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

CIVIL APPEAL NO. ABU 0002 OF 2004
(High Court Civil Action HBC 69 of 1994L)

BETWEEN:

JOSUA MALINAVITILEVU

Appellant
(Original Plaintiff)

AND: **RATU JOSEFA ILOILOVATU ULUIVUDA**

First Respondent

AND: **NATIVE LAND TRUST BOARD**

Second Respondent
(Original Defendant)

Coram: **Eichelbaum, JA**
Gallen, JA
Scott, JA

Date of Hearing: **19 July 2005**

Counsel: **Mr. K. Vuetaki for the Appellant**
Mr. G.E. Leung for the Respondents

Date of Judgment: **29 July 2005**

JUDGMENT OF THE COURT

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[1] The proceedings were commenced in 1994 in the High Court at Lautoka by Timoci Nagaga Naulivou suing on his own behalf and behalf of the Yavusa Subutoyatoya of Wayasewa. Following his death, his brother, the present Appellant was substituted with the leave of the Court. There was only one defendant in the High Court, the Native Land Trust Board (the Board). The second Respondent, the present first Respondent, in his capacity as head of the Yavusa Subutoyatoya Viseisei was not added until November 2004.

[2] The High Court's judgment was appealed by the present second Respondent and a cross appeal was filed by the present Appellant. In June 2005 the present Respondents filed Notice of Discontinuance. It will be convenient to describe the parties as Plaintiff and Defendants.

INTRODUCTION

[3] The subject matter of the proceedings is two islands Vomo Levu and Vomo Lailai which are situated about 22 kilometers north west of Lautoka in the province of Ba. A luxury hotel and other developments have taken place on Vomo after a native lease for tourism purposes was granted by the Native Land Trust Board to Offshore Resorts Limited in 1989. The present annual rent payable by the lessee is not less than $100,000. The parties have been unable to agree on how the receipts from the lease should be distributed.

[4] In Fijian custom land is held and occupied in land owning units of increasing size. The smallest is the family. A group of families together make up a tokatoka. A group of tokatokas make up a mataqali. A group of mataqalis make up a yavusa. Several yavusas constitute a tikina, or district and several districts will be found within a yasana or province.

[5] The Plaintiff and the first Defendant (Respondent) represent two different groups of landowners. The Plaintiff's group live at Namara on Wayalailai island about 20 kilometers north west of Vomo. The Defendant/Respondent group lives at Veiseisei on the mainland of Viti Levu about ten kilometers from Lautoka.

[6] Both groups of landowners call themselves by the same name – yavusa Subutoyatoya. This is most unusual: normally different yavusas have different names. It seems, however, that at some point in the latter quarter of the 19th century some members of the yavusa, all of whom were then resident at Viseisei moved to Namara. They continued to call themselves by their original name. Both groups still continue to owe allegiance to the Tui Vuda.

THE CLAIM

[7] The amended Statement of Claim filed in May 1995 pleaded that in 1899 the Vomo Islands were sold and transferred by Francis Pratt Winter to mataqali Subutoyatoya, Yasawa province. It is not disputed that Francis Pratt Winter had inherited the islands upon the death of his father George Winter who had purchased the islands in 1882 from

the then Tui Vuda, and neither is it in dispute that the buy back for a sum of £60 was initiated by the previous Tui Vuda's successor..

[8] Paragraph 5 of the amended Statement of Claim asserted that the islands, which had previously been held under a crown grant, reverted to native land by virtue of the Native Lands Amendment Ordinance 1895.

[9] When native land is leased by the Board, the distribution of receipts from the lessee is governed by the Native Land Trust (Leases and Licences) Regulations (Cap. 134 – subs 12). Regulation 12 sets out the proportions in which the receipts are to be distributed to the proprietary units as a whole and to their various heads. The Plaintiff claimed that "mataqali Subutoyatoya, Yasawa province" was the same proprietary unit now known as and made up by both yavusas and that accordingly it was entitled to one half of the receipts. It had, however, received nothing.

