar.

Counsel for the Conservator took no active part in the appeal, and agreed to abide the decision of the court. Accordingly we direct that the costs be the joint liability of the Trust Board and Timber Fiji. As between themselves, the costs should be paid equally.

Sheppard JA, Presiding Judge

Tompkins JA

Smellie JA

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