[10] In 1990 the Native Lands and Fisheries Commission enquired into the ownership of the islands. It directed that they were to be registered in the Register of Native Lands under the ownership of yavusa Subutoyatoya of Viseisei "with the administration and use of the islands vested solely with the holder of the title of the Tui Vuda". The Plaintiff appealed to the Appeals Tribunal established by the Native Lands Act (Cap. 133). In a letter sent by the Commission to the Board in March 1991 it was stated that the Appeal Tribunal sat in October 1990. According to the Commission the two yavusas agreed that the Plaintiff was "also to be included in the ownership of the island after approaching the Tui Vuda to soro or seek forgiveness for questioning his control of the island". It is not clear whether

the "I soro" was ever performed but the Plaintiff claims that despite the recognition by the Native Lands and Fisheries Commission that it was indeed part of the proprietary unit owning the Vomo islands it continued to receive nothing from the Board.

[11] In the prayer in its amended Statement of Claim the Plaintiff sought a declaration that it was entitled to one half of all distributable receipts under the lease and secondly, payment to it by the Board of one half of all the moneys which had been received since the lease was granted.

[12] The amended Statement of Defence filed by the Board in April 1997 is not entirely satisfactory. While accepting that all the receipts had been paid to the head of the yavusa Subutoyatoya Viseisei, namely the Tui Vuda, and that nothing had been paid to the Plaintiff it is not clear whether the Board's case was that the two yavusas were separate entities or whether they were but two halves of the same land owning unit. In paragraph 5 the Board denied that the islands had reverted to native land after their purchase from Francis Pratt Winter by operation of the Native Lands Trust Amendment Ordinance 1895. In paragraph 6 however it asserted that when the lease was granted in 1989 the Board was exercising powers vested in it by the Native Land Trust Act (Cap. 134). Of course, only native land is vested in the Board. The Board denied that the Plaintiff had a cause of action against it and sought dismissal of the claim.

THE TRIAL

[13] A statement of agreed facts and issues was filed on 3 April 2000. The three issues before the Court were agreed to be:

(i) is there one yavusa Sabutoyatoya or two?

(ii) Were premiums and the rental proceeds paid out by the Native Land Trust Board on leasing of Vomo Levu and Vomo Lailai in the correct proportions?

(iii) If not, what is the measure of damages and costs?

[14] A number of copy documents were also admitted by consent. Principally included were:

(i) The certificate of title held by Francis Pratt Winter;

(ii) The Register of Transfer of the sale by Francis Pratt Winter to mataqali Subutoyatoya;

(iii) The native lease granted in 1989;

(iv) The Register of Native Lands volume 4 folio 443A.

[15] The first witness was the Plaintiff. He explained why he considered that there were two distinct yavusas. He accepted that both regarded themselves as the same people and that both owed allegiance to the Tui Vuda. While the Tui Vuda was entitled to receive the entire payments from the Board the heads of the two yavusas should each be paid no more than their share. The balance should then be distributed to the tokatokas in the two yavusas. He told the Court that after the original decision of the Native Lands Commission, he had appealed. The Commission had then told him that the two yavusas were to be joint owners. The Plaintiff's grievance was to be reconciled by Fijian protocol. According to the Plaintiff he and other members of the yavusa went and gave a traditional presentation to the Taukei Nakelo which was accepted on behalf of the Tui

Vuda. Despite this, however, the Register of Native Lands was not amended as had been promised and they continued to receive nothing.

[16] The second witness, Nacanieli Naulivou, was a commissioner with the Native Lands Commission. He tendered a 48 page bundle of documents, one of which was the 1990 ruling already referred to. The basis on which these documents were tendered is not clear, but there was no objection. Mr. Naulivou told the Court that the Commission's records revealed that there were two yavusas Subutoyatoya. At this point, Counsel for the Defendant accepted that it had been:

> "brought beyond doubt by documentation that the yavusas are separate. This is the main issue. It appears to be overwhelming evidence."

[17] The remaining witnesses called by the Plaintiff did not add materially to the evidence. The only witness for the Defendant Board was one of its accounts clerks who confirmed that all payments of lease monies had been paid direct to the Tui Vuda on instructions given by the Native Lands Commission and on the basis that "he is the sole owner and sole recipient."

[18] In his closing address to the High Court, which is only very briefly recorded, Mr. Vuataki submitted that there were two issues for decision. The first was whether there were one or two yavusas; the second was whether the lease monies had been correctly paid out.

[19] Mr. Rabo Matebalavu, who appeared for the defendant Board handed up a comprehensive written submission. The two issues which Mr. Vuataki had identified

were also addressed in detail by Mr. Rabo. Although he acknowledged that the Plaintiff had an entitlement to share in the lease monies he submitted that on the basis of the number of tokatokas making up the two yavusas there was "no legal basis whatever for the Plaintiffs claim to be entitled to 50% of the monies". As to the monies which the Plaintiff had not received since 1989, Mr. Rabo suggested that these should be forgone in return for payments to them in future at the proper rate indicated by the regulations.

[20] There is no record of either counsel addressing the Court on the third issue before it, namely the measure of damages and costs. Neither is there any record of counsel raising the question of the nature of the title under which the Vomo Island were held.

[21] At the conclusion of his judgment the judge (Gates J) made the following orders:

> "1. CT register 12 folio 1019, the land title to Vomo Island which includes the islands of Vomo Levu and Vomo Lailai is a freehold.
>
> 2. The subject freehold is owned by the two yavusas, Subutoyatoya [Viseisei] and Subutoyatoya [Wayasewa] as owners in common.
>
> 3. The two yavusas are separate yavusas.
>
> 4. The income from the subject freehold is to be distributed on the basis of 50% of the income to each yavusa.
>
> 5. With the two yavusas, distribution should follow the distribution as laid down in regulation 11 of the Native Land Trust (Leases and Licences) Regulations Cap 134.
>
> 6. Liberty to the parties to apply for directions on trusteeship, distribution or correction of title matters."

THE APPEALS

[22] As already mentioned, the Defendant appealed and the Plaintiff cross appealed. The appeal was discontinued and therefore it is not necessary to set out the grounds in full. Grounds 5, 6 and 9 should, however, be noted.

[23] Ground 5:

"The learned trial judge erred as a matter of fact and law in holding that the subject land remains a freehold title."

Ground 6:

"The learned trial judge erred as a matter of law in determining that the subject land had not reverted to native title pursuant to operation of law."

Ground 9:

"The learned trial judge erred in law in making orders that he did without such relief being claimed in the Statement of Claim."

[24] In its cross appeal the Plaintiff asserted that the trial judge had wrongly concluded that the islands were jointly owned by the two yavusas. It suggested that the historical evidence and the title clearly pointed to the islands being wholly owned by the Plaintiff. Furthermore, and in answer to the Defendants grounds 5 and 6 set out above, the Plaintiff sought to uphold the Courts finding that the islands were freehold. If the islands were freehold and wholly owned by the Plaintiff then the yavusa Subutoyatoya Viseisei had no entitlement at all and neither was there any justification for the monies to be distributed according to the regulations, which only applied to native land.

[25] In addition to the applications to add and substitute parties already mentioned, there was also an application by the Plaintiff to file further evidence. Leave was given by a single Justice in March 2004 and subsequently no less than five further affidavits, some of them substantial, were then filed. All this additional material was compiled into a substantial supplementary appeal record which effectively doubled the material before us. In view of the amount and detail of the evidence filed we wondered whether we were being invited, in effect, to conduct a fresh trial and whether we were being invited to overturn findings of fact made by the High Court on the basis of material which it was not at all clear to us was not available for presentation to the High Court at the trial. Might it not be preferable to remit the matters in issue to the High Court for further enquiry? Both counsel urged us not to take this course, pointing to the eleven years that had elapsed since the proceedings had been commenced. For reasons which will be shortly be given we were satisfied that the additional evidence, though both interesting and relevant, did not materially affect the outcome of the appeal.

[26] As has been seen, the Plaintiff presented its case in the High Court on the basis that it was the co-owner with yavusa Subutoyatoya Viseisei of the Vomo Island. That is how the case was pleaded and that was what the Plaintiff stated in his evidence. In accepting that the Plaintiff was entitled to a half share in the lease money, the High Court granted the first declaration which the Plaintiff had sought. Mr. Vuataki attempted to justify what, on the face of it, was an attempt to appeal against a decision which had gone in the Plaintiff's favour by suggesting the wholly unexpected finding that the islands were

freehold justified what he termed a "180 degree turn". We do not agree. Given the basis and evidence upon which the High Court was invited to conclude that the Plaintiff had a half share in the profits derived from the islands, the finding that they had proved their entitlement to a half share on the balance of probabilities was in our view entirely reasonable. The whole thrust of the Plaintiff's case was directed at the claim to a half share. While we accept that the finding that the land was freehold was unexpected it must be remembered that the half share in freehold land is even more valuable than a half share in the receipts from native lands. In other words, the Plaintiff obtained even more than it had asked for. In our view, the Plaintiff is now attempting to raise on appeal an entirely new case inconsistent with that presented to the High Court. It is however established law that such a course is not open to it (see ex parte Reddish, in re Walton (1877) 5 Ch D 882). This ground of appeal fails.

[27] There was no appeal by the Plaintiff against the High Court's omission to deal with the third agreed issue, namely the measure of damages (and costs). Curiously, the judge wrote in paragraph 71 of his judgment that he was not "asked to right all of that wrong". In view, however, of the grounds of appeal filed we say no more about the matter.

[28] The remaining order of the High Court which the Plaintiff sought to set aside was order number 5, the direction that the lease monies should in future be distributed as though the monies were receipts from the leasing of native land. Mr. Vuataki submitted that having found that the land was freehold an order that its profits be distributed as though they were derived from native land was plainly wrong.

[29] In our view it is unarguable that if the land is indeed freehold, then it is held in common by all the members of the land owning units who form part of the two yavusas Subutoyatoya. Such ownership entitles each member to an equal share in the profits and no more. It is clearly inconsistent with distribution along the customary lines enshrined in the regulations. While doubtless the co-owners could agree among themselves that they wished to have the profits distributed according to native custom, we are satisfied that the High Court was wrong in ordering them to do so. It is at this point that the most troublesome aspect of the judgment is brought sharply into relief.

[30] We have already referred to the fact that the nature of the title to the land was not in issue, either on the pleadings or on the evidence. There is no mention of the matter in Mr. Rabo's excellent written submissions which form part of the record. Mr. Leung did not appear in the High Court and therefore was unable to assist us on the matter although it formed the basis of his ninth ground of appeal. Mr. Vuataki who did appear in the High Court could not be sure that the matter had not been raised, at least in passing. But despite this, the very first question which the judge asked himself in his judgment was "What type of land is it?" As will be seen from the judgment, in reaching his conclusion he did not refer to any submissions made to him by counsel, nor to any evidence led before him. He disposed of the Plaintiff's claim that the land had reverted to the status of native land by virtue of the Native Lands Amendment Ordinance 1895 by stating : " no such Ordinance has been brought to my attention". The fact, however, is that such an Ordinance was indeed enacted on 22 February 1895, that a copy is available

from the High Court library and that it deals in part with the reversion to native land of land previously the subject of a crown grant following its purchase by native owners.

[31] Section 1 of the Ordinance requires the Governor in Council to approve the reversion of the land to native land while section 3 requires the crown grant to be cancelled. According to an affidavit filed by Waisale Tora Tuinamataya in February 2004, Annexure B1 (an untranslated document written in Fijian) discloses that the Governor gave approval for the buy back by the Tui Vuda on 22 November 1898.

[32] One of the documents tendered in the High Court was a copy of Francis Pratt Winter's Certificate of Title. The copy provided to us in the record is poor and only partly legible. We do not know whether the copy tendered in the High Court was any better. On the day of the hearing before us we were provided with a much clearer copy. An important difference between the two copies was immediately apparent: the clearer copy (in handwriting certainly similar to that of the words recording the transfer to mataqali Subutoyatoya) is endorsed with the statement :

> "This Certificate is wholly cancelled".

[33] We drew this statement to counsels' attention. Mr. Vuataki showed us another document which he told us was clipped to the original held in the Titles Office and which read:

> "This title appears not to have been wholly cancelled".

[34] Although the judge did not explain what prompted his enquiry into the title under which the islands were held, it may be that he had in mind the opening paragraph of the 1990 Native Lands Commission Report which was tendered by the second witness and which commences: "this ruling applies to the ownership of Vomo Island, a freehold whole land ...". This ruling was considered by the judge at paragraphs 32 to 38 of his judgment. His finding that the Native Lands Commission had no jurisdiction to deal with the land if it was indeed freehold was clearly correct. The question which has however troubled us is whether the judge was right in his assessment (paragraph 25) that:

> "it cannot be doubted that a freehold title was purchased by the mataqali Subutoyatoya of the province of Yasawa [and] conceptually the title remained a freehold."

[35] For reasons including those which we have given we are unable to agree that the matter is beyond doubt. Furthermore, persons and bodies importantly affected by the finding such as the Tui Vuda himself, the yavusa Sabutoyatoya (Viseisei) and lessees were not parties to the litigation.

[36] We have anxiously considered whether we would be justified in re-opening the High Courts finding but have concluded that we must let it stand. The finding is not now the subject of any appeal and it is not irrefragably erroneous. While it is binding on the

parties in the High Court it is not a judgment in rem and does not find persons not parties to the proceedings . The Judges sixth order may also have some relevance.

[37] A number of consequences some of which were probably unforseen flow from the decision to leave the freehold finding intact. For the purposes of this appeal the most significant is that it must lead to a variation of Order No. 4 which requires the lease income to be divided equally between the two yavusas. Even though no party sought variation of the Order in this way, since it is accepted that owners in common of freehold land are entitled equally to share in the income from the land it must follow that the size of the share to which each yavusa is entitled must be determined by the percentage of co-owners who make up each yavusa. In the present case the yavusa Subutoyatoya Viseisei comprises 16 tokatokas whereas the yavusa Subutoyatoya Wayasewa comprises only four. Assuming (purely for the purposes of illustration) that the number of co-owners in each tokatoka is precisely the same then the larger yavusa will be entitled to four fifths of the total income, the smaller only to one fifth. In the absence of agreement to the contrary such an outcome is inevitable where the proceeds from freehold land are being distributed to co-owners according to common law. Indeed, the effect of the holding that the land is freehold means that strictly the distributions will not be to the yavusas but to the individual members of each yavusa in equal shares.

RESULT

[1] Orders 1, 3 and 6 of the High Court, not being the subject of appeal are confirmed.

[2] The appeal against Order 2 is dismissed.

[3] Orders 4 and 5 are set aside. Profits derived from the lease are to be distributed equally to all registered members of the two co-owning yavusas.

[4] There will be no Order as to costs.

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Eichelbaum, JA

FIJI COURT OF APPEAL

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Gallen, JA

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Scott, JA

Solicitors

Messrs Vuataki Qoro for the Appellant

Howards for the Respondent